United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 12-1531**
	)	**Issued: March 5, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, West Palm Beach, FL, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 9, 2012 appellant, through his attorney, filed a timely appeal from an April 25, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant established that he sustained greater than a two percent impairment to the right lower extremity.

On appeal, appellant, through counsel, contends that he has established entitlement to an impairment rating of nine percent of the right lower extremity. In the alternative, counsel contends that the case should be remanded and referred for a new impartial medical examination.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 16, 2004 appellant, then a 50-year-old biomedical engineering technician, filed a traumatic injury claim alleging that, on November 12, 2004, while coming out from the electronic shop, someone called him and as he turned to his right side, he felt a strong pain in his right knee. On December 27, 2004 OWCP accepted his claim for tear of right medial cartilage or meniscus of knee. It paid appellant compensation for wage-loss and medical benefits. On January 26, 2005 appellant underwent a diagnostic and surgical arthroscopy of the right knee with abrasion chondromalacia of the patellofemoral of the patella and trochlear grove; and a partial medial meniscectomy of the right knee. He returned to work on March 21, 2005. On April 28, 2009 OWCP also accepted appellant's claim for aggravation of degenerative joint disease.

In a medical report dated July 16, 2007, Dr. David Weiss, appellant's osteopath, listed appellant's diagnoses as: (1) post-traumatic internal derangement to the right knee with a tear of the medial meniscus; (2) post-traumatic chondromalacia patella to the right knee; (3) post-traumatic synovitis to the right knee; (4) status post-arthroscopic surgery with abrasion chondroplasty to the right knee; (5) status post-partial synovectomy to the right knee; (6) status post-partial medial meniscectomy to the right knee; (7) post-traumatic internal derangement to the left knee with a tear of the medial meniscus; (8) status post-arthroscopic surgery with revision of tear of the left medial meniscus; (9) chondromalacia patella of the left knee; and (10) post-traumatic osteoarthritis of the left knee. Reviewing appellant's case under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) he determined that appellant had a 15 percent impairment of the right lower extremity.

On November 5, 2007 appellant filed a claim for a schedule award.

On November 13, 2007 OWCP referred the report of Dr. Weiss to an OWCP medical adviser, who determined that appellant failed to improve as expected and was not yet at maximum medical improvement. The medical adviser suggested a reevaluation by a second opinion physician to determine current diagnoses and recommend treatment.

On October 23, 2008 OWCP referred appellant to Dr. Daniel Benson, a Board-certified orthopedic surgeon, for a second opinion. In a November 4, 2008 report, Dr. Benson recommended a 48 percent impairment of the right lower extremity.

On January 22, 2009 OWCP referred the case to its medical adviser, who reviewed the case under the fifth edition of the A.M.A., *Guides* and determined that appellant had a right lower extremity impairment of two percent. The medical adviser noted errors with Dr. Benson's report and indicated that a correct application of the fifth edition of the A.M.A., *Guides* yielded a two percent impairment rating for the right lower extremity.

After OWCP accepted appellant's case for the additional condition of aggravation degenerative joint disease in April 28, 2009. It referred his case to a different OWCP medical adviser, who indicated that, based on this additional condition, OWCP was entitled to an

additional impairment of five percent of the right lower extremity pursuant to the fifth edition of the A.M.A., *Guides.*

On August 17, 2009 OWCP referred appellant to Dr. Robert Sellards, a Board-certified orthopedic surgeon, for an impartial medical examination. In describing the nature of the conflict, it asked Dr. Sellards to determine whether appellant had a permanent impairment to his right lower extremity using the sixth edition of the A.M.A., *Guides.* In a September 28, 2009 report, Dr. Sellards concluded that appellant had a one percent impairment of the right lower extremity.

On December 17, 2009 an OWCP medical adviser noted that the referee opinion of September 28, 2009 was correct in applying the A.M.A., *Guides* and in calculating permanent impairment at one percent for the right lower extremity.

On January 12, 2010 OWCP issued a schedule award for one percent impairment of the right lower extremity.

Appellant requested an oral hearing before an OWCP hearing representative. In a February 23, 2010 decision, the hearing representative found that the case was not in posture for decision as it required further development of the medical evidence. Specifically, he found that Dr. Sellards did not function as a referee examiner because there was no conflict between appellant's treating physician and a government-appointed physician. Furthermore, the hearing representative found that the opinion of Dr. Sellards was not well rationalized and that clarification of Dr. Sellards' report was necessary.

