United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket Nos. 12-1536 & 13-255**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Spokane, WA, Employer	)	**Issued: March 20, 2013**

Appearances:
Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 9, 2012 appellant filed a timely appeal from a June 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation and denying waiver of recovery. The Board assigned Docket No. 12-1536. On November 13, 2012 appellant, through his attorney, filed a timely appeal from a June 8, 2012 schedule award decision.[1] The Board assigned Docket No. 13-255. Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these issues.

ISSUES

The issues are: (1) whether appellant has more than a 37 percent permanent impairment of the right lower extremity; (2) whether he received an overpayment of $54,008.31 because he received inaccurate schedule award compensation; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

[1] Appellant retained counsel after filing the first appeal.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 26, 2008 appellant, then a 45-year-old electronics technician, filed a traumatic injury claim alleging that he sustained right knee pain on June 20, 2008 in the performance of duty. OWCP accepted the claim for right knee sprain, a medial meniscus tear and a temporary aggravation of right knee degenerative joint disease. Appellant underwent a partial medial meniscectomy of the right knee on October 30, 2008. He stopped work on October 30, 2008 and returned to work in January 2009.

On March 20, 2009 appellant filed a claim for a schedule award. By decision dated May 12, 2009, OWCP denied his schedule award claim. It determined that appellant had not reached maximum medical improvement. In a decision dated September 25, 2009, OWCP's hearing representative affirmed the May 12, 2009 decision.

On January 12, 2010 appellant underwent a total right knee replacement. He returned to modified employment on April 21, 2010. In a report dated June 30, 2010, Dr. Alan Alyea, a Board-certified orthopedic surgeon, found a small amount of mediolateral laxity and measured flexion of more than 120 degrees with full extension.

In an impairment evaluation dated December 20, 2010, Dr. John W. Ellis, Board-certified in family medicine, evaluated the extent of appellant's bilateral knee impairment.[3] On the right side, he measured 101 degrees of right knee flexion and negative 8 degrees extension with "moderately severe laxity of the medial collateral and lateral collateral ligaments" and "moderate laxity of the anterior cruciate ligament." Dr. Ellis applied Table 16-3 on page 511 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*) to the clinical findings. He identified a class 4 impairment due to appellant's total knee replacement, which yielded a default value of 67 percent. Dr. Ellis applied grade modifiers and concluded that he had a 59 percent permanent impairment of the right lower extremity.

On February 8, 2011 OWCP's medical adviser noted that Dr. Alyea found a small amount of mediolateral laxity while Dr. Ellis found moderately severe laxity of the medial and lateral collateral ligaments and moderate laxity of the anterior cruciate ligament. He recommended a second opinion examination to determine whether appellant's condition had worsened and the extent of his right lower extremity impairment.[4]

On June 1, 2011 Dr. Kenneth S. Bayles, an osteopath, provided a second opinion examination, diagnosed status partial right medial meniscectomy and subsequent right total knee replacement arthroplasty with slight ligamental laxity.[5] He measured 100 degrees of right knee flexion and 0 degrees extension. Dr. Bayles found that Lachman's test and drawer tests showed "slight laxity on the right" with weaker quadriceps strength "due to knee pain with give-away weakness." He noted that appellant had an "antalgic gait favoring his right knee" and was

[3] Appellant has a separate claim for the left knee.

[4] In an April 22, 2011 response to OWCP's request for information, Dr. Alyea advised that he believed that appellant was stable at the time of his June 30, 2010 evaluation and that he had not evaluated him since that time.

[5] Dr. Bayles also evaluated the extent of impairment of appellant's left knee.

unable to squat or heel or toe walk. Dr. Bayles utilized Table 16-3 of the A.M.A., *Guides* to identify the diagnosis as a total knee replacement, class 4, applicable to total knee replacements with a poor result due to instability, loss of motion or poor position. He related:

> "Using Table 16-6, [F]unctional [H]istory (GMFH) adjustment, the claimant falls into modifier grade 3 with severe problems with antalgia. Using Table 16-7, [P]hysical [E]xam[ination] (GMPE) adjustment modifier, the claimant falls into grade 3, for severe palpatory findings and limited range of motion. Using Table 16-8, [C]linical [S]tudies (GMCS) adjustment, there is no available imaging studies, giving a grade modifier 0."

Dr. Bayles concluded that appellant had a 59 percent permanent impairment of the right lower extremity.

