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

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| **D.K., Appellant** | ) | |
| **and** | ) | **Docket No. 13-1526** |
| | ) | **Issued: August 1, 2014** |
| **U.S. POSTAL SERVICE, POST OFFICE, Arlington, MA, Employer** | ) | |

*Appearances:*
*Daniel B. Shapiro, Esq.,* for the appellant
*No appearance,* for the Director

Oral Argument May 21, 2014

## DECISION AND ORDER

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

### ***JURISDICTION***

On June 11, 2013 appellant, through his attorney, filed a timely appeal of a December 20, 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 to consider the merits of the case.

### ***ISSUE***

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

On appeal, counsel argued that the grade modifier for functional history should have been calculated as positive two based on the required subjective report, the American Academy of Orthopedic Surgeons (AAOS) questionnaire, which is the highest component when compared to a grade modifier of zero for gait derangement in accordance with the American Medical

[1] 5 U.S.C. § 8101 *et seq.*

Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*) section 16.3[3] and would result in an impairment rating of 34 percent.

Following the oral argument, counsel submitted a memorandum arguing that all the necessary factual evidence was present in the record before the Board and that it should make a finding that the weight of the credible medical evidence rested with appellant's attending physician and establishes that appellant has a 34 percent impairment of the right lower extremity.

## ***FACTUAL HISTORY***

On December 19, 2008 appellant, then a 61-year-old letter carrier, filed a traumatic injury claim alleging that on that date he slipped on ice causing his right knee to buckle. He underwent a magnetic resonance imaging (MRI) scan of his right knee on April 14, 2009 which demonstrated a tear in the posterior horn of the medial meniscus of the right knee involving both articular surfaces. OWCP accepted appellant's claim for right quadriceps strain on April 21, 2009. Appellant underwent an arthroscopic partial right medial meniscectomy on May 11, 2009. He returned to regular duty on June 6, 2009.

Appellant requested a schedule award on November 29, 2011. Beginning on November 9, 2009 his physician recommended a right knee replacement due to bone-on-bone arthritis of the right medial joint space noting that he had a total knee replacement on the left in 2006. Appellant underwent a right knee total arthroplasty on January 21, 2010.

Dr. Byron V. Hartunian, an orthopedic surgeon, completed a report on November 18, 2011 and stated that he first examined appellant on September 1, 2011. He described appellant's job duties and history of injury. Dr. Hartunian noted that appellant continued to experience discomfort and swelling in the right knee following his replacement as well as restricted mobility and loss of sensation along the incision at the anterior part of the knee. Appellant completed an AAOS questionnaire stating that he experienced moderate stiffness and moderate swelling in his lower extremities as well as pain when walking on flat surfaces or traversing stairs. He also reported moderate pain lying in bed and moderate difficulty donning and removing socks.

On physical examination, Dr. Hartunian found a normal gait without a noticeable limp, normal alignment of the knees and restricted squatting. He found palpable effusion of the knee resulting in one-half inch increased circumference on the right. Appellant was found not to demonstrate atrophy or ligament laxity. Range of motion with a goniometer on three attempts was 108 degrees of flexion and 0 degrees of extension. Dr. Hartunian diagnosed total right knee arthroplasty for end-stage degenerative arthritis. He opined that appellant reached maximum medical improvement one year after his right knee arthroplasty in January 2011.

[2] A.M.A., *Guides* 6th ed. (2009).

[3] *Id.* at 516, section 16.3a.

Dr. Hartunian applied the A.M.A., *Guides* and found that a total knee replacement with mild motion deficit was a class 3 impairment.[4] He determined that physical examination was used to determine the class and was not used as a modifier. Dr. Hartunian also found that clinical studies adjustment was excluded as postoperative x-rays were only used to confirm the diagnosis of a total knee replacement. He stated:

> "The [f]unctional [h]istory [a]djustment per Table 16-6 using the gait derangement analysis is [m]odifier 0 as there is no noticeable limp on [p]hysical [e]xamination. However, using the AAOS Lower Limb Questionnaire there is a [g]rade [m]odifier of 2, moderate deficit. Since the difference in these [m]odifiers is 2, the [f]unctional [h]istory [a]djustment is considered unreliable and excluded from the grading process."

Dr. Hartunian determined that the net adjustment formula was not applicable and that appellant had a default class 3, grade C impairment of 37 percent of the right lower extremity.

OWCP referred appellant's claim for schedule award to Dr. David I. Krohn, a Board-certified internist and OWCP medical adviser. In his report dated December 31, 2011, Dr. Krohn noted appellant's history of injury and medical treatment history. He opined that the accepted conditions should be expanded to include acceleration of right knee osteoarthritis. Dr. Krohn found that appellant reached maximum medical improvement in January 2011. He applied the A.M.A., *Guides* and found that appellant's total knee replacement resulted in a class 3 impairment or fair result due to knee flexion of 108 degrees which correlated with 37 percent impairment. Dr. Krohn found that the functional history modifier was zero and that the diagnosis grade was 3 resulting in -3 for a modifier. He based his conclusions on the findings that appellant had no limp on examination.[5] Dr. Krohn noted that the grade modifier for physical examination was used to determine the class of the impairment and that the record did not include a postoperative x-ray of the knee arthroplasty so that the grade modifier for clinical studies could not be determined. He disagreed with Dr. Hartunian's conclusions regarding functional history class modifiers. Dr. Krohn stated:

> "I do not believe that the AAOS lower limb instrument disqualifies the functional history from being used. To quote the [A.M.A.,] *Guides,* 'The examiner must assess the reliability of the functional reports recognizing the potential influence of behavioral and psychosocial factors. Therefore, the examiner must use appropriate clinical judgment in interpreting subjective reports.' The claimant's overall outcome is better than 'fair' by all objective criteria. It is not reasonable, in my opinion, to empower the claimant's subjective report on the AAOS instrument to raise his impairment of the right lower extremity by [six percent] as Dr. Hartunian has determined it should. There is no need for determination of GMCS, [Grade Modifier Clinical Studies], in my opinion, as [Grade Modifier Functional History] adjusts the CDX maximally to grade A correlation with a 31 percent impairment of the right lower extremity."