By letter dated March 12, 2010, OWCP asked Dr. Sellards, the IME physician, for a rationalized opinion with regard to appellant's impairment pursuant to the sixth edition of the A.M.A., *Guides*. In an April 15, 2010 report, Dr. Sellards noted that, in applying the sixth edition of the A.M.A., *Guides*, the regional grid places appellant's partial medial meniscectomy in class 1, mild problem. In addressing the adjustment grid and grade modifiers, he noted that Functional History (GMFH) of an antalgic limp would equal a grade modifier 1, Physical Examination (GMPE) of moderate palpatory findings, consistently documented, would equal a grade modifier 2 and that Clinical Studies (GMCS), which confirmed diagnosis of mild pathology would equal a grade modifier 1. Accordingly, Dr. Sellards used a class of diagnosis of 1 and grade modifiers for GMFH of 1, for GMPE of 2 and GMCS of 1. He noted that the net adjustment was (1-1) + (2-1) + (1-1) = 1, which was grade D. Dr. Sellards indicated that the regional grid identified the impairment rating value for the impairment class as class 1, grade D or two percent of the right lower extremity.

On June 2, 2010 OWCP noted that appellant's claim was accepted for tear of medial meniscus of knee, current right; chondromalacia patellae and osteoarthrosis unspecified.

In a June 8, 2010 report, an OWCP medical adviser indicated that, according to Dr. Sellards' report of May 27, 2010, appellant is not at maximum medical improvement of the right lower extremity. However, in a July 23, 2010 report, the medical adviser noted that the date of maximum medical improvement was September 28, 2009 and stated that the referee applied the edition of the A.M.A., *Guides* correctly.

On June 25, 2010 Dr. Weiss updated his July 16, 2007 report to apply the sixth edition of the A.M.A., *Guides* and determined that appellant had a nine percent impairment of the right lower extremity. He determined that appellant was class 1 for left knee primary joint arthritis, which equaled a seven percent impairment. Dr. Weiss found grade modifiers 2 for functional history, 2 for physical examination (atrophy) and did not find the modifier for diagnostic testing to be appropriate. He then made adjustments. (For functional history, 2-1 equals 1; for physical examination, 2-1 equals 1, for a total net adjustment of 2). With this adjustment, Dr. Weiss determined that appellant was entitled to an impairment rating of nine percent for the right lower extremity. He made an identical finding for the left lower extremity.

On July 30, 2010 OWCP issued a schedule award for an additional one percent impairment of the right leg.

On August 10, 2010 appellant, through counsel, requested a hearing. At a hearing held on December 7, 2010 appellant's attorney requested referral of the case to an impartial medical examiner due to the conflict between the opinion of appellant's physician, Dr. Weiss, and the opinion of the medical advisers and Dr. Sellards. He further argued that Dr. Sellards' report failed to carry the weight of the evidence.

In a decision dated February 7, 2011, the hearing representative found that a conflict existed between appellant's treating physician, Dr. Weiss, and the opinions of Dr. Sellards and an OWCP medical adviser. Accordingly, he remanded the case for referral for an impartial medical examination.

On February 28, 2011 OWCP referred appellant to Dr. Bradford Slutsky, an orthopedic surgeon, for an impartial medical examination. The nature of the conflict was listed as "conflict of physician opinions with impairment rating." In a March 21, 2011 report, Dr. Slutsky indicated that he applied the A.M.A., *Guides*. He stated that, pursuant to Table 64 of the impairment rating guide for a partial medial or lateral meniscectomy, appellant would have a one percent whole person impairment rating. Dr. Slutsky noted that, in addition to the partial meniscectomy, appellant did have what was described as chondromalacia or an injury to the articular cartilage. He noted that this could have been preexisting, although there was no history of any preexisting problems. In order to evaluate an impairment for appellant's articular cartilage injury, one option would be to use the Arthritis Impairment on Table 62. Dr. Slutsky also noted that there were other impairments as mentioned by previous physicians for weakness and appellant's abnormal gait. He noted that these were somewhat atypical due to the subjective nature of these findings. Dr. Slutsky opined that it would be reasonable, since the operative report describes some significant injury to the articular cartilage, that the patient had areas where an abrasion arthroplasty was performed, which means that there were isolated areas that were worn down or injured to the bone. He opined that it would be reasonable to use the cartilage interval of 2 millimeters (mm) on Table 62, which would give him an eight percent whole person impairment rating, for a total of nine percent whole person impairment rating when one incorporated the partial meniscectomy. On April 20, 2011 Dr. Slutsky wrote an addendum. He noted that he had been asked for an impairment rating from the A.M.A., *Guides*, that the impairment rating for the meniscectomy is a 2 percent lower extremity impairment rating and the impairment rating for the arthritis which was aggravated by the accident is a 20 percent lower extremity impairment rating, which combined to a 22 percent lower extremity impairment rating.

