United States Department of Labor
Employees' Compensation Appeals Board

K.W. , Appellant	)	
and	)	**Docket No. 14-73**
	)	**Issued: May 20, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Daniel B. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 7, 2013 appellant, through his attorney, filed a timely appeal from an April 25, 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 sustained more than 38 percent permanent impairment of the right lower extremity, for which he received a schedule award.

On appeal, counsel asserts that OWCP should not have relied on the opinion of the impartial medical examiner as he allegedly failed to use a goniometer in assessing range of motion. He contends that OWCP should have relied on the opinion of appellant's attending physician, who used a goniometer to measure ranges of motion.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before February 2, 2001 appellant, then a 43-year-old letter carrier, sustained an aggravation of osteoarthritis of the right hip. It later expanded the claim to include an aggravation of osteoarthritis of the right knee. On June 2, 2003 Dr. Brian J. McGrory, an attending Board-certified orthopedic surgeon, performed a primary uncemented total arthroplasty of the right hip, using the posterior approach. Appellant received wage-loss compensation on the daily rolls for work absences from June 2, 2003 until he returned to full duty in the fall.

On October 4, 2004 appellant filed a claim for recurrence of disability (Form CA-2a) related to a March 8, 2004 slip and fall with subsequent right knee pain. He asserted that he fell because of his right hip. In an October 19, 2004 letter, OWCP advised appellant of the additional evidence needed to determine if he were claiming a new injury or a recurrence of disability. As appellant did not submit additional evidence, OWCP denied the recurrence claim by decision dated December 6, 2004.

On April 3, 2007 he filed a second claim for recurrence of disability for a March 5, 2007 slip and fall on ice. In a March 16, 2007 report, Dr. Stephen J. Kelly, an attending Board-certified orthopedic surgeon, noted appellant's account of a slip and fall at work on March 5, 2007, with subsequent right hip pain. Dr. McGrory restricted appellant to light duty through March 23, 2007, observing full, painless range of motion of the right hip as of March 30, 2007. By decision dated July 18, 2007, OWCP denied the claim due to a lack of medical evidence.

On September 24, 2010 appellant claimed a schedule award. He submitted a September 17, 2010 right leg impairment rating from Dr. Byron Hartunian, an attending Board-certified orthopedic surgeon, utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*). On examination, appellant observed a normal gait and no neurologic impairment of either leg. He obtained the following ranges of motion for the right hip: 93 degrees flexion; 5 degrees extension; 35 degrees abduction; 10 degrees adduction; 5 degrees internal rotation; and 15 degrees external rotation. Dr. Hartunian noted mild crepitus and medial joint line tenderness in the right knee. He reviewed February 8, 2010 x-rays that showed a well-seated total hip replacement, three millimeter medial joint space in the right knee. Dr. Hartunian diagnosed status post right total hip arthroplasty and degenerative right knee medial joint arthritis. He opined that appellant reached maximum medical improvement one year after the June 2, 2003 arthroplasty. Dr. Hartunian explained that appellant's degenerative arthritis continued to worsen, causing continued loss of range of motion, most significantly involving hip rotation. Under Table 16-4 of the A.M.A., *Guides*, the Hip Regional Grid, he found a class 4 diagnosis-based impairment (CDX) according to Table 16-24[2] for moderate motion deficit. Dr. Hartunian assigned a grade 2 modifier for a moderate deficit according to the American Academy of Orthopedic Surgeons lower limb questionnaire showing difficulties with activities of daily living. He assessed a grade 4 modifier for clinical studies (GMCS) as there was a zero cartilage interval

[2] Table 16-24, page 549 of the sixth edition of the A.M.A., *Guides* is entitled "Hip Motion Impairments -- Lower Extremity Impairment."

