

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tulsa, OK, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-1220
Issued: November 22, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2013 appellant filed a timely appeal from an October 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 has more than a 60 percent permanent impairment to each leg.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Board. One hundred and eighty days from October 12, 2012, the date of OWCP's decision was April 10, 2013. Since using April 23, 2013 the date the appeal was date stamped received by the Clerk of the Board would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 10, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 15, 2004 appellant, then a 56-year-old distribution clerk, filed an occupational claim (Form CA-2) alleging that she sustained injuries to her back, hip and knees as a result of her federal employment. The accepted conditions in the case are: bilateral sprain of the lateral collateral ligament, lumbar sprain, bilateral meniscus tears, right leg osteoarthritis, bilateral shoulder arthropathy and bilateral rheumatoid arthritis. Appellant underwent right knee surgery on October 12, 2005, which included partial excision of the right medial meniscus. On March 15, 2006 she underwent left knee arthroscopic surgery.

OWCP referred appellant to Dr. Timothy Pettingell, a Board-certified physiatrist, for a second opinion examination. In a report dated November 1, 2006, Dr. Pettingell opined that appellant had a 22 percent right leg impairment and a 12 percent left leg impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a report dated December 19, 2006, an OWCP medical adviser opined that under the A.M.A., *Guides* appellant had a 20 percent left leg impairment and a 10 percent right leg impairment based on loss of knee range of motion.

By decision dated February 13, 2007, OWCP issued a schedule award for a 20 percent left leg and 10 percent right leg permanent impairment. The period of the award was 86.40 weeks from July 13, 2006.

Appellant underwent right knee total arthroplasty surgery on June 25, 2008. In a report dated April 22, 2009, Dr. J. Arden Blough, a Board-certified family practitioner, provided results on examination. He opined that, under the sixth edition of the A.M.A., *Guides*, appellant had a 59 percent right leg impairment due to the total knee replacement surgery. Dr. Blough also found that she had a two percent left leg impairment due to a torn meniscus and a two percent whole person impairment due to recurrent low back pain with radicular symptoms.

In a report dated August 13, 2009, an OWCP medical adviser opined that appellant had 59 percent right leg impairment due to the total knee arthroplasty and a 2 percent leg impairment from the lumbar injury. The medical adviser combined the values for a 60 percent right leg impairment. As to the left leg, the medical adviser found 2 percent impairment for the meniscectomy, which was less than the 10 percent previously awarded. The medical adviser found that appellant did have an additional two percent left leg impairment based on the lumbar spine injury.

By decision dated September 15, 2009, OWCP issued a schedule award for an additional 50 percent to the right leg and 2 percent for the left leg. The period of the award was 149.76 weeks of compensation commencing April 22, 2009.

Appellant underwent additional left knee arthroscopic surgery on February 5, 2010. In a report dated May 28, 2010, Dr. M. Stephen Wilson, an orthopedic surgeon, opined that she had a 37 percent left leg impairment due to her knee injury. OWCP referred appellant to Dr. Michael Smith, a Board-certified physiatrist, for a second opinion examination. In a report dated January 4, 2011, Dr. Smith opined that she had a 59 percent right leg impairment based on the right knee surgeries and a 22 percent impairment to the left leg based on the left knee.

In a report dated July 8, 2011, Dr. Wilson opined that appellant had a 59 percent impairment to both her right and left legs based on her bilateral knee conditions. By report dated July 28, 2011, an OWCP medical adviser found that she had not reached maximum medical improvement with respect to the left leg.³

By report dated February 10, 2012, Dr. Wilson again opined that appellant had a 59 percent permanent impairment to each leg based on the A.M.A., *Guides*. In a report dated March 6, 2012, an OWCP medical adviser reviewed Dr. Wilson's report. The medical adviser concurred that appellant had a 59 percent bilateral leg impairment. For the right leg, he found that she was not entitled to an additional award. For the left leg, the medical adviser noted that appellant had previously received 20 percent due to the left knee and 2 percent from the lumbar spine injury. He found that 20 subtracted from 59 was 39 percent and then combined 2 percent with 39 percent under the Combined Values Chart in the A.M.A., *Guides*, resulting in 40 percent. The medical adviser then subtracted 2 percent and opined that appellant was entitled to an additional 38 percent for the left leg.

