United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 14-848**
	)	**Issued: August 11, 2014**
DEPARTMENT OF HOMELAND SECURITY, U.S. COAST GUARD, Cape May, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 5, 2014 appellant, through his attorney, timely appealed the October 28, 2013 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 has greater than 31 percent impairment of the right lower extremity.

FACTUAL HISTORY

This case was previously before the Board.[2] Appellant, a 63-year-old construction representative, has an accepted claim for aggravation of bilateral lower leg osteoarthritis, which

[1] 5 U.S.C. §§ 8101-8193.

[2] Docket No. 11-1542 (issued February 8, 2012). The Board's prior decision is incorporated herein by reference.

arose on or about July 1, 2005. He underwent bilateral total knee replacement surgery on November 15, 2006. When the case was previously before the Board, the Branch of Hearings and Review affirmed an August 23, 2010 schedule award for 22 percent impairment of the left lower extremity (LLE) and 25 percent impairment of the right lower extremity (RLE). However, the Board set aside OWCP's hearing representative's February 28, 2011 decision because there was an unresolved conflict in medical opinion regarding the extent of appellant's RLE impairment.[3] The Board remanded the case to OWCP for referral to an impartial medical examiner.

In a report dated April 5, 2013, Dr. Ian B. Fries, a Board-certified orthopedic surgeon and impartial medical examiner (IME), found 31 percent RLE impairment under Table 16-3, (Knee Regional Grid), A.M.A., *Guides* 511 (6th ed. 2008).[4] The rating was based on a diagnosis of total knee replacement with a fair result (class 3, grade A).[5]

On April 12, 2013 another DMA, Dr. Andrew A. Merola, reviewed the record and noted his agreement with the Dr. Fries' April 5, 2013 impairment rating.[6] He also indicated that appellant reached maximum medical improvement as of the date of the Dr. Fries' evaluation.

On April 15, 2013 OWCP issued two separate schedule award decisions. In one decision, it noted that the evidence did not establish entitlement to a greater award than the previous 22 percent schedule award for appellant's left lower extremity. The other April 15, 2013 decision granted an additional 6 percent impairment of the right lower extremity, for a total RLE impairment of 31 percent.[7]

Counsel requested a hearing with respect to OWCP's April 15, 2013 decision awarding an additional six percent RLE impairment.[8] He also submitted a May 31, 2013 report from Dr. Diamond, who reviewed the latest reports from both the IME and DMA. Dr. Diamond reiterated his prior rating of 59 percent RLE impairment.[9] He disagreed with the IME that the

[3] Appellant's physician, Dr. Nicholas P. Diamond, a pain management specialist, found 59 percent RLE impairment based on the result of the November 2006 total knee replacement. Dr. Diamond applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides* 2008). The district medical adviser (DMA) disagreed with Dr. Diamond's assignment of class 4 impairment (poor result) under Table 16-3 (Knee Regional Grid), A.M.A., *Guides* 511 (6th ed. 2008). Instead, the DMA found only class 2 impairment (good result) and a corresponding RLE impairment of 25 percent.

[4] Dr. Fries examined appellant on April 1, 2013.

[5] The IME also found 21 percent LLE impairment under Table 16-3, A.M.A., *Guides* 511 (6th ed. 2008). However, there was no prior conflict with respect to OWCP's August 23, 2010 award of 22 percent LLE impairment.

[6] Dr. Merola is a Board-certified orthopedic surgeon.

[7] OWCP reduced this latest award by the 25 percent RLE award appellant previously received on August 23, 2010.

[8] A video hearing was held on August 22, 2013.

[9] Dr. Diamond had not examined appellant since his initial evaluation on July 31, 2008.

outcome of appellant's right total knee replacement represented class 3 (fair result), rather than class 4 (poor result) impairment. Dr. Diamond also criticized the IME's decision to exclude Functional History (GMFH) as a grade modifier when determining the appropriate net adjustment.

By decision dated October 28, 2013, the Branch of Hearings and Review affirmed OWCP's April 15, 2013 decision. OWCP's hearing representative found that the weight of the medical evidence, as represented by the IME's opinion, supported that appellant had 21 percent LLE impairment and 31 percent RLE impairment. The hearing representative further noted that because OWCP previously awarded 22 percent for the LLE and the current evidence only supported a 21 percent LLE impairment, OWCP should take follow-up action to declare an overpayment, if appropriate.[10]

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[11] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[12] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[13]

If there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[14] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[15] Where OWCP has referred the employee to an impartial medical

[10] As noted, counsel did not request a hearing with respect to OWCP's April 15, 2013 decision concerning left lower extremity impairment. Additionally, there was no conflict with respect to the previous finding of 22 percent LLE impairment, which was based on a combined rating that included appellant's total knee replacement (21 percent) and Achilles tendinitis (1 percent). Accordingly, the IME's April 5, 2013 opinion regarding the extent of his LLE impairment would not be entitled to determinative weight. Given that counsel's hearing request was limited to OWCP's April 15, 2013 decision awarding an additional six percent RLE impairment, OWCP's hearing representative's analysis and findings regarding appellant's LLE impairment and possible overpayment exceeded the scope of her review.

