

**United States Department of Labor
Employees' Compensation Appeals Board**

R.T., Appellant)	
)	
and)	Docket No. 14-1282
)	Issued: October 9, 2014
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

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

JURISDICTION

On May 12, 2014 appellant, through his attorney, timely appealed the April 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has greater than two percent impairment of the right lower extremity.

¹ 5 U.S.C. §§ 8101-8193.

² The record on appeal contains evidence received after OWCP issued its April 9, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 41-year-old former marine machinist, injured his right knee in the performance of duty on March 10, 2013.³ OWCP initially accepted his claim for right knee sprain. The claim was later expanded to include right knee internal derangement, partial tear of the right anterior cruciate ligament and right leg villonodular synovitis. Additionally, OWCP authorized a June 20, 2013 right knee arthroscopic procedure. Although appellant was capable of performing limited-duty work, the employing establishment was unable to accommodate his work restrictions.⁴ Accordingly, OWCP paid wage-loss compensation for temporary total disability and placed him on the periodic compensation rolls.

Effective August 28, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits. It based its decision on the May 12, 2011 report of Dr. Robert A. Fullord, a Board-certified orthopedic surgeon and OWCP referral physician.⁵ By decision dated April 2, 2012, the Branch of Hearings and Review affirmed OWCP's August 19, 2011 decision terminating benefits.

On April 30, 2012 appellant filed a claim for a schedule award (Form CA-7).

In a report dated July 3, 2012, Dr. Stuart J. Goodman, a Board-certified neurologist, found five percent right lower extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008). He indicated that the rating was based on class 1 impairment with "mild motion deficits" under Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509 (6th ed. 2008). However, Dr. Goodman's July 3, 2012 report did not include range of motion measurements (ROM) with respect to appellant's right lower extremity.⁶ He also indicated that appellant reached MMI prior to 2006.

OWCP's district medical adviser, Dr. Leonard A. Simpson, reviewed the case record on January 19, 2013 and found two percent right lower extremity impairment under Table 16-3, A.M.A., *Guides* 509 (6th ed. 2008). He based his rating on a diagnosis of muscle/tendon strain with palpatory findings and/or radiographic findings. This represented class 1 (CDX 1) impairment with a default rating (grade C) of two percent.⁷ Dr. Simpson then calculated a net

³ Appellant twisted his knee while walking off the brow of a ship.

⁴ The employing establishment removed appellant from service effective July 23, 2004.

⁵ Dr. Fullord found that appellant had reached maximum medical improvement (MMI) in March 2004 and was capable of performing his usual job without restrictions. He concluded that the effects of appellant's work injury had ceased without disabling residuals.

⁶ Appellant complained of pain, discomfort and swelling of the right knee with activity. He also stated that his knee would pop out of line. Dr. Goodman's neurological examination revealed normal strength. He also reported tenderness of the right patella region. Appellant was unable to squat down to his knees. Reflexes were 1+/-4 and plantar response was normal ("flexor"). Sensory examination was intact and cerebellar examination was normal. Also, Romberg's test was negative and appellant was able to tandem gait.

⁷ Dr. Simpson disagreed with the July 3, 2012 rating for mild motion deficit because Dr. Goodman did not document ROM of either knee. As such, there was no clear evidence of right knee ROM limitation to support Dr. Goodman's five percent right lower extremity impairment rating.

adjustment of -1 based on grade modifiers for Functional History (GMFH 1) and Physical Examination (GMPE 0).⁸ The -1 adjustment from grade C to B still represented a right lower extremity impairment of two percent under Table 16-3, A.M.A., *Guides* 509 (6th ed. 2008). Dr. Simpson found that appellant reached MMI prior to Dr. Goodman's July 3, 2012 evaluation. He recommended an MMI date of no more than three years following appellant's right knee arthroscopy; June 20, 2006 at the latest.

