United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 14-888**
	)	**Issued: February 9, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Bridgewater, 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:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 10, 2014 appellant filed a timely appeal from a November 4, 2013 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 the case.

ISSUE

The issue is whether appellant has more than 18 percent permanent impairment of the right leg for which he received a schedule award and whether he has ratable left leg impairment.

FACTUAL HISTORY

On January 29, 1997 appellant, then a 47-year-old letter carrier, was injured when he was struck in the right knee by a Jeep while working. OWCP accepted the claim for right knee contusion, cervical sprain, and aggravation of left lower extremity varicose veins. Appellant

[1] 5 U.S.C. §§ 8101-8193.

underwent an authorized open arthrotomy of the right knee on February 11, 1998, a left varicose vein ligation and stripping on August 7, 1998, and another right knee arthroscopy on September 9, 1993 to repair a medial meniscus tear.[2]

Appellant was treated by Dr. Thomas J. Nordstrom, a Board-certified orthopedic surgeon, for subluxation of the patella due to trauma from the work injury. On February 11, 1998 he performed an open arthrotomy of the right knee. A June 29, 1997 right knee magnetic resonance imaging (MRI) scan revealed an oblique under-surface tear of the posterior horn of the medial meniscus, secondary osteoarthritis, oblique under-surface tear laterally in the posterior horn of the lateral meniscus. A December 29, 1998 right knee MRI scan showed increased signal in the posterior horn of the medial meniscus, likely an immature granulation tissue due to the August 1998 meniscal surgery.

Appellant was treated by Edward D. Buch, a Board-certified general surgeon, on July 1, 1998 for left varicose vein which he opined was related to his work injury of January 29, 1997. On August 7, 1998 he performed a left varicose vein ligation and stripping and diagnosed left varicose veins.[3]

Appellant filed a claim for a schedule award on October 25, 2001. He submitted a May 29, 2001 report from Dr. David Weiss, an osteopath, who noted upon examination that appellant reached maximum medical improvement on May 14, 2001. Dr. Weiss noted that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[4] (A.M.A., *Guides*), he had 10 percent right leg impairment for right medial and lateral partial meniscectomy and nine percent left leg impairment for peripheral vascular disease. Dr. Weiss also noted impairment for appellant's arms.[5]

On April 26, 2010 OWCP referred appellant for a second opinion to Dr. Jerome Rosman, a Board-certified orthopedic surgeon, for an evaluation of permanent impairment under the sixth edition of the A.M.A., *Guides*.[6] In a report dated May 16, 2010, Dr. Rosman noted normal range of motion of the knees, no instability, no ligamentous laxity, negative McMurray sign, with

[2] On October 14, 1980 appellant injured his right leg while loading a tray of mail. The claim was accepted for right groin muscle strain, claim number xxxxxx959. On August 2, 1988 appellant injured his right forearm when his vehicle skidded into a ditch. The claim was accepted for a right arm crush injury, claim number xxxxxx078. On May 14, 1997 appellant inhaled a solvent and the claim was accepted for respiratory irritation, claim number xxxxxx354. These claims were consolidated into the current claim that is before the Board.

[3] By decision dated May 8, 2000, OWCP indicated that appellant had been employed as a full-time carrier technician for more than 60 days at wages equivalent to his date-of-injury job. It concluded the position of full-time carrier technician fairly and reasonably represented appellant's wage-earning capacity.

[4] A.M.A., *Guides* (5th ed. 2001).

[5] On August 27, 2002 OWCP had granted appellant 38 percent impairment for the right arm. In a September 15, 2003 decision, a hearing representative affirmed the August 27, 2002 decision as modified. The hearing representative noted evidence supported other impairment and instructed OWCP to issue a decision addressing other impairment as a result of appellant's work injuries.

[6] A.M.A., *Guides* (6th ed. 2008).

healed arthroscopic portals, and a lateral surgical scar on the right knee. Motor strength was normal, sensation was intact, and deep tendon reflexes were equal and bilateral. Dr. Rosman's diagnosis included right knee contusion with medial meniscus tear and lateral meniscus tear. He noted that appellant reached maximum medical improvement. Under Table 16-3, Knee Regional Grid, Meniscal Injury, of the A.M.A., *Guides*, Dr. Rosman calculated that appellant had eight percent right leg impairment for a class 1, grade B, partial medial and lateral meniscectomy.[7] In a June 9, 2010 supplemental report, Dr. Rosman opined that based on the physical examination of appellant's left lower extremity, which showed no abnormality, appellant had zero percent impairment of that leg as a result of the accepted work injury.

