United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 13-320**
	)	**Issued: January 29, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 26, 2012 appellant, through counsel, timely appealed from the July 30, 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 a 15 percent impairment of her left lower extremity for which she received a schedule award.

On appeal, appellant's counsel contends that as appellant provided a new report indicating that she was entitled to a greater schedule award, OWCP erred in failing to forward this report to OWCP's medical adviser or further develop the medical evidence.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference.[2]

On March 9, 2009 appellant filed a claim for a schedule award.

In a report dated December 16, 2008, Dr. Arthur Becan, an orthopedic surgeon,[3] listed appellant's diagnoses as: (1) status post displaced lateral tibial plateau of the left knee; (2) status post avulsion fracture of medial tibial spine of the left knee; (3) post-traumatic tricompartmental osteoarthritis of the left knee; (4) chronic post-traumatic cervical strain and sprain; (5) left upper extremity radiculitis; and (6) myofascial pain syndrome. He determined that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (A.M.A., *Guides*), she had a 23 percent impairment of the left lower extremity. OWCP referred the case to its medical adviser, who determined that appellant had a 15 percent impairment under the A.M.A., *Guides*.

In a decision dated April 8, 2009, OWCP issued a schedule award for a 15 percent impairment of the left lower extremity, the impairment rating assigned by OWCP's medical adviser.

On April 14, 2009 appellant requested a hearing before an OWCP hearing representative, which was held on July 23, 2009.

By decision dated October 15, 2009, OWCP's hearing representative found that OWCP's medical adviser's report was not sufficiently rationalized to be considered the weight of the medical opinion, but that it was sufficient to require referral for a second opinion examination. Accordingly, he set aside the April 8, 2009 schedule award decision and remanded the case for further processing.

By letter dated October 27, 2009, counsel stated that he would like to participate in the selection of an impartial specialist, should such referral become necessary. He stated that the reason for this request was an attempt to assure that the claimant receives an impartial examination.

On November 12, 2009 OWCP referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion. In a December 3, 2009 report, Dr. Draper applied the sixth edition of the A.M.A., *Guides* and determined that appellant had a 13 percent impairment of the left lower extremity. In reaching this conclusion, he applied Table 16-3 of the sixth

[2] Docket Nos. 11-1379 and 12-1308 (issued September 26, 2012). OWCP accepted that on November 5, 2007 appellant, then a 58-year-old letter carrier, was hit by a car and sustained a closed fracture of the upper end of her left tibia as well as traumatic arthropathy of the left lower leg. The Board remanded the case to OWCP for further consideration and to apply the guidelines of FECA Bulletin No. 09-05 with regards to appellant's claim for intermittent periods of disability and loss of wage-earning capacity.

[3] The Board cannot confirm that Dr. Becan is Board-certified. Dr. Becan did not treat appellant but evaluated her for a determination as to her percentage of permanent impairment.

edition of the A.M.A., *Guides*[4] and found that based on the Regional Grid -- Lower Extremity Impairment, the diagnostic criteria was tibial plateau fracture, class 1,with angulation of less than nine degrees. The default impairment rating pursuant to Table 16-3 was 10 percent for class 1 using grade C. Dr. Draper calculated the grade modifier for Functional History (GMFH) of 2, grade modifier for Physical Examination (GMPE) of 2 and grade modifier for Clinical Studies (GMCS) of 2.[5] He applied the formula as set forth in the A.M.A., *Guides* of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = 1+1+1 = 3.[6] Utilizing the net adjustment formula, Dr. Draper selected grade E under class 1, which amounted to a 13 percent impairment of the left lower extremity. In a December 30, 2009 report, OWCP's medical adviser, utilizing the same calculations as Dr. Draper, agreed that appellant was entitled to a 13 percent impairment.

In a January 12, 2010 decision, OWCP denied appellant's request for an increased schedule award. It determined that as the previous schedule award was for 15 percent impairment, the evaluations under the sixth edition of the A.M.A., *Guides* indicated that she was not entitled to a greater award.

On January 11, 2010 appellant requested a hearing before an OWCP hearing representative, which was held on May 18, 2010.