On February 28, 2013 OWCP granted a schedule award for two percent right lower extremity impairment.⁹ The decision indicated that appellant reached MMI as of June 20, 2006.

By decision dated June 11, 2013, the Branch of Hearings and Review set aside the February 28, 2013 schedule award and remanded the case for OWCP to obtain clarification from Dr. Simpson regarding his selection of a retroactive date of MMI.

In a June 28, 2013 report, Dr. Simpson, reiterated his two percent right lower extremity impairment rating. Additionally, he referenced a March 9, 2006 progress report from Dr. Loel Z. Payne as indicating that appellant reached MMI at some point in calendar year 2006. Dr. Simpson explained that MMI would appear to be supported on or about three years following appellant's June 2003 right knee surgery. He also acknowledged that MMI could technically be based on Dr. Goodman's July 3, 2012 evaluation.

On August 21, 2013 OWCP issued an amended schedule award for two percent right lower extremity impairment with a March 9, 2006 date of MMI.

In an April 9, 2014 decision, the Branch of Hearings and Review affirmed OWCP's August 21, 2013 schedule award.

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.¹⁰ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule

⁸ Net Adjustment (-1) = (GMFH 1 -- CDX 1) + (GMPE 0 -- CDX 1). See Section 16.3d, A.M.A., *Guides* 521 (6th ed. 2008). The district medical adviser did not include a grade modifier for Clinical Studies (GMCS) because it was nonapplicable at the time of MMI.

⁹ The award covered a period of 5.76 weeks from August 28 through October 7, 2011.

¹⁰ For complete loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

losses.¹¹ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).¹²

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.¹³ For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁴ Where OWCP has referred the employee to an impartial medical 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.¹⁵

ANALYSIS

Counsel previously argued that OWCP should have based the schedule award on Dr. Goodman's July 3, 2012 rating of five percent impairment of the right lower extremity. Alternatively, he argued there was a conflict between Dr. Simpson and Dr. Goodman and, therefore, OWCP should have referred appellant to an impartial medical examiner.

For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁶ Dr. Goodman based his five percent right lower extremity impairment rating on "mild motion deficits." Although he referenced Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509 (6th ed. 2008), he did not indicate the diagnosis upon which he based his rating. Dr. Simpson correctly noted that Dr. Goodman did not provide bilateral knee ROM measurements in support of his finding of "mild motion deficits."¹⁷ Given the deficiencies in Dr. Goodman's July 3, 2012 impairment rating, OWCP reasonably deferred to Dr. Simpson. Contrary to counsel's argument, there is no reasonable basis upon which to declare a conflict in medical opinion.

The Board finds that Dr. Simpson's two percent impairment rating conforms to the A.M.A., *Guides* (6th ed. 2008), and thus, represents the weight of the medical evidence regarding the extent of appellant's right lower extremity impairment. Dr. Simpson's rating, which was

¹¹ 20 C.F.R. § 10.404.

¹² 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).

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

¹⁴ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁵ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹⁶ *Supra* note 14.

¹⁷ Under Table 16-3, the diagnosis of muscle/tendon strain includes class 1 impairment for "Mild motion deficits." See A.M.A., *Guides* 509 (6th ed. 2008). For this particular diagnosis, the range of lower extremity impairment is from five to nine percent, with seven percent representing the default (C) grade. *Id.* Dr. Goodman did not provide an analysis regarding applicable grade modifiers, and thus, he did not calculate a net adjustment.

based on a diagnosis of muscle/tendon strain with palpatory findings and/or radiographic findings, is supported by the record, including Dr. Goodman's July 3, 2012 examination. Furthermore, his assigned grade modifiers for functional history and physical examination, which resulted in a net adjustment of -1.¹⁸ Accordingly, the final rating was two percent right lower extremity impairment under Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 511 (6th ed. 2008). There is no credible medical evidence indicating a greater right lower extremity impairment than previously awarded.

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 has not demonstrated that he has greater than two percent impairment of the right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 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

¹⁸ See *supra* note 8.