

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

_____)
D.L., Appellant)
)
and) **Docket No. 14-1126**
) **Issued: September 5, 2014**
)
DEPARTMENT OF DEFENSE,)
Fort Benning, GA, Employer)
_____)

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 15, 2014 appellant, through his attorney, filed a timely appeal from a January 15, 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.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of the left leg.

FACTUAL HISTORY

The case has previously been before the Board. On March 4, 2003 appellant, then a 54-year-old custodian sustained back and knee injuries when he was cleaning out under the stage. OWCP accepted a lumbar strain, posterior cruciate ligament sprain left knee and left

¹ 5 U.S.C. § 8101 *et seq.*

medial meniscus tear. By decision dated August 3, 2007, it reduced appellant's compensation on the grounds that he had the capacity to earn wages in the selected position of security guard. In a decision dated July 24, 2009, the Board affirmed the wage-earning capacity determination.² On June 4, 2009 OWCP modified the wage-earning capacity determination and terminated compensation for wage-loss and medical benefits. By decision dated April 9, 2012, the Board affirmed the termination of compensation for wage loss, but found that OWCP did not meet its burden of proof regarding the termination of medical benefits for the left knee.³ The history of the case as set forth in the Board's prior decisions is incorporated herein by reference.

In a report dated June 24, 2012, Dr. William Daniels, a Board-certified orthopedic surgeon, provided a history of injury and results on examination. With respect to the permanent impairment resulting from the March 12, 2003 employment injury, he opined that under Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed.) (A.M.A., *Guides*), appellant had a two percent left leg impairment based on the left knee medial meniscus tear. Dr. Daniels also identified Table 17-4 for spinal injuries and found appellant had a three percent whole person impairment. He stated that the three percent whole person was equivalent to a 2.25 percent spine impairment, which was rounded up to three percent. Dr. Daniels opined that appellant had a five percent permanent impairment.

OWCP referred the evidence to its medical adviser for review. In a report dated May 7, 2013, the medical adviser found that appellant's left leg impairment was two percent, based on Table 16-3. The date of maximum medical improvement was reported as March 15, 2004, the date of a functional capacity evaluation.

By decision dated May 21, 2013, OWCP issued a schedule award for a two percent permanent impairment of the left leg. The period of the award was 5.76 weeks from June 7, 2009.⁴

Appellant requested a hearing before an OWCP hearing representative, which was held on October 28, 2013. Counsel stated that there was no disagreement with regard to the left knee, but as to the lumbar injury it was "a little more complicated than just disregarding it in its entirety because it's a back." He argued that appellant had degenerative disc disease superimposed on the lumbar sprain which should be compensable.

By decision dated January 15, 2014, OWCP's hearing representative affirmed the May 31, 2013 decision. She found that the medical evidence did not establish more than a two percent permanent impairment to the left leg.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the

² Docket No. 08-2505 (issued July 24, 2009).

³ Docket No. 11-1840 (issued April 9, 2012).

⁴ Appellant had received wage-loss compensation through June 6, 2009.

permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

With respect to a knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The class of impairment (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 16-6), Physical Examination (GMPE, Table 16-7) and Clinical Studies (GMCS, Table 16-8). The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of “organ” under FECA.⁹

ANALYSIS

Appellant submitted a June 24, 2012 report from Dr. Daniels regarding permanent impairment under the A.M.A., *Guides*. With respect to the left knee, Table 16-3 provides that a partial meniscectomy results in a default (grade C) leg impairment of two percent.¹⁰ It is a class 1 (mild) problem and the default value may be adjusted by applying the formula noted above. Dr. Daniels applied the net adjustment formula by finding a functional history grade modifier of two, with a physical examination modifier of one. The clinical studies grade modifier was not used. The A.M.A., *Guides* provide that, if a factor is used to define the placement in the regional grid, it is not used again as a grade modifier.¹¹ Applying the net adjustment formula (2-1) + (1-1), the impairment is +1 or grade D, but under Table 16-3 the impairment for a meniscal injury remains at two percent.

OWCP’s medical adviser also rated a two percent leg impairment based on Table 16-3. At the October 28, 2013 hearing with OWCP’s hearing representative, appellant’s representative advised that appellant did not contest the left knee rating.

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁹ See James E. Jenkins, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

¹⁰ A.M.A., *Guides* 509, Table 16-3.

¹¹ *Id.* at 500.

The question is whether there was any additional impairment based on the report of Dr. Daniels, who applied Table 17-4, the “lumbar spine regional grid” which rates whole person impairment for spinal conditions. At the October 28, 2013 hearing, appellant argued that his back condition was more complicated than a lumbar strain and that additional impairment should be ratable. Dr. Daniels provided a three percent “whole person” spinal impairment. However, this opinion is of diminished probative value with respect to a schedule award under FECA. An impairment must be to a scheduled member of the body. The Board notes that the spine is not a scheduled member of the body under section 8107 of the regulations. In addition, any impairment must be employment related.¹² The accepted lumbar condition was a lumbar strain. If a physician believes that appellant has an employment-related back condition that caused impairment to a scheduled member of the body, then he or she must support such opinion with sound medical reasoning.¹³ To properly rate any peripheral nerve impairment to the upper or lower extremities resulting from a spinal injury, OWCP procedures note that *The Guides Newsletter* “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” (July/August 2009) is to be applied.¹⁴

Pursuant to 5 U.S.C. § 8107(c), appellant is entitled to two percent of the maximum 288 weeks of compensation for a leg impairment or 5.76 weeks of compensation. The compensation is paid from the date of maximum medical improvement,¹⁵ which OWCP’s medical adviser found was March 15, 2004.¹⁶

The Board finds that the evidence from Dr. Daniels is not sufficient to establish more than a two percent left leg impairment.

CONCLUSION

The Board finds that appellant has not established more than a two percent left leg permanent impairment.

¹² *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

¹³ *See M.M.*, Docket No. 12-1737 (issued February 20, 2013) (physician did not provide sound medical reasoning to support an opinion as to permanent impairment causally related to an employment injury).

¹⁴ *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁵ *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹⁶ OWCP paid the schedule award after the date his wage-loss compensation ended on June 6, 2009, to avoid a concurrent payment issue (a claimant is not entitled to wage-loss compensation and a schedule award for the same period). *James A. Earle*, 51 ECAB 567 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2014 is affirmed.

Issued: September 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board