By decision dated April 11, 2012, OWCP issued a schedule award for an additional 38 percent to the left leg. The period of the award was 109.44 weeks from March 6, 2012. The decision found that appellant was not entitled to an additional impairment to the right leg.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 10, 2012. By decision dated October 12, 2012, the hearing representative affirmed the April 11, 2012 decision.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ Neither, FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁶

With respect to knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3.⁷ The class of impairment (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH), Table 16-6, Physical Examination

³ The medical adviser referred to a report by a Dr. Kalisky without further explanation.

⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ A. *George Lampo*, 45 ECAB 441 (1994).

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ A.M.A., *Guides* 509, Table 16-3.

(GMPE), Table 16-7 and Clinical Studies (GMCS), Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁹

ANALYSIS

In the present case, both the attending physician Dr. Wilson and the medical adviser applied Table 16-3 and found that appellant had a 59 percent permanent impairment to each leg. The diagnostic criteria were a total knee replacement, with a class (CDX) 4 default impairment of 67 percent for a poor result from the surgery. As noted above, the default impairment (grade C) is then adjusted by assigning a grade modifier for functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). Dr. Wilson and the medical adviser assigned a grade modifier 3 for functional history and physical examination and 2 for clinical studies. Applying the adjustment formula noted above, the result is -4, resulting in an adjustment to a grade A or 59 percent.¹⁰

There is no evidence of a greater impairment to either leg. Both Dr. Wilson and the medical adviser applied Table 16-3 and concluded that appellant had 59 percent bilateral leg impairment.

There remains, however, the issue of a reduction of the schedule award based on the compensation previously paid for permanent impairment to the legs. As to the right leg, appellant had received compensation based on 60 percent leg impairment. In the September 15, 2009 schedule award, OWCP found that appellant had a 59 percent right leg impairment based on the knee and 2 percent impairment for a lumbar injury. Combining the 59 percent and 2 percent under the A.M.A., *Guides* Combined Values Chart¹¹ results in 60 percent leg impairment. Therefore, the record indicated that appellant had previously received a schedule award based on 59 percent for the right knee and 1 percent for the lumbar injury. Since she had already received compensation for a 59 percent leg impairment based on the right knee, she was not entitled to an additional schedule award for the right leg.

As to the left leg, the record indicates that appellant had received compensation for 22 percent leg impairment. Appellant had received a schedule award for a 20 percent left leg impairment on February 13, 2007 that was based on a left knee impairment. But the additional two percent paid for the left leg in the September 15, 2009 schedule award was based on a lumbar condition affecting the left leg. The medical adviser appeared to find that the current leg

⁸ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁹ T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

¹⁰ A.M.A., *Guides* 511, Table 16-3.

¹¹ A.M.A., *Guides* at 604.

impairment based on the knee did not duplicate the two percent impairment based on a lumbar injury. He noted that appellant had received a two percent impairment based on the “accepted condition in the lumbar spine.” But the medical adviser, after deducting 20 percent for the prior impairment, then combines 39 and 2 for 40 percent and then further deducts 2 percent for a 38 percent additional impairment. No authority is cited for such a calculation or additional explanation is provided.

If the current leg impairment does not duplicate the 2 percent impairment from a lumbar condition, then it is not clear why the reduction from the current impairment would not simply be 20 percent. The case will be remanded for a proper medical report with a clear explanation, in accord with 20 C.F.R. § 10.404(c), as to any reduction based on duplication of a preexisting impairment. After such further development as is deemed necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that OWCP properly found that appellant was not entitled to an additional impairment for the right leg. The case requires further development with respect to the left leg impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated October 12, 2012 is affirmed with respect to the right leg and set aside and remanded for further development as to the left leg.

Issued: November 22, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees’ Compensation Appeals Board

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

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