United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 14-1921**
	)	**Issued: December 1, 2015**
SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY ADJUDICATION & REVIEW, Mt. Pleasant, MI, Employer	)	

Appearances:
Lonnie Boylan, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2014 appellant, through her representative, filed a timely appeal from an April 8, 2014 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 has established permanent impairment warranting a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

On January 25, 2012 appellant, then a 54-year-old legal assistant, filed an occupational disease claim (Form CA-2) alleging that her right knee osteoarthritis was causally related to her

[1] 5 U.S.C. § 8101 *et seq.*

federal employment. On the claim form, she indicated that she had left knee replacement surgery on January 15, 2011, and had returned to work in March 2011. Appellant stated that in September 2011 she moved to a new seat which aggravated her already deteriorating right knee condition. The record indicates that she underwent arthroscopic right knee surgery on January 24, 2012. In a report of that date, Dr. Michael Austin, an osteopath, diagnosed right knee degenerative arthritis, medial meniscus tear, and lipoma. In a March 1, 2012 statement, appellant indicated that she had to repeatedly get up out of her seat as the office printer and fax machines were 25 feet from her desk.

OWCP accepted the claim on April 23, 2012 for aggravation of right knee osteoarthritis and aggravation of a right knee medial meniscus tear. In a report dated June 21, 2012, Dr. Austin stated that appellant had patellofemoral crepitation and would perhaps need a total joint replacement. He opined that she could work three days a week. The record indicates that appellant returned to work at three days per week and stopped working on August 6, 2012. She received wage-loss compensation intermittently from October 20, 2011 through August 11, 2012. Appellant filed claims for compensation (Forms CA-7) commencing August 12, 2012.

In a report dated July 10, 2012, Dr. Jason Cochran, an osteopath, provided a history and results on examination. He diagnosed internal derangement with underlying end-stage osteoarthritis. Dr. Cochran stated that it was "unclear" what had occurred at the initial injury, but appellant likely had arthritis irritated by work duties. He stated that conservative therapy had failed and the only option was a total joint arthroplasty. Appellant requested authorization for a total knee arthroplasty.

Appellant was referred for a second opinion examination by Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon. In his report dated October 8, 2012, Dr. Obianwu provided a history and results on examination. He diagnosed right knee tricompartmental arthritis. Dr. Obianwu opined that appellant's employment-related aggravation had ceased, and "it definitely would not cause an aggravation that would necessitate a right knee replacement." He found that, while the proposed surgery was appropriate treatment, it was for the underlying arthritis and not related to the employment injury.

On January 2, 2013 appellant underwent a right total knee arthroplasty surgery performed by Dr. Cochran. OWCP found a conflict existed between Dr. Cochran and Dr. Obianwu as to whether the proposed surgery should be authorized. Appellant, with medical records and a statement of accepted facts (SOAF), was referred to Dr. James Wessinger, a Board-certified orthopedic surgeon. In a report dated February 19, 2013, Dr. Wessinger provided a history and results on examination. He noted that appellant had a sedentary job and about one quarter of the time was up and about getting files and using the copy machine. Dr. Wessinger opined that her job did not cause, significantly aggravate or accelerate the underlying right knee arthritis that required a total knee replacement.

In a supplemental report dated March 15, 2013, Dr. Wessinger indicated that he had reviewed the SOAF. He stated that the severe patellofemoral arthritis was not related to appellant's employment, noting x-ray evidence on November 30, 2010 that showed severe arthritis, and this was within one month of her start of employment. Dr. Wessinger found that

appellant's employment did not cause, significantly aggravate or accelerate the underlying right knee arthritis that required a total knee replacement. He opined that he agreed with Dr. Obianwu that the employment did not cause the need for a total knee replacement, and any future restrictions were not employment related.

By decision dated October 1, 2013, OWCP terminated compensation for wage-loss and medical benefits. It found the weight of the evidence was represented by Dr. Wessinger.

On July 15, 2013 appellant submitted a Form CA-7 claim for a schedule award. She submitted a June 26, 2013 report from Dr. Mitchell Pollack, a Board-certified orthopedic surgeon, stated that he had applied Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) for the diagnosis of total knee arthroplasty. Dr. Pollack opined that appellant had 23 percent right leg impairment for total knee arthroplasty under Table 16-3.

By letter dated August 8, 2013, OWCP requested that Dr. Pollack review the SOAF, noting that the claim had been accepted for aggravation of osteoarthritis and torn medial meniscus. It asked him to opine whether the schedule award was based on the accepted conditions or the nonwork-related total knee arthroplasty.

