United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 15-0962**
	)	**Issued: August 27, 2015**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Fairton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2015 appellant, through counsel, filed a timely appeal from a January 20, 2015 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 OWCP made a proper determination that appellant did not have a ratable permanent impairment of the left leg or the right leg as a result of his accepted accident of March 10, 2010.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on March 10, 2010 appellant, then a 43-year-old correctional officer, sustained bilateral ankle sprains when he was guiding a bus down a ramp at work.[2] A grate gave away causing him to turn his left ankle and hop on his right ankle.[3]

On September 17, 2010 appellant filed a claim for a schedule award due to his accepted work injuries. He submitted a September 17, 2010 report of Dr. Arthur Becan, an attending Board-certified orthopedic surgeon, who stated that appellant reached maximum medical improvement on September 17, 2010, *i.e.*, the date of his examination. Dr. Becan found that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), appellant sustained four percent permanent impairment of his right leg due to a class 1 right ankle strain with mild motion deficit. He also found that appellant sustained a four percent permanent impairment of his left leg due to a class 1 left ankle strain with mild motion deficit. Dr. Becan also found two percent right leg impairment and three percent left leg impairment due to his prior work-related knee injuries. He calculated a combined six percent impairment for the right leg and a combined seven percent impairment for the left leg.

On December 16, 2010 Dr. Henry Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that appellant reached maximum medical improvement on September 17, 2010, the date of Dr. Becan's examination. He calculated that appellant sustained a four percent permanent impairment of each leg due to bilateral ankle deficits. Dr. Magliato did not include ratings for appellant's accepted knee conditions.

On February 13, 2012 OWCP determined that a conflict in medical opinion evidence existed between Dr. Becan and Dr. Magliato regarding the ratable diagnoses and extent of permanent impairment. It referred appellant to Dr. George Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his leg impairment. In a March 29, 2012 report, Dr. Glenn stated that appellant denied that he had any residual complaints in his ankles. His examination of the ankles showed that they were symmetrical without any evidence of swelling, discoloration, or mottling. The ranges of ankle motion in dorsiflexion and plantarflexion were symmetrical and normal. Dr. Glenn did not, however, provide any range of motion measurements for appellant's ankles. He noted that appellant did not have any palpable tenderness about either ankle. Dr. Glenn concluded that there was no ratable permanent impairment for either the right or left ankle. He indicated that appellant had some limitation of bilateral knee motion, but he did not provide specific knee motion measurements. Dr. Glenn found no permanent left leg impairment due to a left knee condition, but he found one percent right leg impairment related to a meniscus diagnosis. He

[2] By decision dated May 20, 2010, OWCP accepted appellant's claim for: "Sprain of ankle, other specified sites, bilateral."

[3] Appellant sustained prior work-related injuries to his legs. On April 3, 1997 he sustained a work-related injury to his right knee for which he received a schedule award for a four percent permanent impairment of his right leg. On October 16, 2002 he sustained a work-related injury to his left knee for which he received a schedule award for a two percent permanent impairment of his left leg.

derived this diagnosis-based rating from Table 16-3 of the sixth edition of the A.M.A., *Guides*. In calculating this impairment rating, Dr. Glenn derived grade modifiers under the relevant tables and applied the net adjustment formula.[4]

On June 24 and September 10, 2012 Dr. Andrew Merola, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed Dr. Glenn's report and determined that appellant sustained no ratable permanent impairment for either ankle. He did find that Dr. Glenn substantiated one percent right leg permanent impairment due to a right knee condition. Dr. Merola stated that appellant reached maximum medical improvement on March 29, 2012, the date of Dr. Glenn's examination.

By decision dated October 1, 2012, OWCP granted appellant a schedule award for one percent permanent impairment of his right leg. The award ran for 2.88 weeks from March 29 to April 18, 2012 and was based on Dr. Glenn's permanent impairment rating as reviewed by Dr. Merola. It does not appear that OWCP considered appellant's prior schedule awards in granting this schedule award compensation.

On October 31, 2013 and June 17, 2014 appellant's counsel at the time requested a formal decision regarding a schedule award for appellant's leg impairment. By decision dated June 20, 2014, OWCP denied any increase in schedule award payment for the left leg. Appellant disagreed and, through counsel, requested a hearing with an OWCP hearing representative.

During the oral hearing held on November 19, 2014, appellant's counsel at the time argued that Dr. Glenn's impairment rating did not constitute the weight of the medical evidence. She stated that appellant told her that Dr. Glenn did not examine his ankles; and he did not tell Dr. Glenn that his ankles were fine. Counsel argued that Dr. Glenn's examination was insufficient to represent the weight of medical opinion in this case, as Dr. Glenn did not provide his range of motion measurements for the ankles, and compared two injured ankles to each other for symmetry. She also argued that Dr. Glenn did not provide his measurements for range of motion of appellant's knees.

Subsequent to the hearing, the claimant provided a supplemental opinion from Dr. Becan dated November 14, 2014. Dr. Becan explained that his 2010 examination was consistent with prior findings. He stated that the left knee condition documented continued clinical findings, and that magnetic resonance imaging (MRI) scan test showed multiple left knee objective findings. Dr. Becan indicated that he completely disagreed with Dr. Glenn's use of grade modifiers for the right knee and provided his calculations instead. He again concluded that appellant sustained a total right leg permanent impairment of six percent and total left leg permanent impairment of seven percent, with four percent for each extremity represented by the work-related ankle injuries.