in the right hip prior to surgery. The class 4 CDX added one point to each grade modifier according to pages 521 and 522 of the A.M.A., *Guides*. Dr. Hartunian applied the net adjustment formula of GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) to find a net adjustment of zero, "yielding a class 4, grade C impairment of 67 percent." Regarding the right knee, he found a class 1 CDX for knee joint arthritis according to Table 16-3, the Knee Regional Grid, due to a three millimeter cartilage interval on standing x-ray. Dr. Hartunian noted a physical examination modifier (GMPE) of zero as there were no motion deficits or "palpatory findings." He utilized the Net Adjustment Formula to find a -1 net adjustment, "yielding a class 1, grade B impairment of 6 percent." Dr. Hartunian used the Combined Values Chart to calculate a total 69 percent impairment of the right lower extremity.

In an October 28, 2010 report, Dr. Craig Uejo, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Hartunian's impairment rating. He found that the objective clinical findings did not support more than 34 percent impairment of the right leg. Dr. Uejo opined that the ranges of motion obtained by Dr. Hartunian did not comport with earlier findings, particularly Dr. McGrory's March 30, 2007 observation of full ranges of right hip motion. He explained that it was not medically probable that hip motion should drastically decrease within seven years of arthroplasty without a known cause. Dr. Uejo assigned a class 3 CDX for a "fair result" right hip arthroplasty, with a default 37 percent impairment rating for the right leg, reduced by three points to 34 percent due to a grade 1 modifier. In a November 16, 2010 supplemental report, he concurred with Dr. Hartunian's assessment of six percent impairment of the right knee. Dr. Uejo combined the 6 percent impairment with 34 percent impairment for the right hip to equal a total 38 percent impairment of the right lower extremity.

By decision dated December 15, 2010, OWCP granted appellant a schedule award for 38 percent impairment of the right leg. The 38 percent impairment rating, from the Combined Values Chart, combined 34 percent impairment for status post right hip arthroplasty with limited motion, and 6 percent impairment of the right knee. The award was based on appellant's weekly pay rate of $805.65 as of June 2, 2003. The period of the award ran from June 2, 2004 to July 8, 2006. On January 11, 2011 appellant requested an oral hearing. He contended that Dr. Uejo's calculations were confused.

In a March 23, 2011 decision, an OWCP hearing representative found that the case was not in posture for a decision due to a conflict of medical opinion between Dr. Uejo, for OWCP, and Dr. Hartunian, for appellant, regarding the appropriate percentage of impairment. To resolve the conflict, OWCP referred appellant, the medical record and a statement of accepted facts to Dr. David Markellos, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Markellos submitted an August 25, 2011 report reviewing the medical record and statement of accepted facts. He obtained right hip x-rays which showed appropriate placement and excellent alignment of the hip prosthesis. Dr. Markellos obtained standing x-rays of the right knee showing minimal degenerative changes with a well-preserved joint space of nearly four millimeters. He noted a one centimeter leg length discrepancy, shorter on the left leg. Dr. Markellos noted the following range of motion measurements for the right hip: 108 degrees forward flexion; 22 degrees internal rotation; 48 degrees external rotation; 38 degrees abduction. He noted full range of motion with the right knee, with full strength, sensation and pulses

throughout the right knee, lower leg and foot. Dr. Markellos diagnosed status post right total hip replacement for treatment of progressive degenerative arthritis. He found 37 percent impairment of the right leg according to Table 16-4 for status post arthroplasty with a fair result as determined by range of motion. Dr. Markellos characterized the ranges of motion he measured on examination as "mild," a class 3 CDX with a default score of 37 percent. He agreed with Dr. Uejo's assignment of a grade 1 modifier, resulting "in three points subtracted result[ing] in the same final lower extremity of 34 percent." In a February 27, 2012 supplemental report, Dr. Markellos concurred with Dr. Hartunian's finding of six percent impairment based on the right knee. Using the Combined Values Chart, he found a total 38 percent impairment of the right leg. In a July 25, 2012 report, an OWCP medical adviser concurred with Dr. Markellos' impairment rating and methods of calculation.