In an April 29, 2011 report, an OWCP medical adviser stated that the report by Dr. Slutsky of March 21, 2011 and amended on April 20, 2011 was not in agreement with OWCP requirements. He noted that Dr. Slutsky cited the A.M.A., *Guides*, Table 62 and Table 64, but that those tables were not a part of the sixth edition of the A.M.A., *Guides*, which are mandated by OWCP. The medical adviser also noted that Dr. Slutsky attempted to recognize the presence of chondromalacia or arthritis in the impairment rating, but did so incorrectly. In prior OWCP reviews, he noted that it was done correctly in the fifth edition on April 24, 2009 and correctly in the sixth edition on July 20, 2010.

On May 13, 2011 OWCP referred appellant for a new impartial medical examination to Dr. Jeffrey Penner, a Board-certified orthopedic surgeon. In a June 7, 2011 report, Dr. Penner listed his impression as status post right knee arthroscopy with resultant significant right knee pain. He did not believe that appellant had reached maximum medical improvement based on subjective complaints, history given by appellant, physical examination and medical records and tests. Dr. Penner indicated that appellant had a 10 percent impairment of the right lower extremity, based on his June 7, 2011 examination. In reaching this conclusion, he noted 90 degrees of retained active flexion and retained extension of 10 degrees. Dr. Penner also included in his calculations four percent for impairment of function due to weakness, atrophy, pain or discomfort.

On June 27, 2011 an OWCP medical adviser reviewed the case and indicated that Dr. Penner's report was not helpful. He noted that Dr. Penner indicated that appellant needed additional surgery based on pain complaints and stated that appellant had a 10 percent whole body impairment due to right lower extremity dysfunction, which was not consistent with the sixth edition of the A.M.A., *Guides*. The medical adviser recommended further discussion with the impartial medical examiner concerning OWCP requirements.

By letter dated July 7, 2011, OWCP asked Dr. Penner for clarification. It noted that impairment must be determined by utilizing the sixth edition of the A.M.A., *Guides.* No clarification was provided.

On December 13, 2011 referred to Dr. Michael Leighton, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 5, 2012 report, Dr. Leighton indicated that appellant sustained an injury in November 2004 and subsequently underwent arthroscopic debridement and partial medial meniscectomy and that at that time it was found that he had significant osteoarthritic changes of medial femoral condyle and degenerative and possibly traumatic posterior horn medial meniscus tear of the right knee. He noted that appellant continued to have some pain on the medial side of the right knee, but did return to full-duty work. Dr. Leighton opined that, based on the sixth edition of the A.M.A., *Guides*, Table 16-3 with modifiers, Table 16-5, Table 16-6 and Table 16-7, he would place appellant at a six percent lower extremity with modifiers of +1, +1 and +1, making him a nine percent lower extremity impairment rating.

In a March 22, 2012 report, an OWCP medical adviser determined that appellant had a two percent impairment rating. He indicated that Dr. Leighton did not apply the A.M.A., *Guides* correctly as appellant had a partial medial meniscectomy and Dr. Leighton utilized the figures in the A.M.A., *Guides* for total medial meniscectomy. The medical adviser stated that, according to

Table 16-3 on page 509 of the sixth edition of the A.M.A., *Guides*, for a meniscal injury, partial medial meniscectomy class 1, the impairment rating was two percent of the right lower extremity. The medical adviser then made adjustments of 1 for functional history, 1 for physical examination and 0 for diagnostic tests. Applying these adjustments, he determined that there was no net change. (For functional history, 1-1 = 0; for physical examination, 1-1 = 0; there were 0 adjustments for diagnostic tests.) The medical adviser then concluded that appellant had a final rating of two percent impairment of the right lower extremity.

On March 27, 2012 OWCP asked Dr. Leighton to comment on the findings by the medical adviser. Dr. Leighton responded "agree with DMA. Partial 2 mm percent."

By decision dated April 25, 2012, OWCP denied appellant's claim for an additional schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations[2] set forth the number of weeks of compensation payable to employee sustaining permanent impairment from loss or loss of use, of scheduled members or functions 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.[3] 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. An A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

Section 8123(a) provides that, 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.[6] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.[7] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for

[2] 20 C.F.R. § 10.404.

[3] *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

[4] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[6] 5 U.S.C. § 8123(a).

[7] 20 C.F.R. § 10.321.

the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

OWCP accepted appellant's claim for tear of the right medial cartilage or meniscus of the knee; aggravation of degenerative joint disease; tear of the medial meniscus of the knee; chondromalacia patellae and osteoarthrosis. Appellant underwent an arthroscopy of the right knee and abrasion chondromalacia of the patellofemoral of the patella and trochlear groove and a partial medial meniscectomy of the right knee on January 26, 2005. He filed a claim for a schedule award and OWCP issued a schedule award for a one percent impairment of the right lower extremity on January 12, 2010. On July 30, 2010 OWCP issued a schedule award for an additional one percent impairment of the right lower extremity. Appellant contends that he is entitled to a greater schedule award.