[11] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[12] 20 C.F.R. § 10.404.

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[14] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. §10.321(b).

[15] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same schedule member.[17] Benefits payable under 5 U.S.C. § 8107(c) shall be 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.[18]

ANALYSIS

The Board previously found there was an unresolved conflict in medical opinion regarding the extent of appellant's right lower extremity impairment. Whereas appellant's physician, Dr. Diamond, found 59 percent RLE impairment, he found only 25 percent impairment. On remand, OWCP referred the case to Dr. Fries, who found 31 percent RLE impairment under Table 16-3, A.M.A., *Guides* 511 (6th ed. 2008). The IME found the results of appellant's total right knee replacement represented class 3 impairment (fair result) with a corresponding default (grade C) rating of 37 percent lower extremity impairment. In assigning the appropriate diagnosis class (CDX), he relied on what he considered "credible" complaints of right knee instability and decreased function, which were consistent with the limp appellant exhibited. The IME further noted that appellant's Lower Limb Questionnaire (LLQ) showed moderately reduced function.[19] Based on the above-noted functional history, he found class 3 impairment. Factoring in adjustments for Physical Examination (GMPE 1) and Clinical Studies (GMCS 0), the IME calculated a net adjustment of -3, which resulted in a finding of class 3, grade A impairment with a RLE rating of 31 percent.[20] Dr. Merola, another DMA agreed. The Board notes that the correct net adjustment would be -5; however, this would not change the final rating (grade A) under Table 16-3, A.M.A., *Guides* 511 (6th ed. 2008).[21]

When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well reasoned and based upon a proper factual background, must be given special

[16] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[17] 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[18] 20 C.F.R. § 10.404(c)(1), (c)(2).

[19] *See* section 16.9, Appendix 16-A: LLQ, A.M.A., *Guides* 555 (6th ed. 2008).

[20] The IME properly excluded functional history from the net adjustment calculation because appellant's functional history, including the results of the LLQ, formed the basis for the class 3 diagnosis CDX under Table 16-3, A.M.A., *Guides* 511 (6th ed. 2008). *See* section 16.3, A.M.A., *Guides* 515-16 (6th ed. 2008).

[21] Net Adjustment (-5) = (GMPE 1 - CDX 3) + (GMCS 0 - CDX 3). *See* section 16.3d, A.M.A, *Guides* 521 (6th ed. 2008). Both the IME and the DMA incorrectly used a CDX of two rather than three. Because the net adjustment procedure does not allow jumping from one class to a lower (or higher) class, in this instance (-5) the rating would move to the lowest grade within the class (C to A). *Id.*

weight.[22] The Board finds that OWCP properly deferred to Dr. Fries' April 5, 2013 findings. Dr. Fries provided a well-reasoned report based on a proper factual and medical history. He also accurately summarized the relevant medical evidence. Additionally, Dr. Fries provided a thorough physical examination. His April 5, 2013 report included detailed findings and medical rationale supporting his opinion. As the IME, Dr. Fries' opinion is entitled to determinative weight.[23] Accordingly, the Board finds that OWCP properly relied on Dr. Fries' findings in determining the extent of appellant's RLE impairment.

In his latest report, Dr. Diamond continued to challenge the assessment of the right knee replacement surgery as anything other than class 4 (poor result). His May 31, 2013 report is almost five years removed from his last physical examination of appellant. Dr. Diamond also questioned Dr. Fries' exclusion of functional history as a grade modifier in determining the appropriate net adjustment. As previously discussed, the IME properly excluded functional history from his net adjustment calculation.[24] Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved would generally be insufficient to overcome the weight accorded the IME's report and/or insufficient to create a new medical conflict.[25] Dr. Diamond's May 31, 2013 report reiterated his earlier finding of 59 percent RLE impairment. Consequently, this evidence is insufficient to overcome the weight properly accorded Dr. Fries' April 5, 2013 opinion and similarly insufficient to create a new conflict in medical opinion.

The Board finds that the impairment ratings from both the IME and the DMA conform to the A.M.A., *Guides* (6th ed. 2008) and thus, represent the weight of the medical evidence regarding the extent of appellant's right lower extremity impairment. The Board further finds that OWCP properly reduced the current 31 percent RLE impairment by the previous 25 percent impairment appellant received in August 2010.[26]

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

Appellant failed to establish that he has greater than 31 percent impairment of the right lower extremity.

[22] *Supra* note 16.

[23] *Id.*

[24] *Supra* note 20.

[25] *I.J.*, 59 ECAB 408, 414 (2008).

[26] *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed with respect to the extent of appellant's right lower extremity impairment.

Issued: August 11, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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