By decision dated September 4, 2012, OWCP found that appellant had not established that he sustained more than 38 percent impairment of the right lower extremity, for which he received a schedule award. It accorded the weight of the medical evidence to Dr. Markellos.

In a September 25, 2012 letter, appellant requested a telephonic hearing, held February 14, 2013. At the hearing, counsel asserted that OWCP should have relied on Dr. Hartunian's finding of 67 percent impairment of the right leg as he used a goniometer to measure range of motion whereas Dr. Markellos did not. He also contended that OWCP used an incorrect pay rate to calculate the schedule award.

In a December 28, 2012 statement, appellant asserted that Dr. Markellos did not use a goniometer during his examination. He explained that the "tool has been described to me and [he] understood what it [was] because of what [he had] been told and because it was used by Dr. Hartunian" during his impairment evaluation.

In a December 28, 2012 letter, counsel asserted that Dr. Markellos did not provide physical findings to substantiate his finding that appellant had only a mild range of motion impairment of the right hip. In a February 14, 2013 letter, he contended that Dr. Markellos' opinion could not represent the weight of the medical evidence as he did not use a goniometer. Counsel also asserted that OWCP should have utilized March 1, 2010 as the pay rate date as this was the date of his impairment rating.

Following the hearing, counsel submitted a February 5, 2013 report from Dr. Hartunian, contending that his range of motion measurements remained valid and demonstrated a moderate level of impairment. He stated that his September 17, 2010 opinion remained unchanged.

Appellant retired from federal employment effective January 31, 2013.

By decision dated April 25, 2013, an OWCP hearing representative affirmed OWCP's September 4, 2012 decision regarding the percentage of permanent impairment. The hearing representative modified the September 4, 2012 decision to reflect that award should be based on appellant's pay rate as of August 25, 2011. The hearing representative remanded the case to obtain appellant's pay rate as of August 25, 2011 and issuance of an amended schedule award to correct appellant's pay rate.

LEGAL PRECEDENT

The schedule award provisions of FECA[3] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 mater which rests in the sound 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[4] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[5]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[6] Under the sixth edition, the evaluator identifies 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).[7] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[8]

ANALYSIS

OWCP accepted that appellant sustained an aggravation of right hip and knee osteoarthritis, necessitating a total arthroplasty of the right hip. Following two slip and fall incidents, Dr. McGrory, an attending Board-certified orthopedic surgeon, found full and painless motion of the right hip as of March 30, 2007.

Appellant claimed a schedule award on September 24, 2010. Dr. Hartunian, an attending Board-certified orthopedic surgeon, provided a September 17, 2010 impairment rating finding a 69 percent impairment of the right leg, based on moderate range of motion impairments of the

[3] 5 U.S.C. § 8107.

[4] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] A.M.A., *Guides* (6th ed. 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[7] A.M.A., *Guides* 494-531 (6th ed. 2008).

[8] 5 U.S.C. § 8123(a).

right hip totaling 67 percent impairment, and 6 percent impairment due to right knee osteoarthritis. On October 28 and November 16, 2010 OWCP obtained the opinion of Dr. Uejo, a Board-certified orthopedic surgeon and OWCP medical adviser, who assigned a default 37 percent impairment to the right lower extremity for total hip arthroplasty with a fair result, and 6 percent impairment due to right knee osteoarthritis. He opined that Dr. Hartunian's measurements for range of motion were not supported by the medical record and were not medically reasonable. OWCP initially granted appellant a schedule award for 38 percent impairment of the right leg, then found a conflict of medical opinion between Dr. Hartunian and Dr. Uejo. It selected Dr. Markellos, a Board-certified orthopedic surgeon, to resolve the conflict.