On May 10, 2010 Dr. Becan updated his report of December 16, 2008 to apply the sixth edition of the A.M.A., *Guides*. He also found that pursuant to Table 16-3 of the sixth edition of the A.M.A., *Guides*, appellant was entitled to a 10 percent impairment for a class 1 left comminuted fracture tibial plateau (less than nine degrees angulation).[7] Dr. Becan found grade modifiers of 2 for GMFH due to difficulty with personal care, 2 for GMPE for range of motion, and that GMCS was not applicable.[8] Applying the formula set forth in the A.M.A., *Guides*, he determined that appellant had a net adjustment of 2, which yielded a left lower extremity impairment after a net adjustment of 13 percent. Dr. Becan then noted that pursuant to Table 16-3, appellant had class 1 left collateral ligament laxity of 10 percent, which was adjusted by 2, which yielded a lower extremity impairment after adjustment of 24 percent.

Three separate decisions were issued by OWCP's hearing representatives with regard to this hearing request. In a July 22, 2010 decision, the hearing representative found that as the weight of the evidence failed to establish that appellant was entitled to a schedule award for greater than a 15 percent impairment of the left lower extremity, he affirmed the April 8, 2009 decision.[9] In an amended decision dated August 10, 2010, he vacated the decision of January 12, 2010. The hearing representative remanded the case to apply the fifth edition of the

[4] A.M.A., *Guides* 510.

[5] *Id.* at 516, Table 16-6; 517, Table 16-7; 519, Table 16-8.

[6] *Id.* at 521.

[7] *Id.*

[8] *Supra* note 4.

[9] The Board notes that, although OWCP's hearing representative actually noted a 10 percent impairment, this is a typographical error.

A.M.A., *Guides*. However, in a September 16, 2010 decision, the Chief of the Branch of Hearings and Review vacated the July 22, 2010 decision and modified the August 10, 2010 decision to reflect that there was a conflict in the medical evidence between Drs. Becan and Draper, instructed OWCP to refer appellant for an impartial medical examination and noted that a decision should be issued based on the sixth edition of the A.M.A., *Guides.*

On December 10, 2010 OWCP referred appellant to Dr. Andrew Collier, a Board-certified orthopedic surgeon, for an impartial medical examination. With regards to this referral, the record contains a Form ME-M Memorandum of Referral to Specialist, a copy of the ME023 Appointment Schedule Notification, a record of the telephone call to Dr. Collier to schedule the examination and a screen shot of a bypass of Dr. Rekant for the reason that he treated hands only. In an opinion dated January 5, 2011, Dr. Collier noted that appellant sustained an acute lateral tibial plateau fracture on the left-hand side which was minimally displaced. He also noted that she had a fracture of the tibial spine. Dr. Collier indicated that there were no injuries to the medial collateral ligament or the anterior cruciate ligament. He stated that at the present time appellant's fracture had healed and that she had no angular deformity. Dr. Collier did note some post-traumatic arthritis of the knee. He calculated an impairment rating utilizing Table 16-3 of the A.M.A., *Guide* for regional grid for lower extremity/knee, tibial plateau fracture nondisplaced with less than 9 percent angulation and abnormal findings which was class 1 with a default of C or 10 percent. Dr. Collier then found a GMFH of two, and a GMCS for two. For GMPE, he noted that observed and palpatory finders modifier was two for moderate, stability modifier was zero, alignment deformity was zero, range of motion was moderate loss of 2, muscle atrophy was zero and limb length discrepancy was zero. Dr. Collier determined that this amounted to a GMPE of 4/6 or 2/3. He determined that, after applying the adjustments for grade modifiers, utilizing Table 16-3, the default of C under class 1 goes from 10 to E or plus 2 which is a 13 percent permanent impairment of the left lower extremity.

On January 13, 2011 OWCP referred Dr. Collier's report to OWCP's medical adviser for comments, but none were received.

In an April 11, 2011 decision, OWCP found that the opinion of the impartial medical examiner represented the weight of the medical evidence with respect to the level of permanent partial and causal relationship, and that accordingly, entitlement to an additional schedule award was denied.

On April 14, 2011 appellant requested a hearing.

Following a preliminary review, by decision dated July 13, 2011, OWCP's hearing representative set aside the April 11, 2011 decision and remanded the case as OWCP failed to obtain an opinion from its medical adviser evaluating Dr. Collier's report.

On remand, OWCP referred appellant's case to its medical adviser. In an August 29, 2011 report, OWCP's medical adviser indicated that he agreed with Dr. Collier's report, indicated that Dr. Collier's finding of 13 percent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides* was correct, and that as the 13 percent impairment rating for the left lower extremity impairment did not exceed the prior award of 15 percent left lower extremity impairment, there is no incremental impairment due at this time.

