United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 11-1244**
	)	**Issued: January 3, 2012**
U.S. POSTAL SERVICE, FRED WEATHERS POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 26, 2011 appellant filed a timely appeal from a January 14, 2011 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award and a nonmerit February 18, 2011 decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained more than a three percent permanent impairment of the right lower extremity, for which he received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that OWCP did not fully consider the severity of the accepted medial meniscus tear when calculating the percentage of permanent impairment.[2]

FACTUAL HISTORY

OWCP accepted that on January 7, 2009 appellant, then a 38-year-old city carrier, sustained a right lateral meniscus tear when he slipped and fell on a wooden step while delivering mail. It also accepted a left hip strain which resolved by February 13, 2009.[3] On May 11, 2009 Dr. W. Christopher Kostman, an attending Board-certified orthopedic surgeon, performed an arthroscopic partial lateral meniscectomy of the right knee. During surgery, he observed grade 3 chondromalacia of the patella. In a June 9, 2009 report, Dr. Kostman found that appellant had reached maximum medical improvement and released him to full duty.

On August 19, 2009 appellant claimed a schedule award. OWCP advised him to obtain an impairment rating from his attending physician referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). It accepted that appellant sustained a second lateral meniscus tear on September 12, 2009 while delivering mail.[4]

In a September 18, 2009 report, Dr. Kostman opined that according to unspecified portions of the A.M.A., *Guides*, appellant had a 2 percent impairment of the right lower extremity due to the accepted injury and an additional 10 percent impairment due to preexisting degenerative osteoarthritis of the right knee.

In a December 17, 2009 report, Dr. Keith J. Odegard, an attending Board-certified orthopedic surgeon, observed an antalgic gait, right patellofemoral crepitus and an audible pop in the right knee when appellant stepped up. X-rays showed mild degenerative changes and medial joint space narrowing in both knees. Dr. Odegard recommended a repeat right partial lateral meniscectomy.

In an October 14, 2010 impairment rating, an OWCP medical adviser reviewed the medical record and a statement of accepted facts. He opined that, according to Table 16-3,[5] appellant's grade 2 and 3 chondromalacia did not warrant an impairment rating for arthritis. The medical adviser assessed a grade 2 meniscal injury according to Table 16-3. Utilizing Table

[2] Appellant submitted new medical evidence on appeal. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. Appellant may submit such evidence to OWCP pursuant to a valid request for reconsideration.

[3] A February 24, 2009 magnetic resonance imaging scan of the right knee showed a complete tear and other severe abnormalities throughout the lateral meniscus.

[4] Appellant initially claimed a September 12, 2009 recurrence of disability. OWCP processed the claim as a new injury under File No. xxxxxx394. On September 28, 2010 it doubled File No. xxxxxx394 with File No. xxxxxx485, assigning File No. xxxxxx485 as the master file number.

[5] Table 16-3, pages 509-511 of the sixth edition of the A.M.A., *Guides* is entitled "Knee Regional Grid -- Lower Extremity Impairments."

16-6,[6] he assigned a grade 2 modifier for Functional History (GMFH) for an antalgic limp. Referring to Table 16-7,[7] the medical adviser assigned a grade 1 modifier for Physical Examination (GMPE) for consistent, minimal palpatory findings without observed abnormalities. He assigned a grade 1 modifier for Clinical Studies (GMCS) for medial joint space narrowing, according to Table 16-8.[8] Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), an OWCP medical adviser found that (2-1) + (1-1) + (1-1) resulted in a net grade modifier of +1, raising the impairment class from "C" to "D," equaling a two percent permanent impairment of the right lower extremity.

By decision dated October 26, 2010, OWCP issued appellant a schedule award for two percent impairment of the right lower extremity.

In a November 10, 2010 letter, appellant requested reconsideration, contending that OWCP did not consider the complete medical record. In a November 10, 2010 report, Dr. Odegard noted that an OWCP medical adviser's impairment rating did not include a May 4, 2010 repeat right knee arthroscopy to repair a large lateral meniscus tear with a large flap. On examination, Dr. Odegard noted an antalgic gait and medial and lateral joint line tenderness. Referring to the A.M.A., *Guides*, he assessed a GMFH of 2 according to Table 16-6, a GMPE of 2 according to Table 16-7 and a GMCS of 2 according to Table 16-8. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Odegard found a "class adjustment plus 3, moving him to the [nine] percent lower extremity impairment rating." He contended, however, that he actually felt that appellant had a 12 percent impairment of the right leg.

In a December 23, 2010 report, an OWCP medical adviser reviewed the medical record. He explained that, according to Table 16-3, a partial lateral meniscectomy equaled a class C or default rating of two percent lower extremity impairment. Considering the grade modifiers offered by Dr. Odegard, the medical adviser increased the impairment class from C to E, resulting in three percent impairment of the right leg. The medical adviser explained that the remainder of Dr. Odegard's rating was incorrect as it was based on a total lateral meniscectomy, whereas appellant only underwent a partial lateral meniscectomy.

By decision dated January 24, 2011, OWCP granted an additional schedule award for an additional one percent permanent impairment of the right leg, for a total of three percent.