On July 28, 2011 OWCP's medical adviser reviewed Dr. Bayles' report and stated:

> "For the right knee, the history and physical reported by Dr. Bayles is very detailed and complete. The [t]able references are correct. The total knee arthroplasty, on the basis of impairment range of motion and joint instability is a DBI [diagnosis-based impairment] [c]lass 4 ([p]oor result), with a grade C value of 67 percent. Again a man of few words when it comes to his rationale, Dr. Bayles applies grade modifiers to reduce the grade of C to a grade of A, which is a PPI [permanent partial impairment] of 59 percent. Although he does not show the worksheets or the math, he appears to be tracking the correct process of DBI classification and grade modification and his history and physical exam[ination] clearly support his conclusions."

OWCP's medical adviser found that he was unable to determine the extent of physical impairment for the left side due to differences in physical examination but opined that the extent of the impairment of the right lower extremity was 59 percent due to appellant's unstable total knee replacement. He then related that an impartial medical examination was required in view of the difference in the findings of Dr. Ellis and Dr. Bayles regarding the bilateral knees and the issue of "whether the right knee post arthroplasty is stable or unstable…."

By decision dated September 1, 2011, OWCP granted appellant a schedule award for a 59 percent permanent impairment of the right leg. The period of the award ran for 169 weeks from June 30, 2010 to October 1, 2013.[6]

On December 15, 2011 OWCP found a conflict in medical evidence existed between Dr. Ellis on one side and Dr. Bayles and OWCP's medical adviser on the other side regarding the extent of appellant's permanent impairment of the right lower extremity.[7]

[6] On September 19, 2011 OWCP paid appellant the remainder of his schedule award for the period September 25, 2011 to October 1, 2013 in a lump sum of $92,092.63.

[7] In a progress report dated January 4, 2012, Dr. Alyes measured flexion of the right knee of 125 degrees from full extension. He found a "little bit of increased medial lateral laxity in all positions, but the knee is well balanced."

By letter dated March 1, 2012, OWCP referred appellant to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion. In a report dated March 23, 2010, Dr. Hubbard reviewed the history of injury and the medical reports of record. He discussed appellant's complaints of his right knee pain and his inability to squat, kneel or climb stairs. Dr. Hubbard found that the knees were "stable to posterior drawer testing for instability" but that with "approximately 10 degrees flexion there is mild-to-moderate instability." He diagnosed right knee pain due to status post right medial meniscus partial excision, right knee joint arthrosis/degenerative arthritis and status post right total knee arthroplasty. Applying the sixth edition of the A.M.A., *Guides*, Dr. Hubbard found that appellant had a class 3 impairment due to his total knee arthroplasty which yielded a default impairment of 37 percent using Table 16-3 on page 511. He applied a grade modifier of 3 for functional history due to appellant's inability to squat or climb stairs, a grade modifier of 3 for physical examination due to his restricted knee motion and a grade modifier of 0 for x-ray findings of a stable total knee replacement. Dr. Hubbard applied the net adjustment formula to find no adjustment from the 37 percent lower extremity impairment.

On April 17, 2012 OWCP's medical adviser reviewed Dr. Hubbard's report. He noted that Dr. Hubbard found a mild-to-moderate positive right anterior drawer test and loss of range of motion and placed appellant in a class 3 impairment with a default value of 37 percent. The medical adviser determined that Dr. Hubbard's modifiers would reduce the grade from an A to a C but found that the "modifiers are very subjective and confused in this case, with conflicting views presented at different times by different observers." He concluded that appellant had a 37 percent permanent impairment of the right lower extremity.

On May 17, 2012 OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of $54,008.31 because it incorrectly determined the extent of his right lower extremity impairment. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On May 19, 2011 appellant submitted an overpayment recovery questionnaire. He questioned the need for another examination given that he had attended two evaluations and both physicians found that he had a 59 percent impairment. Appellant requested a telephone conference.

A conference was held on June 7, 2012. In a decision dated June 8, 2012, OWCP granted appellant a corrected schedule award for a 37 percent permanent impairment of the right lower extremity, reduced from the original 59 percent award. The period of the award ran for 106.58 weeks from June 30, 2010 to July 14, 2012.

By decision dated June 27, 2012, OWCP found that appellant received an overpayment of $54,008.31 because it had inaccurately calculated his schedule award compensation. It found that he was without fault in creating the overpayment but denied waiver of recovery. OWCP requested that appellant submit the full amount of the overpayment.