In a report dated August 14, 2013, Dr. Pollack stated that he was aware that the claim was accepted for aggravations of right knee osteoarthritis and medial meniscus tears. He stated that the most appropriate category for a permanent impairment calculation was total knee arthroplasty. Dr. Pollack further stated, "It is supposed that the aggravation of the preexisting right knee osteoarthritis, for which the claim was accepted, contributed to the need for appellant to undergo total knee arthroplasty. As [appellant] had already undergone the right total knee arthroplasty at the time I saw her, I could not, very well, examine her for the arthritis."

By decision dated October 4, 2013, OWCP determined that appellant was not entitled to a schedule award. It found that the reports from Dr. Pollack were based on an impairment for a total knee replacement, which was not employment related.

In a decision dated April 8, 2014, an OWCP hearing representative affirmed the October 4, 2013 decision. He found that the evidence did not establish an employment-related permanent impairment.

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

permanent impairment of the scheduled member or function.[2] The permanent impairment must be causally related to an accepted employment injury.[3]

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.[4] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[5]

ANALYSIS

In the present case, appellant submitted reports dated June 26 and August 14, 2013 from Dr. Pollack in support of his claim for a schedule award. Dr. Pollack opined that under Table 16-3 of the A.M.A., *Guides* appellant had a 23 percent right leg impairment.

Table 16-3 is the knee regional grid and does provide an impairment for a total knee replacement, with a default (grade C) impairment of 25 percent for a "good result."[6] When an attending physician submits a report as to permanent impairment, typically the case is referred to an OWCP medical adviser,[7] but in this case it is not a question of whether the impairment is properly described or whether Table 16-3 was properly applied. As noted above, a permanent impairment must be causally related to an employment injury. Prior to the submission of reports by Dr. Pollack, the medical evidence had been developed by OWCP on the issue of whether the January 2, 2013 total knee arthroplasty surgery was causally related to federal employment.

In this regard OWCP found a conflict between attending physician, Dr. Cochran, who performed the surgery, and Dr. Obianwu, the second opinion physician.[8] The physician selected to resolve the conflict, Dr. Wessinger, provided a rationalized medical opinion that the surgery was not causally related to the employment injury. He found that appellant had a preexisting osteoarthritis, and indicated that any aggravation from employment had resolved and did not necessitate the surgery.

[2] *Id*. at § 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).

[3] *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

[4] *A. George Lampo*, 45 ECAB 441 (1994).

[5] FECA Bulletin No. 09-03 (March 15, 2009).

[6] A.M.A. *Guides* 509, Table 16-3.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (February 2013).

[8] 5 U.S.C. § 8123(a) provides that if there is a disagreement between an attending physician and a physician making the examination for OWCP, a third physician is selected to resolve the conflict.

It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[9] Dr. Wessinger's opinion was entitled to special weight in this case. Dr. Pollack did not provide an opinion on the issue, other than note he "supposed" the surgery was related to the accepted aggravations. However, he acknowledged he had not examined or treated appellant prior to the surgery.

As the weight of the medical evidence established that the total knee arthroplasty was not employment related, appellant is not entitled to a schedule award for a permanent impairment based on the surgery. OWCP properly determined that she was not entitled to a schedule award based on the medical evidence of record.

On appeal, appellant argues that Dr. Wessinger relied on information not in the SOAF, such as stating in his report that appellant was up getting files about one quarter of her day. The Board notes that such a statement was not inconsistent with any evidence of record. Dr. Wessinger discussed appellant's job duties and there is no indication he had an inaccurate or incomplete background for an opinion as to the January 2, 2013 surgery. Appellant also argued that, even if the surgery was not authorized, it would not preclude entitlement to a schedule award, but a permanent impairment results in a schedule award under FECA only if there is some causal relationship between an employment injury and the permanent impairment.[10] If there was an aggravation of a preexisting condition that contributed to the need for surgery, then an impairment evaluation would include any preexisting impairment.[11] In this case, however, the weight of the medical evidence did not establish that an impairment resulting from the total knee replacement surgery was employment related. Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in a permanent impairment.

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award under 5 U.S.C. § 8107.

[9] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[10] *Supra* note 3.

[11] *See, e.g., L.P.*, Docket No. 14-1394 (issued November 7, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2014 is affirmed.[12]

Issued: December 1, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[12] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.