In August 25, 2011 and February 27, 2012 reports, Dr. Markellos provided range of motion measurements for the right hip in the category of "mild" impairment under Table 16-24. He opined that as appellant had a class 3 diagnosis-based impairment, with a default value of 37 percent, reduced by 3 points to 34 percent due to the grade 1 modifier as found by Dr. Uejo. Combined with the 6 percent impairment for degenerative arthritis in the right knee, this resulted in 38 percent impairment of the right leg. An OWCP medical adviser concurred with this assessment on July 25, 2012. OWCP therefore issued a September 4, 2012 decision finding that appellant had not established that he sustained more than the 38 percent impairment of the right leg previously awarded. Following a hearing, it affirmed the percentage of impairment by an April 25, 2013 decision but directed modification of the monetary amount by adjusting the date of the pay rate utilized.

The Board finds that Dr. Markellos' impairment rating, as reviewed by OWCP medical adviser, is entitled to the weight of the medical evidence, as it was based on the medical record and statement of accepted facts, and utilized the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides*. When a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight.[9] Therefore, OWCP's April 25, 2013 decision finding 38 percent impairment of the right lower extremity was proper under the facts and circumstances of this case.

On appeal, counsel contends that OWCP improperly relied on the opinion of Dr. Markellos, the impartial medical examiner, as he allegedly did not use a goniometer to obtain the range of motion measurements reported. He noted that the sixth edition of the A.M.A., *Guides* at pages 543 to 548 mandated the use of a goniometer in assessing range of motion. Counsel also noted that Dr. Hartunian used a goniometer to measure the six ranges of hip motion as required by the sixth edition of the A.M.A., *Guides*. He requested that either the Board authorize a schedule award for the percentage of impairment found by Dr. Hartunian, or remand the case for Dr. Markellos to provide accurate range of motion measurements following the goniometric protocols set forth in the A.M.A., *Guides*.

Section 16.7, page 543 of the sixth edition of the A.M.A., *Guides* entitled "Range of Motion Impairment," provides that "Range of motion (ROM) determination is an essential component of LE impairment ratings with a strong historical precedent.… Surface goniometry

[9] *Y.A.*, 59 ECAB 701 (2008).

can be carried out reliably and effectively on the joints of the extremities, so that range of motion can be objectively determined. The conventional ROM goniometric procedures previously advocated in the A.M.A., *Guides* should be followed." Figure 16-9, page 547, "Using a Goniometer to Measure Flexion of the Right Hip" also provides that "[a]ccurate measurements of the lower extremity can also be obtained using a proper inclinometer…."

In *J.B.*,[10] the Board found that an impartial examiner's failure to use a goniometer in obtaining range of motion measurements negated the probative value of his report. The Board held that a proper range of motion evaluation under the fifth edition of the A.M.A., *Guides* required "actual goniometer readings or linear measurements." The sixth edition of the A.M.A., *Guides* states specifically that the "conventional ROM [range of motion] goniometric procedures previously advocated in the [A.M.A.,] *Guides* should be followed," encompassing the fifth edition requirements cited to in *J.B.* The Board finds, however, that there is insufficient evidence in the present case to establish that Dr. Markellos did not use a goniometer or properly determine appellant's range of motion. Dr. Markellos provided very specific ranges of motion and referred to them as measurements, indicating the use of a measuring tool or instrument. The Board notes that although Dr. Markellos did not state that he used a goniometer, neither did Dr. Hartunian. This is problematic, as in his December 28, 2012 statement, appellant asserted that his knowledge of goniometers came from observing Dr. Hartunian use a goniometer as well as from unspecified descriptions. Also, appellant did not indicate if Dr. Markellos used an inclinometer, the alternative assessment tool permitted by the A.M.A., *Guides*.[11] Under these circumstances, there is insufficient evidence that Dr. Markellos did not follow the appropriate A.M.A., *Guides* measurement protocols for assessing range of motion.

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 sustained more than 38 percent impairment of the right lower extremity, for which he received a schedule award.

[10] Docket No. 08-969 (issued November 17, 2008).

[11] A.M.A., *Guides* 547.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2013 is affirmed.

Issued: May 20, 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