United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 13-501**
	)	**Issued: January 28, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2013 appellant, through his attorney, filed a timely appeal from the August 21, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim. 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

This issue is whether appellant met his burden of proof to establish a schedule award for an employment-related permanent impairment to his left lower extremity.

On appeal, counsel contends that OWCP should have issued a schedule award under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as it failed to adjudicate appellant's schedule award claim in a timely manner. He also contends that, under FECA, appellant should be awarded a schedule award based on the

[1] 5 U.S.C. §§ 8101-8193.

impairment to his left lower extremity that includes all prior injuries. Counsel also disputes the manner in which OWCP weighed the medical evidence and contends that at a very minimum, appellant's case should be referred to an impartial medical examiner.

FACTUAL HISTORY

On October 14, 1993 a traumatic injury claim was filed on behalf of appellant, then a 35-year-old general mechanic. The claim form indicated that on that date he tripped on a grate with his right leg and while trying to get his balance, his previously injured left leg kicked out from him and he landed on the ground, injuring his left knee. OWCP accepted appellant's claim for contusion of the left hip and thigh and sprain of the left knee, lateral collateral ligament. Appellant stopped working after the accident, received medical treatment and was released to sedentary duty on October 14, 1993 and to full duty on November 16, 1993.

Appellant had previously suffered a crush injury to his left leg in a 1981 nonwork-related hit and run accident which resulted in tibia and fibula fractures and approximately 17 surgeries of his left leg. He underwent left knee arthroscopy for disruption of anterior cruciate ligament, erosion of the lateral femoral condyle and microtrabecular fracture in April 1993.

On December 13, 2010 appellant filed a claim for a schedule award. In support of his request, he submitted two reports from Dr. Nicholas Diamond, an osteopath, evaluating appellant for a schedule award. In a September 14, 2006 report, Dr. Diamond noted that appellant had three employment-related injuries: the October 14, 1993 injury, an injury on May 3, 1997 to his cervical spine and a March 30, 2002 injury to his lumbar spine. He diagnosed appellant with: (1) post-traumatic anterior cruciate ligament tear with grade 1 chondral erosion of lateral femoral condyle of the left knee; (2) status post arthroscopy left knee with arthroscopic debridement of anterior cruciate ligament and with irrigation of joint; (3) post-traumatic right posterolateral C5-6 herniated nucleus pulposus; (4) post-traumatic right C6 radiculopathy; (5) status post anterior cervical discectomy and fusion with right iliac crest bone graft and anterior plate fixation; (6) post-traumatic L5-S1 herniated nucleus pulposus per L3-4, L4-5, L5-S1 discogram; (7) bilateral S1 radiculopathy per small pain fiber conduction study; and (8) status post anterior lumbar interbody fusion L5-S1 with prosthetic cage device and left iliac crest bone graft. Dr. Diamond's physical examination of appellant included an examination of his left knee. He noted well-healed portal arthroscopy scars. Dr. Diamond also noted an effusion, peripatellar tenderness, medial joint space tenderness, lateral joint line tenderness and crepitus in the medial joint compartment. Appellant had difficulty performing both kneeling and squatting and range of motion revealed flexion-extension of 0-120/140 degrees. He also noted that Thesally's test was positive. Dr. Diamond applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and determined that appellant had a 30 percent impairment of the left lower extremity, a 40 percent impairment of the right lower extremity and a 6 percent impairment of the right upper extremity.

On December 18, 2009 Dr. Diamond modified this opinion, applied the sixth edition of the A.M.A., *Guides* and determined that appellant had a 12 percent impairment of his left lower extremity. He explained that appellant had a class 1 left anterior cruciate ligament injury with

mild laxity which equaled a 10 percent impairment under the A.M.A., *Guides*.[2] Dr. Diamond adjusted this figure by noting a grade modifier for Functional History (GMFH) of 1[3] and a grade modifier based on his Physical Examination (GMPE) of 2 for atrophy.[4] He found that a grade modifier for Clinical Studies (GMCS) as not applicable. Dr. Diamond then found that GMFH-class-based diagnosis (CDX) (1-1) equaled 0; and GMPE -- CDX (2 -- 1) equaled 1, for a net adjustment of 1. He determined that the left lower extremity impairment after the net adjustment was 12 percent. Dr. Diamond also diagnosed appellant with a right lower extremity impairment of six percent and a right upper extremity impairment of one percent.