There are a multitude of medical opinions in the record addressing appellant's impairment to his right lower extremity. Effective May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9] The July 16, 2007 report of Dr. Weiss and the November 4, 2008 report of Dr. Benson are not applicable as these reports applied the fifth edition of the A.M.A., *Guides.*

Using the sixth edition, Dr. Weiss, appellant's treating physician, determined that appellant had a nine percent impairment of his right lower extremity. Dr. Sellards concluded that appellant had a two percent impairment of the right lower extremity. The hearing representative, in the December 7, 2010 decision, properly determined that there was a conflict between the opinion of Dr. Weiss and the opinions of Dr. Sellards and the medical adviser and ordered referral to an impartial medical examiner.

The first impartial medical examiner was Dr. Slutsky. In his initial report of March 21, 2011, Dr. Slutsky concluded that appellant had a whole person impairment.[10] In his supplemental report of April 20, 2011 report, he indicated that appellant had a 22 percent impairment of his right lower extremity. However, Dr. Slutsky did not apply the A.M.A., *Guides*, despite the fact that he mentions them in his April 20, 2011 report. He refers to tables that do not appear in the A.M.A., *Guides*. An OWCP medical adviser, in an April 29, 2011 report, noted that Dr. Slutsky did not properly apply the A.M.A., *Guides*. The Board also notes that Dr. Slutsky did not apply the sixth edition of the A.M.A., *Guides* as his discussion and reference to Table 62 are not applicable to the sixth edition of the A.M.A., *Guides*. Accordingly, Dr. Slutsky's opinions do not resolve the conflict due to the diminished probative value of his

[8] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[9] *See id.*

[10] A schedule award for whole person impairment is not allowed under FECA. *See also D.A.*, Docket No. 10-2172 (issued August 3, 2011); *see J.Q.*, 59 ECAB 366 (2008).

reports. Thus, OWCP properly referred appellant to Dr. Penner for an impartial medical evaluation and impairment rating.[11]

However, Dr. Penner's report was also insufficient to resolve the conflict, as noted by an OWCP medical adviser. He does not reference specific tables or pages of the A.M.A., *Guides* and it is not possible to determine how he arrived at his conclusion that appellant had an impairment rating of 10 percent of the right lower extremity. Although OWCP requested clarification, Dr. Penner did not respond.

As Dr. Penner did not provide clarification, OWCP properly referred appellant to Dr. Leighton for an impartial medical examination.[12] In a December 13, 2011 report, Dr. Leighton noted that he applied Table 16-3 on page 509 of the A.M.A., *Guides* and determined that appellant had a key factor impairment of six percent. He then modified this by adding one for each of the three modifiers and determined that appellant had a nine percent impairment of the right lower extremity. However, when Dr. Leighton's opinion was referred to the impartial medical examiner, he noted that Dr. Leighton improperly evaluated appellant under the criteria for a total meniscectomy whereas appellant had a partial meniscectomy. An OWCP medical adviser noted that, pursuant to Table 16-3 of the sixth edition of the A.M.A., *Guides*, appellant was entitled to a two percent impairment rating for a partial medial meniscectomy. He then modified this with adjustment of 1 for functional history, 1 for physical examination and 0 for diagnostic testing. After applying the formula (1-1 = 0; 1-1 = 0; 0+0+0 = 0), the medical adviser determined that appellant had an impairment rating of two percent to his right lower extremity. OWCP properly referred the medical adviser's report to Dr. Leighton for a supplemental opinion,[13] who indicated that he agreed with the medical adviser, noting that appellant did have a partial medial meniscectomy and that he had an impairment of two percent of the right lower extremity.

The Board finds that appellant had a two percent impairment of his right lower extremity. It is clear that in Dr. Leighton's first opinion, he improperly applied the criteria from Table 16-3 for a total meniscectomy whereas appellant had a partial meniscectomy. He agreed in his subsequent note that his first opinion was in error and that appellant, in fact, had a two percent impairment of the right lower extremity. Accordingly, contrary to the assertions of appellant's attorney, the impartial medical examiner agreed with the medical adviser and clarified his report. Pursuant to Table 16-3, appellant is entitled to a diagnostic rating of two percent for a partial medial meniscectomy. There is no change in the rating when the modifiers are applied.

[11] When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue. Unless this procedure is carried out by OWCP, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence. *Harold Travis*, 30 ECAB 1071 (1979).

[12] *Id.*

[13] *Id.*

Accordingly, OWCP properly determined that appellant was entitled to a schedule award of two percent of the right lower extremity based on the opinion of the impartial medical examiner, Dr. Leighton, who is accorded the special weight of the medical evidence.

CONCLUSION

The Board finds that appellant has not established that he is entitled to greater than a two percent impairment of his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2012 is affirmed.

Issued: March 5, 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