United States Department of Labor
Employees' Compensation Appeals Board

D.Y., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Vancouver, WA, Employer**	)	**Docket No. 13-416** **Issued: August 19, 2013**

Appearances:
Coby Jones, for the appellant
Office of Solicitor, for the Director

Oral Argument April 25, 2013

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2012 appellant, through his representative, filed a timely appeal from a June 22, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which granted him a schedule award. 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 the case.

ISSUE

The issue is whether appellant has more than 31 percent permanent impairment of the right lower extremity for which he received a schedule award.

FACTUAL HISTORY

On September 9, 2008 appellant, then a 60-year-old mail carrier, filed an occupational disease claim alleging that he developed pain, stiffness and swelling of the right knee as a result

[1] 5 U.S.C. §§ 8101-8193.

of performing repetitive duties as a mail carrier. OWCP accepted his claim for arthritis of the right knee. Appellant did not stop work.[2]

Appellant came under the treatment of Dr. David Cortese, a Board-certified orthopedist, from May 19 to August 18, 2008, for right knee pain associated with arthritis and medial knee strain. Dr. Cortese noted that appellant was a letter carrier who walked prolonged distances delivering mail on a daily basis. In reports dated January 7 to October 21, 2009, he diagnosed persistent right knee pain associated with mild arthritis, medial strain and degenerative joint disease of the right knee. Dr. Cortese noted that appellant had two prior surgeries for right meniscal problems in the 1960's. In reports dated April 28 to October 21, 2009, he noted performing a total right knee replacement on February 6, 2009 with appellant experiencing postsurgical pain and stiffness. In an October 21, 2009 report, Dr. Cortese noted a neuroma of the infrapatellar branch of the saphenous nerve, tenderness at the distal quad, medially and laterally, a 10-degree deficit in range of motion for extension and some laxity to varus and valgus stress. On January 28, 2010 he noted little change in appellant's condition with persistent stiffness in the right knee and a range-of-motion deficit of 15 degrees of full extension of 100. Dr. Cortese opined that appellant was status post one year after a total right knee replacement with poor results due to stiffness. He noted discussing the possibility of revision replacement. A July 27, 2008 magnetic resonance imaging (MRI) scan of the right knee revealed medial joint space narrowing with severe medial meniscal degeneration, chondromalacia patella and moderate joint effusion.

On February 16, 2010 appellant filed a claim for a schedule award. He submitted an April 19, 2010 report from Dr. Donald Tilson, a Board-certified orthopedist, who noted that appellant was status post two meniscus operations on his right knee after a work-related motor vehicle accident in 1966. Appellant reported injuring his right knee on March 9, 2008 while walking his mail route. Dr. Tilson noted findings of pain in the right knee on a daily basis with aching that increased to stabbing when he bends, stoops, kneels, squats, twists, walks, climbs stairs or sits more than 10 minutes. Appellant had stiffness after sitting or sleeping. He noted that Dr. Cortese offered him revision surgery. Dr. Tilson reported that appellant's work-related right knee pain began with his postal service which included two meniscus surgeries in 1966 and opined that appellant's current condition was the direct and proximate result of his employment. He opined that appellant had 59 percent impairment of the right leg under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In an April 26, 2010 report, Dr. Tilson noted findings of tenderness of the medial joint line, no effusion or instability, negative Lachman's, drawer's and McMurray's tests, no crepitation. Appellant was able to drive and walk and his gait was antalgic on the right although

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[2] On May 27, 1966 appellant was in a motor vehicle accident while in his work vehicle. OWCP accepted his claim for tenderness of the neck, left shoulder, left elbow and right knee, Claim No. xxxxxx251. On August 15, 1966 appellant twisted his right knee and OWCP accepted tear of the medial meniscus of the right knee and authorized a right knee arthrotomy and medial meniscectomy, Claim No. xxxxxx200. In a September 13, 1968 decision, he was granted a schedule award for 15 percent right leg impairment. On August 13, 1967 appellant hit his knee on a door latch while working and OWCP accepted sore right knee, Claim No. xxxxxx392.

