

**United States Department of Labor
Employees' Compensation Appeals Board**

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J.L., Appellant)	
)	
and)	Docket No. 13-1560
)	Issued: December 11, 2013
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Tuscaloosa, AL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2013 appellant filed a timely appeal from the March 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her schedule award claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case. The Board also has jurisdiction to review OWCP's May 29, 2013 nonmerit decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant is entitled to an additional schedule award for permanent impairment resulting from her accepted employment injury; and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 24, 1999 appellant, a 41-year-old nursing assistant, sustained a traumatic injury in the performance of duty while repositioning a patient. OWCP accepted her claim for a lumbar strain, right knee strain, right knee meniscal tear and aggravation of right knee osteoarthritis. In 2000 appellant underwent an arthroscopic partial lateral meniscectomy and shaving of articular cartilage lesion. In 2002 she underwent an arthroscopic partial lateral meniscectomy and debridement of osteophyte. In 2004 appellant underwent a right total knee arthroplasty.

On April 20, 2006 appellant received a schedule award for a 37 percent permanent impairment of her right lower extremity for a good result following her total knee replacement. In 2007 appellant underwent a revision of the right total knee arthroplasty. Shortly, thereafter she required a second revision.

On April 8, 2010 OWCP denied appellant's claim for an additional impairment, as it appeared her need for still further revision indicated that her condition had not yet reached a fixed and permanent state. In 2011 appellant underwent a revision for a failed right total knee arthroplasty.

On January 24, 2013 appellant filed a claim for an additional schedule award. OWCP advised her to request her treating physician to submit a medical report containing a detailed description of any permanent impairment and a rating calculated under the sixth edition of the America Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009).

Dr. D. Shane Buggay, the Board-certified orthopedic surgeon who performed the 2011 revision surgery, examined appellant on March 29, 2012. Radiographs showed satisfactory placement of the tibial femoral component in the condylar knee with excellent alignment. There was no evidence of loosening. Appellant showed excellent patella tracking on November 28, 2012. She demonstrated full extension and flexion to 115 degrees.

Dr. Buggay examined appellant again on January 14, 2013. As far as her right knee was concerned, appellant was very satisfied. She had a midline healed incision on the knee. There was no instability, no warmth or synovitis. Appellant was neurologically intact. She had 5/5 strength with foot flexors, extensors, quadriceps and hamstrings. Dr. Buggay noted that she had no pain with hip internal or external rotation. His impression: "Overall excellent course given the difficulty with [appellant's] knee." Dr. Buggay recommended that appellant follow up on a yearly basis for evaluation. He found her to be at maximum medical improvement.

In a decision dated March 19, 2013, OWCP denied appellant's claim for an increased schedule award. It found that she had not provided the medical evidence required to support a greater permanent impairment.

On April 17, 2013 OWCP received a letter dated April 10, 2013 from appellant requesting an oral hearing.² The record contained no envelope or postmark. Appellant submitted, among other things, a copy of Dr. Buggay's January 14, 2013 progress note.

Appellant resent her request for an oral hearing on April 23, 2013. She indicated that she had sent her earlier request to the wrong address.

In a decision dated May 29, 2013, OWCP denied appellant's hearing request. It found that the request, postmarked on April 23, 2013, was not sent within 30 days of the March 19, 2013 decision denying her schedule award claim. OWCP found that appellant was therefore not entitled to a hearing as a matter of right. It considered her request and determined that a discretionary hearing was not warranted because she could equally well address the issue in her case by requesting reconsideration and submitting evidence not previously considered to establish additional permanent impairment.

On appeal, appellant contends that she has done everything that was asked of her, that she requested the necessary information from Dr. Buggay's office. The missing information and the delay were caused not by her actions or inactions, she explains, they were caused by Dr. Buggay's neglect to answer and submit the necessary medical information in a timely manner.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA³ and the implementing regulations⁴ set forth the number of weeks of compensation payable to employees who sustain permanent impairment of a scheduled member, function or organ of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁵

For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

² The Board notes that the letter actually contained the date of April 10, 2013; however, this appears to be a typographical error.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁶ *Supra* note 4; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

ANALYSIS -- ISSUE 1

Diagnosis-based impairment is the primary method for evaluating impairment to the lower limb. Impairment is determined first by identifying the relevant diagnosis, then by selecting the class of the impairment: no objective problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss. This provides a default impairment rating, which can be adjusted slightly up or down using grade modifiers or nonkey factors, such as functional history, physical examination and clinical studies.⁸

The impairment values for a total knee replacement are found in Table 16-3, page 511 of the A.M.A., *Guides* or the Knee Regional Grid. A good result -- good position, stable, functional -- has a default impairment value of 25 percent. A fair result -- fair position, mild instability and/or mild motion deficit -- has a default impairment value of 37 percent. A poor result has a default impairment value of 67 percent. A poor result with chronic infection has a default impairment value of 75 percent.

Appellant did not submit an impairment evaluation under the sixth edition of the A.M.A., *Guides*. For this reason, OWCP denied her schedule award claim. Dr. Buggay, the orthopedic surgeon who performed the 2011 revision, examined appellant on several occasions following surgery and recorded findings that relate to the criteria for classifying her total knee replacement under Table 16-3: position, stability, motion. He also found her to be at maximum medical improvement.

The Board will therefore set aside OWCP's March 19, 2013 decision and remand the case for review by a medical adviser to determine whether Dr. Buggay's postrevision clinical findings (or perhaps other evidence, such as a functional capacity evaluation) are sufficient to characterize appellant's result under Table 16-3 of the sixth edition of the A.M.A., *Guides*.⁹ Following such further development as may become necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.¹⁰

CONCLUSION

The Board finds that this case is not in posture for decision. Further, development is warranted.

⁸ A.M.A., *Guides* 497 (6th ed. 2009).

⁹ See *Ruben Franco*, 54 ECAB 496 (2003).

¹⁰ As OWCP will issue a *de novo* decision on appellant's schedule award claim with full appeal rights, the second issue on appeal, whether OWCP properly denied her request for an oral hearing, is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 29 and March 19, 2013 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action.

Issued: December 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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