United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 14-318**
	)	**Issued: May 9, 2014**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

Appearances:
Appellant, pro se
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 November 26, 2013 appellant filed a timely appeal from the November 6, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. 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 review this nonmerit decision. The Board also has jurisdiction to review OWCP's September 5, 2013 merit decision affirming his schedule award.

ISSUES

The issues are: (1) whether appellant has more than a two percent impairment of his right lower extremity causally related to the accepted employment injury, for which he received a schedule award; and (2) whether OWCP properly denied his reconsideration request.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 8, 2005 appellant, then a 47-year-old maintenance mechanic, sustained a traumatic injury in the performance of duty when his foot slipped off a rung and he twisted his right knee. OWCP accepted his claim for a right knee sprain, unspecified internal derangement of the right knee and a torn right medial meniscus.

Appellant underwent a right partial medial meniscectomy on August 24, 2005. Although an earlier imaging study found a tear involving the posterior horn of the lateral meniscus, surgical inspection reveal that no such tear was present.

Appellant filed a schedule award claim in 2012.

Dr. Jerome O. Carter, a Board-certified physiatrist, evaluated appellant on January 16, 2013. He related appellant's history and complaints as well as his findings on physical examination. There was no swelling of the right knee. All tests (valgus stress, varus stress, Lachman's stress, McMurray's stress, posterior drawer, Apley's test) were negative, though there was some mild crepitation. The right calf was half an inch larger than the left. Right knee range of motion was within normal limits. Strength testing was normal in most cases and good for hip flexors, hip extensors and leg flexors. Appellant was able to perform heel and toe walking with difficulty.

Dr. Carter diagnosed right knee sprain/strain, right knee medial meniscus tear and right knee internal derangement. He found that appellant had reached maximum medical improvement.

Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), Dr. Carter found that appellant's diagnosis had a default impairment rating of two percent, based on Table 16-3, page 509. As his functional history and physical examination were both mild -- appellant walked with a limp and slow gait but used no assistive devices – Dr. Carter made no adjustment to the default rating and concluded that appellant had a two percent lower extremity impairment.

OWCP's medical adviser reviewed Dr. Carter's evaluation and confirmed that appellant's partial medial meniscectomy represented a two percent impairment of his right lower extremity.

On February 8, 2013 OWCP issued a schedule award for a two percent impairment of appellant's right lower extremity.

Appellant requested a review of the written record by an OWCP hearing representative. He argued that a magnetic resonance imaging scan confirmed a tear of the medial and lateral meniscus, and that Dr. Carter had told him that his rating would be at 10 to 12 percent, maybe a little more.

In a decision dated September 5, 2013, OWCP's hearing representative affirmed appellant's schedule award. The hearing representative noted that, although an imaging scan was interpreted to show both a medial and lateral tear, the surgical examination established there was no tear of the lateral meniscus. As the default impairment value of a partial medial

meniscectomy was two percent with no net adjustment, the hearing representative found that appellant had no more than a two percent right lower extremity impairment, for which he had received a schedule award.

Appellant requested reconsideration. OWCP received this request on September 16, 2013. Appellant argued that the two percent rating was far lower than what Dr. Carter had told him it would be. He submitted a disability slip from 2009; a 2005 report diagnosing right medial and lateral meniscus tears; imaging studies from 2005 and 2009 interpreted as showing a tear in the posterior horn of the right lateral meniscus; and work restrictions from 2005.

In a decision dated November 6, 2013, OWCP denied appellant's reconsideration request. It found that the evidence was repetitious and insufficient to reopen the case for a merit review.

Appellant argues that his rating should be increased for both a medial and a lateral meniscus tear, based on evidence already submitted. He questions the accuracy of Dr. Carter's comparison to a previously injured left lower extremity. Appellant repeats his work history since 2005 and his current complaints.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[2] and the implementing regulations[3] set forth the number of weeks of compensation payable to employees 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.[4]

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6]

ANALYSIS -- ISSUE 1

Diagnosis-based impairment is the primary method of evaluating the lower limb. Impairment is determined first by identifying the relevant diagnosis and then by selecting the class of the impairment: no objective problem; mild problem; moderate problem; severe

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

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

[5] 20 C.F.R. § 10.404; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

problem; and very severe problem approaching total function loss. This will provide a default impairment rating. The evaluator may then adjust the default rating up or down slightly for grade, which is determined by such grade modifiers or nonkey factors as functional history, physical examination and clinical studies.[7]

In most cases, only one diagnosis in a region, such as the knee, will be appropriate. If a patient has two significant diagnoses, the examiner should use the diagnosis with the highest impairment rating in that region that is causally related for the impairment calculation.[8]

OWCP accepted appellant's claim for several medical conditions: a right knee sprain; unspecified internal derangement of the right knee; and a torn right medial meniscus, for which he underwent a partial meniscectomy on August 24, 2005. With no laxity or joint instability shown on orthopedic testing, there was no basis under Table 16-3, page 510 of the A.M.A., *Guides* for rating impairment due to sprain of a cruciate or collateral ligament. Unspecified internal derangement is a vague diagnosis not listed in Table 16-3. The table does allow, however, a lower extremity rating of one to three percent for a partial medial or lateral meniscectomy or meniscal tear.