In a January 26 and February 11, 2011 letters, appellant requested reconsideration. He asserted that he had greater than a three percent impairment of the right leg as he had ongoing knee symptoms that interfered with prolonged walking and activities of daily living. Appellant submitted a January 18, 2011 report from Dr. Odegard opining that the two partial lateral

[6] Table 16-6, page 516 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Adjustment -- Lower Extremity Impairments."

[7] Table 16-7, page 517 of the sixth edition of the A.M.A., *Guides* is entitled "Physical Examination Adjustment -- Lower Extremity Impairments."

[8] Table 16-8, page 519 of the sixth edition of the A.M.A., *Guides* is entitled "Clinical Studies Adjustment -- Lower Extremities."

meniscectomies caused progressive osteoarthritis in the right knee. He also submitted photographs from the May 14, 2010 arthroscopy and copies of reports previously of record.

By decision dated February 18, 2011, OWCP denied reconsideration on the grounds that the evidence submitted in support of appellant's request was irrelevant to the schedule award issue or duplicative of evidence previously of record.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[9] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[10] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[11]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[13] The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right lateral meniscal tears on January 7 and September 12, 2009. Appellant underwent an arthroscopic partial lateral meniscectomy on May 11, 2009. He claimed a schedule award on August 19, 2009. OWCP initially issued an October 26, 2010 schedule award for a two percent impairment of the right lower extremity. On reconsideration appellant submitted a November 10, 2010 report from Dr. Odegard, an attending Board-certified orthopedic surgeon, describing a May 4, 2010 partial lateral meniscectomy.

[9] 5 U.S.C. §§ 8101-8193.

[10] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[11] Federal (FECA) Procedure Manual, Part 2 – Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- *Medical, Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[12] A.M.A., *Guides* (6th ed., 2008), page 3, section 1.3, "The of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[13] A.M.A., *Guides* (6th ed., 2008), pp. 494-531.

In a December 23, 2010 report, an OWCP medical adviser assessed a grade 2 meniscal injury according to Table 16-3. He concurred with Dr. Odegard's November 10, 2010 findings of a GMFH of 2 for an antalgic limp according to Table 16-6, a GMPE of 2 for consistent tenderness to palpation with minimal abnormal findings according to Table 16-7 and a GMCS of 2 for medial joint space narrowing according to Table 16-8. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), an OWCP medical adviser found that (2-1) + (2-1) + (2-1) resulted in a net grade modifier of +2, raising the impairment class from "C" to "E," equaling three percent permanent impairment of the right lower extremity. OWCP issued a January 24, 2011 decision awarding an additional one percent impairment of the right leg, or a total of three percent.

The Board finds that an OWCP medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Odegard's clinical findings. An OWCP medical adviser's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. The medical adviser explained that Dr. Odegard's assessment of a 9 to 12 percent lower extremity impairment was based erroneously on a total meniscectomy, whereas appellant only underwent a partial lateral meniscectomy. Therefore, OWCP properly relied on an OWCP medical adviser's assessment of a three percent impairment of the right lower extremity.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

On appeal, appellant contends that OWCP did not fully consider the severity of the accepted medial meniscus tear when determining the appropriate percentage of permanent impairment. As stated, an OWCP medical adviser properly applied the A.M.A., *Guides* to Dr. Odegard's clinical findings. There is no medical evidence of record properly applying the A.M.A., *Guides* that supports a greater percentage of impairment.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA[14] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.[15] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[16]

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b)(2).

[16] 20 C.F.R. § 10.608(b). *See also D.E.*., 59 ECAB 438 (2008).

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[17] The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.[18] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[19]

ANALYSIS -- ISSUE 2

OWCP issued a January 24, 2011 decision granting a schedule award or a three percent permanent impairment of the right leg. Appellant requested reconsideration on January 26, 2011, asserting that he sustained a greater percentage of impairment. He submitted a February 11, 2011 letter describing difficulties with activities of daily living, May 14, 2010 surgical photographs, copies of evidence previously of record and a January 18, 2011 report from Dr. Odegard opining that the two lateral meniscectomies precipitated osteoarthritis in the right knee.

To be considered relevant evidence, the documents submitted on reconsideration must address the issue of whether appellant sustained more than a three percent impairment of the right lower extremity. In the January 26 and February 11, 2011 letters, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Instead, appellant asserted that he had a greater percentage of impairment than that awarded.

Dr. Odegard's January 18, 2011 report and the May 14, 2010 surgical photographs do not provide a schedule award rating or otherwise address the appropriate percentage of permanent impairment. They are therefore irrelevant to the recurrence claim and do not require reopening the record for further merit review.[20] The duplicate reports are not an adequate basis for a merit review.[21]

The Board therefore finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[17] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[18] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[19] *Annette Louise*, 54 ECAB 783 (2003).

[20] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Mark H. Dever*, *supra* note 18.

[21] *Denis M. Dupor*, 51 ECAB 482 (2000).

CONCLUSION

The Board finds that appellant has not established that he sustained more than a three percent impairment of the right lower extremity, for which he received a schedule award. The Board further finds that OWCP properly denied his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 18 and January 14, 2011 are affirmed.

Issued: January 3, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board