[4] *Id*. at 509-11, Table 16-3 and 549, Table 16-23.

[5] *Id.* at 516, Table 16-6.

Dr. Hartunian completed an additional report on January 20, 2012. He opined that appellant's work injury resulted in excess stressing going through his knee during his work and caused progression of his arthritis. Dr. Hartunian concluded that there was a direct causal relationship between appellant's work injury and his right knee arthroplasty. He also noted that appellant had a diagnosis of degenerative arthritis which was a permanent condition. Dr. Hartunian concluded that appellant's right knee total arthroplasty was necessary.

By decision dated May 8, 2012, OWCP granted appellant a schedule award for 31 percent impairment of the right lower extremity. It accepted his right knee osteoarthritis and right knee arthroplasty as related to his employment.

Counsel requested an oral hearing before an OWCP hearing representative on May 24, 2012. He submitted a memorandum and argued that Dr. Krohn erroneously assigned a functional history grade modifier of zero when the functional history grade modifier should have been excluded as unreliable. Counsel argued that the A.M.A., *Guides* requires that grade assignment for functional symptoms be based on subjective reports.[6] He further argued that the AAOS questionnaire supported a grade modifier of two which should be deemed unreliable as the physical examination showed a gait derangement of zero and the AAOS supported a grade modifier of two a difference of two.[7]

In a decision dated December 20, 2012, OWCP's hearing representative found that appellant had no more than 31 percent impairment of the right lower extremity for which he received a schedule award. He found that appellant's right knee total replacement had a default impairment of 37 percent under the A.M.A., *Guides*. The hearing representative noted that, if the functional history, physical examination and clinical studies modifiers were all excluded appellant was entitled to an impairment rating of 37 percent. He found that the automatic exclusion of the functional history modifier under section 16.3 of the A.M.A., *Guides*[8] did not apply as Dr. Hartunian did not apply the physical examination or the clinical studies grade modifiers. The hearing representative further found that Dr. Hartunian did not provide adequate explanation for why he relied on the AAOS questionnaire to exclude other factors including gait which should be relied upon to calculate functional history modifiers. He found that Dr. Krohn properly determined that the functional history modifier of -3 resulted in 31 percent impairment and that this report was entitled to the weight of the medical evidence.

[6] *Supra* note 3.

[7] *Id.*

[8] *Id.*

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[9] and its implementing regulations,[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[11]

In addressing lower extremity impairments, the sixth edition of the A.M.A., *Guides* requires identifying 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). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

## ***ANALYSIS***

Appellant's diagnosis of total knee replacement, class 3, fair result including fair position, mild instability or mild motion deficit was agreed upon by both physicians, Drs. Hartunian and Krohn, due to his loss of range of motion. This diagnosis-based estimate ranges from 31 for grade A to 43 for grade E.[13]

The A.M.A., *Guides* provide that the grade modifiers associated with functional history, physical examination and clinical studies would be used to calculate a net adjustment, that permits modification of the default value, grade C, up or down within a given class adjustment.[14] The examiner is to assess each of the components of the adjustment when determining the grade modifier and use the highest class modifier as the value for that adjustment in the net adjustment calculation.[15]

[9] 5 U.S.C. §§ 8101-8193, 8107.

[10] 20 C.F.R. § 10.404.

[11] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[12] A.M.A., *Guides* 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[13] *Id.* at 511, Table 16-3.

[14] *Id.* at 515.

[15] *Id.*

Grade assignment for functional symptoms is based on subjective reports that are attributable to the impairment. Table 16-6, Functional History Adjustment -- Lower Extremities is divided into two categories, gait derangement and AAOS lower limb instrument. Appellant demonstrated no gait derangement or grade modifier 0 and Dr. Hartunian found appellant reported on the AAOS grade modifier 2 or moderate deficit.[16] As noted above, the A.M.A., *Guides* provide that an examiner is to use the highest class modifier as the value for that adjustment in the net adjustment calculation. In this situation the highest class modifier for functional history is 2 for the AAOS instrument.

The Board finds that the case is not in posture for a decision. The Board would like Dr. Krohn, as OWCP's medical adviser, to explain how the application of the AAOS impacts the functional grade modifier in this case. Dr. Krohn should review the A.M.A., *Guides* and explain how the application of the AAOS would properly impact the functional history grade modifier given to the claimant. The A.M.A., *Guides* specifically state that the AAOS instrument may be used as part of the process of evaluating functional symptoms[17] and also state that the highest class modifier should be used as the value for that adjustment in the net adjustment calculation.[18] Dr. Krohn should provide his findings, opinions and conclusions in accordance with the applicable provisions of the A.M.A., *Guides*. The Board finds that it is necessary to secure additional medical opinion evidence contrary to appellant's most recent argument before the Board. After this and such other development as OWCP deems necessary, OWCP shall issue a *de novo* decision.

## ***CONCLUSION***

The Board finds that the case is not in posture for a decision as the medical evidence must be further correlated with the applicable provisions of the A.M.A., *Guides* by OWCP's medical adviser.

[16] *Id.* at 516, Table 16-6.

[17] *Id.* at 516.

[18] *Supra* note 14, example in the text.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 20, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: August 1, 2014
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