Although a 2005 imaging study showed both medial and lateral tears, only a medial tear was confirmed upon surgical inspection. No tear of the lateral meniscus was present. As the visual and physical inspection of the lateral meniscus failed to confirm the interpretation of the imaging study, only a partial medial meniscectomy was established. Further, the Board notes that during his physical examination of appellant Dr. Carter performed orthopedic testing specifically designed to detect a torn lateral meniscus, but those tests were negative.

The default lower extremity impairment rating for a partial medial meniscectomy is two percent.

Functionally, appellant walked with a limp and had a slow gait. He used no assistive device, such as an external orthotic device or cane or crutch. There was no evidence that appellant had an asymmetric shortened stance. Therefore, no adjustment to the default rating was warranted under Table 16-6, page 516 of the A.M.A., *Guides*.

Findings on orthopedic examination were normal or mild. Appellant showed no moderate findings with regards to observed or palpatory findings, laxity or instability, alignment or deformity, range of motion, atrophy or limb length discrepancy. Thus, no adjustment to the default rating was warranted under Table 16-7, page 517.

Because clinical studies were used to establish the diagnosis and default impairment rating, they may not be used again in the impairment calculation to adjust the default rating.[9]

[7] A.M.A., *Guides* 497.

[8] *Id*. at 497, 499, 529.

[9] *Id*. at 515-16.

Accordingly, appellant's right lower extremity impairment due to the knee remains two percent, which is what OWCP awarded. The Board will therefore affirm OWCP's September 5, 2013 decision.

Appellant argues that his rating should be increased for both a medial and a lateral meniscus tear. Based on the evidence that was before an OWCP's hearing representative at the time of his decision, only a tear of the medial meniscus was confirmed. Appellant questions whether Dr. Carter should have compared his right calf to a previously injury left calf, but the A.M.A., *Guides* provide: "For muscle atrophy, the limb circumference should be measured and compared to the opposite limb at equal distances from either the joint line or another palpable anatomic structure."[10] As Table 16-7, page 517 indicates, the relevant finding is one of asymmetry with the opposite extremity, not one of deviation from the norm or from appellant's preinjury status. In order to adjust the default rating for physical examination findings, which is a class 1 or mild problem, appellant would have to establish that his right calf was at least 2.0 centimeters smaller than his left, whatever circumference that might be. Dr. Carter's findings do not support such an adjustment.

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.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.[11] An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[12]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[13] A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these

[10] *Id*. at 518.

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606.

[13] *Id*. at § 10.607(a).

standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[14]

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request on September 16, 2013, only 11 days after the hearing representative's decision on his schedule award. Appellant's request was therefore timely. The question for determination is whether that request met at least one of the standards for obtaining a merit review of his case.

Appellant's reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted.

Appellant did not advance a new and relevant legal argument. He previously argued in his request for a review of the written record that an imaging study confirmed a tear of the medial and lateral meniscus and that Dr. Carter had told him that his rating would be at 10 to 12 percent, maybe a little more. Those arguments were not new. Appellant asked OWCP to consider all of his right knee medical conditions, but this was previously considered. The A.M.A., *Guides* explains that, when multiple medical conditions are present, the examiner should use the diagnosis with the highest impairment rating in that region that is causally related for the impairment calculation. Indeed, in Example 16-9, page 526, involving an anterior cruciate reconstruction and a medial meniscus repair, the comment states: "The methodology requires the examiner to pick one diagnosis for the region. The anterior instability was chosen and the effect of the meniscal tear is reflected in the adjustments." In appellant's case, the diagnosis with the highest impairment rating in the right knee that was causally related was the partial medial meniscectomy. The effect of other conditions may be reflected in appellant's functional history and findings on physical examination and therefore used to adjust, if necessary, the default impairment rating.

Appellant submitted additional evidence that did not constitute relevant and pertinent new evidence not previously considered by OWCP. None of the evidence evaluated the impairment of his right lower extremity. The 2009 imaging study showed a lateral meniscus tear, which is either repetitive of the 2005 imagining study that could not be confirmed upon surgical inspection or physical examination or demonstrative of a new tear sustained during the four-year period since appellant's surgery. In either case, without a physician's medical opinion causally relating the finding to what happened on May 8, 2005 and reconciling both the surgical and orthopedic inspection of appellant's right lateral meniscus, the evidence is not relevant and pertinent to the September 5, 2013 decision.

Accordingly, the Board finds that appellant's reconsideration request did not meet any of the requirements for obtaining a merit review of his case. The Board finds that OWCP properly denied a merit review of his claim and will therefore affirm OWCP's November 6, 2013 nonmerit decision.

[14] *Id*. at § 10.608.

CONCLUSION

The Board finds that appellant has no more than a two percent impairment of his right lower extremity due to the accepted employment injury, for which he received a schedule award. The Board further finds that OWCP properly denied his reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the November 6 and September 5, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 9, 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