[3] A.M.A., *Guides* (6th ed. 2008).

not far from normal. He noted knee range of motion of -15 degrees to 100 degrees on the right and 0 to 140 degrees on the left and mid-patellar circumference of 39 centimeters on the right and 38.5 centimeters on the left. Dr. Tilson noted standing right knee x-rays revealed a well-seated and well-aligned implant without evidence of osteolysis or loosening. He diagnosed arthritis of the right knee, status post total knee arthrosis on February 6, 2009. Dr. Tilson concurred in appellant's decision to defer revision surgery of the right knee. He advised that, under Chapter 16 of the A.M.A., *Guides,* appellant had 59 percent impairment of the right leg. Dr. Tilson explained that, under Table 16-3, Knee Regional Grid, Total Knee Replacement, appellant was a class 4, default value C, poor result with moderate-to-severe motion deficit, revision surgery offered and declined.[4] Applying the net adjustment formula of the A.M.A., *Guides*,[5] Dr. Tilson found that for functional history appellant was a grade modifier of two, noting antalgic limp with a moderate deficit per the AAOS Lower Limb Questionnaire with results of 17 of 44; for physical examination appellant was a grade modifier of one pursuant to Table 16-7, noting moderate flexion contracture as well as mild flexion deficit; and for clinical studies, appellant was a grade modifier of one pursuant to Table 16-8, noting less than 10 degrees angulation. He utilized the net adjustment formula to find a net adjustment of -8. Dr. Tilson adjusted the impairment rating, noting that appellant was adjusted from class 4 with a default value C with a rating of 67 percent impairment for the right leg to class 4 value A for a 59 percent impairment of the leg under the A.M.A., *Guides,* for right total knee replacement. An April 19, 2010 x-ray of the right knee revealed a right total knee replacement, bony alignment and position anatomic unchanged with no obvious complications.

In a May 11, 2010 report, an OWCP medical adviser reviewed the medical record including Dr. Tilson's April 19 and 26, 2010 reports. He noted that appellant underwent a total right knee replacement on February 6, 2009. The medical adviser reviewed Dr. Tilson's April 26, 2010 report which noted medial joint line tenderness, no effusion or instability, negative Lachman's, drawer's and McMurray's tests, no crepitation or muscle atrophy with knee range of motion from -15 to 100 degrees. He noted that the examination revealed some loss of motion but nothing else extraordinary with no joint instability. The medical adviser noted that appellant could walk and drive. He stated that Dr. Tilson found appellant was a class 4 Total Knee Replacement, poor result (poor position, moderate to severe instability and/or moderate-to-severe motion deficit). The medical adviser noted that appellant's gait was described as antalgic although not far from normal with no instability. He opined that the gait and range of motion appeared better than the "moderate-to-severe motion deficit" provided for under a class 4 Total Knee Replacement. The medical adviser noted that page 497 of the A.M.A., *Guides,* defines the 5 classes found in the diagnosis-based impairment regional grids and noted that class 3 was a "severe problem" and class 4 was defined as a "very severe problem approaching total functional loss." He opined that appellant was not a class 4, approaching total functional loss, but could reasonably be classified as a class 3 with a fair position and/or mild motion deficit. The medical adviser indicated that, based on the knee grid Table 16-3, page 511, appellant had a default impairment of 37 percent impairment of the leg. He indicated that, using the net adjustment formula, the default impairment for class 3 of 37 percent impairment was reduced to 31 percent.

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[4] A.M.A., *Guides* 511.

[5] *Id.* at 521-22.

The medical adviser noted maximum medical improvement was February 4, 2010 and no further treatment was required.

In a decision dated June 7, 2010, OWCP granted appellant a schedule award for 31 percent impairment of the right lower extremity. It noted that he was previously granted an award for 15 percent of the right lower extremity in claim number xxxxxx200 and was entitled to an additional 16 percent impairment. The period of the award was from February 4 to December 23, 2010.

On July 2, 2010 appellant requested an oral hearing which was held on December 8, 2010. He submitted reports from Dr. Tilson dated April 19 and 26 and July 26, 2010, previously of record.

In a decision dated February 7, 2011, an OWCP hearing representative affirmed the June 7, 2010 decision.

Appellant submitted a March 11, 2011 x-ray of the right knee which revealed right total knee arthroplasty in anatomic alignment without evidence of hardware failure or loosening or significant joint effusion. In a March 11, 2011 report, Dr. Cortese noted that appellant regained most of the motion in his knee. He noted minimal tenderness on palpation, range of motion of minus three degrees short of full extension, with intact sensation. Dr. Cortese noted that the x-ray showed the implants in place, slight valgus tibial cut, good patellar alignment with no sign of loosening. He noted that appellant was not interested in revision replacement.