In a January 20, 2015 decision, an OWCP hearing representative modified OWCP's June 20, 2014 decision to find that appellant did not have any permanent impairment of either leg due to his ankle conditions. He noted that he was not considering appellant's previously accepted knee conditions in rendering this decision. The hearing representative found that the

[4] *See* A.M.A., *Guides* 515-22 (6th ed. 2009).

weight of the medical opinion evidence rested with the opinion of Dr. Glenn, but that he actually served as an OWCP referral physician rather than an impartial medical specialist. He stated:

> "In the instant case, first, I find that [OWCP] improperly determined that a conflict in medical opinion existed between Dr. Becan and [OWCP medical adviser] Dr. Magliato. Dr. Becan and Dr. Magliato agreed, at the time in 2010, that the claimant sustained four percent bilateral lower extremity permanent impairment due to the claimant's ankle conditions. The only difference between the two ratings is that Dr. Becan rated the claimant's preexisting bilateral knee conditions, and Dr. Magliato did not, nor was he asked to rate these conditions. Therefore, there was no conflict in medical opinion when the referral was made to Dr. Glenn for a referee examination. Dr. Glenn cannot be given special weight as a referee physician, but must be considered a second opinion physician. However, I find that, even though Dr. Glenn is not given special statutory weight, his opinion carries the current weight of the medical opinion, on its own merits, regarding the claimant's permanent impairment causally related to the March 10, 2010 work injury."

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing regulations[6] 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. 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] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[8]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the ankles and knees, the relevant portions of the legs for the present case, reference is made to Tables 16-2 (Foot and Ankle Regional Grid) and Table 16-3 (Knee Regional Grid), beginning on page 501.[9] After the Class of Diagnosis (CDX) is determined from each Regional Grid (including identification of a default grade value), the net

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

[8] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

[9] *See* A.M.A., *Guides* 501-11 (6th ed. 2009).

adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[11]

Section 8123(a) of FECA provides in pertinent part: "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."[12] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[15] OWCP procedures provide:

> "*Impairment ratings for schedule awards include those* conditions accepted by the OWCP as job related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate. There are no provisions for apportionment under FECA. Rated impairment should reflect the total loss as evaluated for the schedule member at the time of the rating exam[ination]."[16]

[10] *Id.* at 515-22.

[11] *Id.* at 23-28.

[12] 5 U.S.C. § 8123(a).

[13] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(d) (February 2013).

ANALYSIS

The Board finds that the case is not in posture for decision regarding the permanent impairment of appellant's legs because the opinion of the impartial medical specialist is in need of clarification.

OWCP properly found that there was conflict in the medical opinion evidence regarding the permanent impairment of appellant's legs. In a September 17, 2010 report, Dr. Becan, an attending Board-certified orthopedic surgeon, calculated six percent impairment for the right leg and seven percent impairment for the left leg due to deficits caused by work-related ankle and knee conditions. In contrast, Dr. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, found on December 16, 2010 that appellant sustained a four percent permanent impairment of each leg due to bilateral ankle deficits.[17]

OWCP properly referred appellant to Dr. Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his leg impairment.[18] In his March 29, 2012 report, Dr. Glenn concluded that there was no ratable permanent impairment for either the right or left ankle. He found no permanent left leg impairment due to a left knee condition, but he found a one percent right leg impairment related to a meniscus diagnosis. Dr. Glenn indicated that the ranges of ankle motion in dorsiflexion and plantarflexion were symmetrical and normal. He did not, however, provide any range of motion measurements for appellant's ankles. Dr. Glenn concluded that there was no ratable permanent impairment for either the right or left ankle. He indicated that appellant had some limitation of bilateral knee motion, but he did not provide specific knee motion measurements.

As Dr. Glenn incorporated his range of motion findings in determining appellant's grade modifiers for impairment rating purposes, his evaluation of appellant's leg impairment would not be complete without providing specific range of motion measurements for the ankles and knees.[19] Appellant sustained work-related ankle injuries on March 10, 2010, but it was also accepted that he had prior work-related knee conditions. All work-related injuries (and preexisting injuries) to a given leg are to be considered in evaluating leg impairment.[20] The record, as presently constituted, contains limited evidence regarding appellant's prior work-

[17] *See supra* notes 10 and 11. In his January 20, 2015 decision, the hearing representative asserted that there was no conflict in the medical opinion evidence regarding appellant's leg impairment and that, therefore, Dr. Glenn served as an OWCP referral physician rather than an impartial medical specialist. However, the above-described reports show that, contrary to the hearing representative's decision, there was a conflict in the medical opinion evidence regarding appellant's leg impairment.

[18] *See supra* note 13.

[19] *See* A.M.A., *Guides* 515-22 (6th ed. 2009).

[20] *See supra* note 15.

related knee conditions and it remains unclear whether the possible contribution of these conditions to appellant's leg impairment has been adequately considered.[21]

For the above-described reasons, the opinion of Dr. Glenn is in need of clarification and elaboration.[22] Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to OWCP for referral of the case record, a statement of accepted facts, and, if necessary, appellant, to Dr. Glenn for a supplemental report regarding the permanent impairment of appellant's legs. If Dr. Glenn is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[23] After carrying out this development, an appropriate decision should be issued regarding the permanent impairment of appellant's legs.

Appellant, through counsel, filed a brief with the Board. The brief argues first that appellant is entitled to an award of four percent to each ankle because Dr. Becan and Dr. Magliato agreed in that impairment. The brief also argues that the report of Dr. Glenn should not be considered most probative. The Board's opinion adequately addressed each contention.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP made a proper determination regarding the extent of the permanent impairment of appellant's legs. The case is remanded to OWCP for further development.

[21] *S.B.*, Docket No. 11-403 (issued September 20, 2011). In his January 20, 2015 decision, OWCP's hearing representative indicated that he was not considering appellant's previously accepted knee conditions in rendering his decision. The Board notes, however, that a complete assessment of appellant's leg impairment would include an evaluation of any contribution of accepted or preexisting knee conditions to the leg impairment.

[22] *See supra* note 14.

[23] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 27, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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