On appeal, counsel argues that the record did not contain a conflict in medical opinion at the time of OWCP's referral to Dr. Hubbard as Dr. Ellis, Dr. Bayles and OWCP's medical adviser found that he had a 59 percent permanent impairment of the right lower extremity. He argues that there is no overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[8] and its implementing federal regulations[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history, physical examination and clinical studies.[12] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

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.[13] 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. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right knee sprain, a right medial meniscus tear and a temporary aggravation of right knee degenerative joint disease due to a June 20, 2008 employment injury. He underwent a partial medial meniscectomy on October 30, 2008 and a total knee replacement on January 12, 2010. In a report dated June 30, 2010, Dr. Alyea provided

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id*. at § 10.404(a).

[11] 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).

[12] A.M.A., *Guides* 494-531.

[13] 5 U.S.C. § 8123(a).

[14] 20 C.F.R. § 10.321.

measurements for flexion of 120 degrees and found that appellant had a small amount of mediolateral laxity.

Appellant submitted a December 20, 2010 impairment evaluation from Dr. Ellis, which reflected 101 degrees of flexion from negative 8 degrees of extension and found moderately severe medial and lateral collateral ligament laxity. Dr. Ellis used the knee regional grid set forth in Table 16-3 of the A.M.A., *Guides* in determining that appellant had a 59 percent permanent impairment of the right lower extremity due to his total knee replacement.

OWCP's medical adviser reviewed Dr. Ellis report and recommended a second opinion examination in view of the different physical findings of Dr. Alyea and Dr. Ellis. OWCP referred appellant to Dr. Bayles for a second opinion examination. In a report dated June 1, 2011, Dr. Bayles measured 100 degrees of flexion and 0 degrees extension of the right knee and found slight ligamental laxity and an anatalgic gait favoring the right side. He found a loss of strength of the quadriceps with "give-away weakness" and noted that appellant could not squat or walk on his heels or toes. Dr. Bayles utilized Table 16-3d in finding that appellant had a class 4 impairment of the right knee due to a poor result from a total knee replacement. He applied grade modifies and concluded that he had a 59 percent permanent impairment of the right lower extremity.

On July 28, 2011 OWCP's medical adviser concurred with Dr. Bayles' finding of a 59 percent impairment due to the right total knee replacement. He further stated, however, that a conflict existed regarding the stability of the right arthroplasty. OWCP determined that a conflict existed between Dr. Ellis on one side and Dr. Bayles and the medical adviser on the other side regarding the extent of appellant's right lower extremity impairment. It referred appellant to Dr. Hubbard for an impartial medical examination. There was, however, no conflict between Dr. Ellis and Dr. Bayles at the time of OWCP's referral to Dr. Hubbard on the issue of the extent of appellant's permanent impairment. Despite the conflict as to the amount of instability of the knee as both physicians, nonetheless, found that he had a 59 percent permanent impairment of the right lower extremity. While the medical adviser indicated that an impartial medical examination was required to determine the stability of the right knee replacement, he also agreed with Dr. Bayles' impairment rating and asserted that Dr. Bayles' examination and history "clearly support[ed]" his conclusions. As the record contained no conflict at the time of OWCP's referral of appellant to Dr. Hubbard, his report is that of a second opinion examiner rather than an impartial medical specialist.

On March 23, 2010 Dr. Hubbard noted that appellant could not climb stairs, squat or kneel due to right knee problems. On examination, he found mild-to-moderate instability with flexion. Dr. Hubbard determined that appellant had a class 3 impairment due to his total knee arthroplasty which yielded a default impairment of 37 percent according to Table 16-3. He applied a grade modifier of 3 for functional history due to appellant's inability to squat, climb stairs or kneel, a grade modifier of 3 for physical examination due to his restriction knee motion, and a grade modifier of 0 for x-ray findings of a stable total knee replacement. Dr. Hubbard determined that there was no adjustment from the 37 percent right lower extremity impairment.

The Board finds that the record now contains a conflict between Dr. Ellis and Dr. Hubbard regarding the extent of appellant's right lower extremity impairment.[15] Section

[15] *See Bryan O. Crane*, 56 ECAB 713 (2005).

8123 of FECA 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.[16] On remand, OWCP should refer appellant to an appropriate physician for an impartial medical examination. Following this and any further development deemed necessary, it shall issue an appropriate decision.[17]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 27 and 8, 2012 decisions of the Office of Workers' Compensation are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 20, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[16] 5 U.S.C. § 8123(a).

[17] In view of the Board's disposition of the schedule award issue, it is premature to address the issue of whether appellant received an overpayment of compensation.