OWCP referred the case to an OWCP medical adviser. In a reply dated March 31, 2011, the medical adviser indicated that there was no ratable left lower extremity impairments related to the accepted conditions in this case. He noted that appellant's claim was accepted for contusion of the left hip and thigh and sprain of the lateral collateral ligament in the left knee. The medical adviser noted that these were self-limiting conditions and do not result in permanent impairment unless the sprains are severe and that there is no medical evidence to determine that this was the case. He indicated that Dr. Diamond rated appellant for cervical and lumbar conditions that were not accepted by OWCP.

By decision dated April 4, 2011, OWCP denied appellant's claim for a schedule award. By letter to appellant's attorney dated May 20, 2011, it noted that, due to a mistake with regards to mailing the decision, appellant's appeal rights would go into effect the date of that letter.

By letter dated May 26, 2011, appellant, through counsel, requested a hearing before an OWCP hearing representative.

Following a preliminary review, by decision dated August 16, 2011, OWCP's hearing representative determined that it was essential to determine whether there were any residuals of the 1993 work injury as asserted by Dr. Diamond, and found that OWCP should arrange for a second opinion examination to determine whether the effects of the injury resolved and whether the injury had any effect on the preexisting condition. She noted that, if OWCP determines that there are residuals of the work injury, then OWCP should determine a schedule award that incorporates impairment for the preexisting condition. Thus, the hearing representative set aside the April 4, 2011 OWCP decision and remanded for a *de novo* decision.

OWCP referred appellant to Dr. Robert A. Smith, a Board-certified surgeon, for a second opinion. In a February 16, 2012 report, Dr. Smith reviewed appellant's past medical history and noted that in the early 1980's appellant sustained a serious injury to his left lower extremity, including fractures of the tibia and fibula, as well as a knee injury, which required approximately 18 surgeries on his left lower extremity over the years, including two arthroscopic procedures, the most recent in April 1993. He noted that, at the present time, appellant had no complaints about his hip or thigh and these were grossly normal. Dr. Smith noted that his examination of

[2] A.M.A., *Guides* 519, Table 16-8.

[3] *Id.* at 510, Table 16-3.

[4] *Id.* at 517, Table 16-7.

the left knee revealed well-healed arthroscopic portal sites, no effusion in knee. He noted no instability in the collateral ligaments, either medially or laterally, but that there was mild instability in the anterior cruciate plane consistent with a complete tear of the anterior cruciate ligament. Dr. Smith noted some mild atrophy in the quadriceps on the left and in the left calf, but opined that these areas of muscle wasting were most likely related to the serious injuries appellant sustained in the 1980's. He also noted a peroneal nerve injury with a foot drop, which again was preexisting and related to his prior injury. Dr. Smith applied the sixth edition of the A.M.A., *Guides* and determined that the total impairment to appellant's left lower extremity was 12 percent, using the same calculations as Dr. Diamond. However, he noted that this impairment was based solely on preexisting factors from appellant's prior injury to his left leg in the early 1980s. Dr. Smith noted that there was a zero percent ratable impairment of the left lower extremity related to the accepted conditions in this case. He stated that the accepted conditions in this case, which included soft tissue sprains of the left knee (lateral collateral ligament) and contusions of the left hip and thigh had resolved and that the only residual impairment was from a preexisting condition/injury.

OWCP referred Dr. Smith's report to OWCP's medical adviser. In a March 4, 2012 report, OWCP's medical adviser agreed that appellant had a 12 percent impairment of his left lower extremity consistent with the condition of mild ACL laxity status post injury and surgical repair.

By decision dated March 7, 2012, OWCP denied appellant's claim for a schedule award.