Appellant appealed his case to the Board and in an order dated March 12, 2012, the Board remanded the matter to OWCP for reconstruction and proper assemblage of the case record. The Board found that OWCP failed to forward the complete contents of appellant's case record, specifically noting that February 6, 2009 operative report from Dr. Cortese in which he performed a right total knee replacement was not in the case record and was essential because it was the basis of OWCP's impairment rating.[6] In accordance with the Board's decision, OWCP included in the record the February 6, 2009 operative report from Dr. Cortese who performed a right total knee replacement and diagnosed right knee osteoarthritis.

In a May 21, 2012 report, a different OWCP medical adviser reviewed the medical record and Dr. Tilson's April 26, 2010 impairment evaluation. The medical adviser also noted that the previous OWCP medical adviser's reports on May 11, 2010 which found a "fair result" for the total knee replacement, and found appellant was a class 3 with modifiers for a 31 percent impairment of the right lower extremity. He reviewed the February 6, 2009 operative report which did not mention any complications with regard to the surgical procedure and opined that the report did not change the impairment rating. The medical adviser opined that appellant had 31 percent impairment of the right leg.

In a schedule award decision dated June 22, 2012, OWCP found that appellant had 31 percent total impairment of the right lower extremity.

[6] Docket No. 11-1132 (issued March 12, 2012).

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing federal regulations,[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[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, for lower extremity impairments, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[13] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14] The grade modifiers are used on the Net Adjustment Formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[15]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical consultant for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with OWCP's medical consultant providing rationale for the percentage of impairment specified.[16]

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[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[11] FECA Bulletin No. 09-03 (issued March 15, 2009).

[12] A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[13] *Id.* at 494-531.

[14] *Id.* at 521.

[15] A.M.A., *Guides* 497.

[16] *See Federal* (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6(d) (August 2002).

ANALYSIS

On appeal, appellant contends that he is entitled to a schedule award greater than 31 percent permanent impairment of the right lower extremity. OWCP accepted appellant's claim for arthritis of the right knee and authorized a total right knee replacement on February 6, 2009. The Board finds that there is a conflict in medical opinion between OWCP's medical advisers and Dr. Tilson, appellant's treating physician.

OWCP's medical advisers who, in reports dated May 11, 2010 and May 21, 2012, advised that based on the A.M.A., *Guides* appellant had 31 percent impairment of the right lower extremity. The medical adviser indicated that appellant underwent a total right knee replacement on February 6, 2009 and Dr. Tilson in his April 26, 2010 report noted no effusion or instability, negative Lachman's, drawer's and McMurray's tests, no crepitation or muscle atrophy with knee range of motion from -15 to 100 degrees. They opined that, under Table 16-3, Knee Regional Grid, Total Knee Replacement, appellant was a class 3, severe problem, with a default value C, for a fair result with a fair position and/or mild motion deficit.

By contrast, in an April 27, 2010 report, Dr. Tilson opined that appellant had a 59 percent impairment of the right lower extremity. He noted that appellant was status post total knee arthrosis on February 6, 2009. Dr. Tilson reported tenderness of the medial joint line, antalgic gait on the right and range-of-motion deficit of -15 degrees to 100 degrees. He opined that, under Table 16-3, Knee Regional Grid, Total Knee Replacement, appellant was a class 4, default value C, for a poor result with moderate-to-severe motion deficit, in which revision surgery offered. Dr. Tilson supported an increased impairment rating of the right lower extremity, noting the basis of his rating under the A.M.A., *Guides*, while OWCP's medical adviser opined that appellant sustained no more than 31 percent permanent impairment of the right lower extremity pursuant to the A.M.A., *Guides*.

Each physician used the same part of the A.M.A., *Guides* to come to differing calculations, after examining appellant, regarding appellant's permanent impairment of the right lower extremity.

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[17] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[18] The Board finds that OWCP should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of permanent impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical opinions, the case will be remanded to OWCP for referral of the case record, including a statement of accepted facts, and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent

[17] 5 U.S.C. § 8123(a).

[18] *William C. Bush,* 40 ECAB 1064, (1989).

of appellant's right lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.[19] After such further development as OWCP deems necessary, an appropriate decision should be issued regarding the extent of appellant's right lower extremity impairment.

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.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development in accordance with this decision.

Issued: August 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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[19] *See Harold Travis,* 30 ECAB 1071, 1078-79 (1979).