In a decision dated August 29, 2011, OWCP determined that appellant was not entitled to an additional schedule award.

On September 7, 2011 appellant requested a hearing which was held on November 5, 2011. At the hearing, counsel contended that there was no snapshot of the Physicians Directory System screen selecting Dr. Collier as an impartial medical examiner. He also contended that Dr. Collier did not rate any ligament laxity, which she contended was inappropriate under the A.M.A., *Guides* and was rated by Dr. Becan. Counsel also argued that as appellant's condition was expanded to include left knee post-traumatic osteoarthritis, the x-ray films are crucial to the proper evaluation of appellant's impairment. He asked that the record be left open for a supplemental report by Dr. Becan.

In a December 5, 2011 report, Dr. Becan stated that his examination did reveal a gap with valgus and varus stress testing which would correspond with collateral ligament laxity. He also noted a separate issue from comminuted fracture of the tibial plateau. Dr. Becan noted that both Dr. Collier and he agreed that appellant is entitled to a 13 percent left lower extremity impairment from the comminuted tibial plateau fracture. However, he opined that due to his examination findings, appellant did have a collateral ligament laxity which entitled her to an additional 13 percent impairment for a final combined left lower extremity impairment of 24 percent.

On January 10, 2012 OWCP received a copy of a report by Dr. Becan. This report was the December 16, 2008 report that was updated to apply the sixth edition of the A.M.A., *Guides* on May 7, 2010. A handwritten note on the first page indicated that the report was again updated on January 3, 2012. In this updated report, Dr. Becan opined that appellant has a 26 percent impairment to the left lower extremity under the sixth edition of the A.M.A., *Guides.* He noted, "x-ray December 8, 2011 = 1 mm." Applying Table 16-3 of the A.M.A., *Guides*, Dr. Becan indicated that the default impairment rating was 30 percent due to class 3 left knee primary knee joint arthritis.[10] He noted grade modifiers as follows: GMFH of 2, GMPE of 2 and determined that GMCS was not applicable. Applying the formula, Dr. Becan found that appellant's left lower extremity impairment after net adjustment was 26 percent.

In a February 28, 2012 decision, OWCP's hearing representative affirmed the August 25, 2011 decision by OWCP.

On June 1, 2012 counsel requested reconsideration. He contended that it was enclosing a copy of the addendum report of Dr. Becan, and attached the previously submitted report that was updated on January 3, 2012 finding that appellant was entitled to a 26 percent impairment of the left lower extremity.

By letter dated July 10, 2012, OWCP asked counsel to provide a copy of the December 18, 2011 x-ray report. It also asked that Dr. Becan certify that the December 16, 2008 report submitted by counsel reflects his review of the December 8, 2011 x-ray, noting that the report indicated that it was updated on May 7, 2010. In response, counsel submitted the same report by Dr. Becan and no copy of the December 8, 2011 x-ray.

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

By decision dated July 30, 2012, OWCP denied modification of its decision.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations[11] 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.[12] 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[13] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14]

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] The sixth edition of the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[17]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[18] Where there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[19] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such

[11] 20 C.F.R. § 10.404.

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

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

[14] 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).

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

[16] *Id.* at 521.

[17] *L.B.*, Docket No. 12-910 (issued October 5, 2012).

[18] Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.808.6(d) (August 2002).

[19] *K.S.*, Docket No. 12-43 (issued March 12, 2013).

specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[20]

A physician selected by OWCP to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, OWCP developed specific procedures for the selection of impartial medical specialist designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialist will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exits between a particular physician and OWCP.[21] The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made though a strict rotational system using appropriate medical directories. The procedure manual provided that the PDS should be used for this purpose wherever possible.[22] The PDS was a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[23] The PDS database of physicians was obtained from the American Board of Medical Specialties which contained the names of physicians who were Board-certified in certain specialties. The Board has held that an appropriate notation should be made in the directory when a specialist indicates his or her unwillingness to accept a case or when, for other valid reasons, it is not advisable or practicable to use his or her services.[24]

ANALYSIS

OWCP accepted appellant's claim for a closed fracture of the upper end of her left tibia as well as traumatic arthropathy of the left lower leg and issued a schedule award for a 15 percent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*. Appellant contends that she is entitled to a greater award.