Dr. Diamond updated his report of September 14, 2006 again on June 8, 2012. In the most recent report, he added a 2 percent impairment to his prior 12 percent impairment rating to the left lower extremity, for a total impairment to the left lower extremity of 14 percent. Dr. Diamond noted that the two percent impairment was added for left lateral collateral ligament sprain of two percent. He calculated this figure by noting a class 1 left lateral collateral ligament sprain which equaled two percent, with modifiers of 1 for GMFH and 2 for GMPE, which amounted to 0 adjustment (GMFH - CDX (1-1) = 0; GMPE - CDX 2-1 = 1, GMCS - CDX (0-1- = 1, net adjustment 0).

At the hearing held on June 13, 2012, counsel argued that OWCP erred in that it failed to develop appellant's claim for a schedule award until two years after the issuance of the sixth edition of the A.M.A., *Guides*, thereby depriving appellant of the opportunity to pursue his claim under the fifth edition of the A.M.A., *Guides*. He argued that under the sixth edition of the A.M.A., *Guides*, a physician is required to rate the worst condition of the body part, and sometimes the worst condition is the preexisting condition. Counsel also argued that at the very least there was a conflict between Dr. Diamond and Dr. Smith, requiring referral of the case to an impartial medical examiner.

By decision dated August 21, 2012, OWCP's hearing representative affirmed OWCP's decision of March 7, 2012.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations[5] 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.[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] 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.[11]

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*.[12]

ANALYSIS

OWCP accepted appellant's claim for contusion of the left hip and thigh and sprain of the left knee, lateral collateral ligament. Appellant filed a claim for a schedule award for an impairment to his left lower extremity. Dr. Diamond, Dr. Smith and OWCP's medical adviser all agree that appellant has a 12 percent impairment to his left lower extremity. However, the

[5] 20 C.F.R. § 10.404.

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

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

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* at 494-531.

[10] *Id.* at 521.

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

[12] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.808.6(d) (August 2002).

Board finds that OWCP properly denied appellant's claim as appellant has not shown that he had any residuals from his employment injury that entitled him to a schedule award.

Initially, the Board rejects the argument that the fifth edition of the A.M.A. *Guides* applies. As of May 1, 2009, OWCP applies the sixth edition of the A.M.A., *Guides.* Although Dr. Diamond initially evaluated appellant on September 14, 2006 under the fifth edition of the A.M.A., *Guides*, there is no evidence that this report was submitted to OWCP until November 29, 2011. Nor is there any evidence that appellant requested a schedule award until December 13, 2010. Accordingly, OWCP properly applied the sixth edition of the A.M.A., *Guides.*

When Dr. Diamond applied the sixth edition of the A.M.A., *Guides* in his report of December 18, 2009, he concluded that appellant had an impairment to his left lower extremity of 12 percent. However, this conclusion did not relate to appellant's accepted injury of left hip and thigh sprain and sprain of the left knee. Rather Dr. Diamond's report is based on multiple conditions not accepted by OWCP. Dr. Smith, the second opinion physician, agreed that appellant had an impairment to his left lower extremity of 12 percent, but found that there was a 0 percent ratable impairment of the left lower extremity related to the accepted conditions in this case. OWCP's medical adviser agreed. Appellant must establish impairment to a scheduled member caused by the accepted condition before impairment due to a preexisting condition can be assessed.[13] Accordingly, when a claimant does not demonstrate any permanent impairment caused by the accepted injury, the claim is not ripe for consideration of any preexisting impairment.[14]

The Board finds that OWCP properly did not consider any preexisting impairment in discussing appellant's entitlement to a schedule award. Although in a report dated June 8, 2012, Dr. Diamond added a two percent impairment for left lateral collateral ligament sprain, he offered no explanation in his report of why this condition was suddenly added, especially since there is no evidence of a new physical examination; nor did he explain the relationship to the employment injury, especially in light of the weight of the medical evidence establishing that there were no employment-related residuals.

Accordingly, appellant has not met his burden of proof to establish a schedule award based on an employment-related impairment to his 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 met his burden of proof to establish that he was entitled to a schedule award for a permanent impairment to his left lower extremity under FECA.

[13] *D.A.*, Docket No. 13-718 (issued June 20, 2013).

[14] *B.N.*, Docket No. 12-1394 (issued August 5, 2013); *see also Thomas P. Lavin*, 57 ECAB 353 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 21, 2012 is affirmed.

Issued: January 28, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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