The Board finds that OWCP made a proper referral to Dr. Collier in order to resolve the conflict between Drs. Becan and Draper with regards to the degree of appellant's disability. The record contains a Form ME023 appointment schedule notification, a Form ME-M Memorandum of Referral to Specialist, a record of the telephone call to Dr. Collier to schedule the examination, and a screen shot of a bypass of Dr. Rekant for the reason that he treated hands only. The Board

[20] *Anna M. Delaney*, 53 ECAB 384 (2002).

[21] *T.T.*, Docket No. 12-736 (issued February 4, 2013).

[22] Federal (FECA) Procedure Manual, Part 3 -- *Medical, Medical Examinations*, Chapter 3.500.4b (May 2003). The Board notes that as of July 2011, the Medical Management Application in IFEC's replaced the prior PDS selection procedure for an impartial medical specialist. The impartial medical specialist in this case was selected under PDS.

[23] *Id.* at Chapter 3.500.7 (September 1995, May 2003).

[24] *David Peisner*, 39 ECAB 1167 (1988).

finds that these documents establish that OWCP properly utilized the PDS system to select Dr. Collier as an impartial medical examiner.[25]

Dr. Becan did an impairment rating for appellant, and determined that she was entitled to a 24 percent impairment of her left lower extremity under the sixth edition of the A.M.A., *Guides.* Dr. Draper, the second opinion physician, determined that appellant had a 13 percent impairment pursuant to the A.M.A., *Guides.* OWCP referred the case to Dr. Collier, the impartial medical examiner, to resolve the conflict.

Dr. Collier determined that appellant had a 13 percent impairment. He applied Table 16-3 of the sixth edition of the A.M.A., *Guides*. Dr. Collier calculated that based on the regional grid for lower extremity/knee, tibial plateau fracture nondisplaced with less than 9 percent angulation and abnormal findings, appellant had a class 1 ranking with a default rating of C, or 10 percent.[26] He determined the grade modifiers and after applying the formula set forth in the A.M.A., *Guides*, determined that appellant had a 13 percent impairment of the left lower extremity. Dr. Collier's report was reviewed by OWCP's medical adviser who determined that the finding of Dr. Collier that appellant had a 13 percent impairment rating under the A.M.A., *Guides* was correct and that, as this rating was below the 15 percent impairment previously awarded, OWCP found that appellant was not entitled to a greater award. The Board finds that he properly applied the A.M.A., *Guides*, and that his report was properly approved by OWCP's medical adviser.

On appeal, counsel contends that Dr. Becan's January 10, 2012 report should have been referred to OWCP's medical adviser. He also contends that this report was sufficient to require further development of the medical evidence. However, this argument is without merit. Appellant submitted three reports wherein Dr. Becan utilized his December 16, 2008 examination findings. In the original December 16, 2008 report, Dr. Becan determined that she had a 23 percent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*. In a May 10, 2010 report, he updated the December 16, 2008 report to apply the sixth edition of the A.M.A., *Guides* and determined that appellant was entitled to a 24 percent impairment of his left lower extremity. On January 3, 2012 Dr. Becan again copied his December 16, 2008 report and updated it to include a new impairment analysis calculation, that is comingled with his prior analyses and concluded that she had a 26 percent impairment to her left lower extremity. In a letter to OWCP dated June 1, 2012, appellant, through counsel, argued that in his January 3, 2012 report, Dr. Becan was able to review x-rays dated December 8, 2011, and concluded that there was a one millimeter joint space narrowing that justified his opinion for a higher impairment rating. By letter dated July 10, 2012, OWCP asked counsel to, within 15 days, have Dr. Becan certify that the December 16, 2008 report submitted with the reconsideration request reflected his review of a December 8, 2011 x-ray and to arrange for submission of a copy of the December 8, 2011 report. Appellant did not file a timely response to OWCP's request. Without a certified report or a copy of the December 8, 2011 x-ray, there is no basis for the new finding. Accordingly, the January 10, 2012 report is insufficient to require further development of the evidence.

[25] *See supra* note 19.

[26] *Supra* note 4.

Therefore, the Board finds that appellant has not met her burden of proof to establish more than 15 percent permanent impairment to her left lower extremity.

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

The Board finds that appellant has not established that he had more than a 15 percent impairment of her left lower extremity for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2012 is affirmed.

Issued: January 29, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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