On August 13, 2010 OWCP asked Dr. Rosman to provide a supplemental report and consider Dr. Buch's August 7, 1998 operative report. In an August 24, 2010 report, Dr. Rosman noted that there was no change in his impairment rating based on Dr. Buch's report. He noted that, based on his physical findings, appellant did not show objective orthopedic impairment of the left leg. Dr. Rosman recommended a vascular examination for evaluation of the left leg venous stripping as this was not part of a standard orthopedic evaluation.

In a report dated September 16, 2010, an OWCP medical adviser concurred in Dr. Rosman's determination that appellant had eight percent impairment of the right lower extremity and no impairment of the left lower extremity.

In a decision dated April 26, 2011, OWCP granted appellant a schedule award for eight percent permanent impairment of the right leg.

Appellant requested an oral hearing which was held on August 8, 2011. He submitted impairment ratings from Dr. Weiss dated June 3 and September 19, 2011 who applied the sixth edition of the A.M.A., *Guides* to his May 29, 2001 examination findings. Dr. Weiss found 13 percent impairment for medial and lateral meniscectomies, five percent impairment of the right patellofemoral arthritis for a total right leg impairment of 17 percent. He also found two percent impairment for the left leg contusion.

In an October 6, 2011 decision, an OWCP hearing representative affirmed the April 26, 2011 decision in part and remanded the matter in part. The hearing representative affirmed that appellant had eight percent right leg impairment but remanded the case for further development with regard to the left leg in view of Dr. Rosman's recommendation for examination by a vascular specialist.

In a report dated January 27, 2012, Dr. Weiss reiterated his finding that appellant had 17 percent impairment of the right leg, and two percent impairment of the left leg.

On January 18, 2012 OWCP referred appellant for a second opinion to Dr. Richard S. Nitzberg, a Board-certified vascular surgeon, for an evaluation of appellant's permanent impairment. In a February 1, 2012 report, Dr. Nitzberg noted a history of the 1997 injury. Appellant related having varicose veins in the left leg before the 1997 injury but noted the condition worsened after the accident. Dr. Nitzberg noted that appellant underwent a left leg

[7] A.M.A., *Guides* 510.

stripping ligation of the great saphenous vein and the removal of the varicosities in 1998. Dr. Nitzberg indicated left leg examination findings of weakness and pain in calves when walking. He noted no obvious edema of the extremities, no pitting edema, no venous stigmata, and no varicosities. Appellant only reported subjective complaints of the left leg feeling heavy and puffy. Dr. Nitzberg noted that appellant reached maximum medical improvement with regard to his varicosities and there was no significant aggravation of his left leg varicosities at that time. He noted no physical findings to support significant problems with appellant's veins. Dr. Nitzberg further opined that appellant did not have any significant permanent impairment. In a February 24, 2012 addendum, he noted reviewing the statement of accepted facts and the medical records including Dr. Buch's reports focusing on the varicose vein condition. Dr. Nitzberg further noted that under the A.M.A., *Guides* appellant was a class zero, pursuant to Table 4-12, page 69, with no significant ongoing varicosities or significant venous stigmata.

On February 27, 2012 appellant requested reconsideration of OWCP's decision dated October 6, 2011. In a February 29, 2012 decision, OWCP denied appellant's request for reconsideration dated February 27, 2012 as the evidence submitted was insufficient to warrant a merit review.

On March 2, 2012 OWCP requested that Dr. Nitzberg clarify his opinion as his prior opinion cited only to the class of impairment and failed to make a formal rating. It asked him to address if appellant had any measurable permanent impairment of the left leg based on the A.M.A., *Guides*. In a March 6, 2012 supplemental report, Dr. Nitzberg noted that appellant did not have any measurable permanent impairment of the left leg based on the A.M.A., *Guides* and thus the permanent impairment of the left leg was zero percent.

In a decision dated March 21, 2012, OWCP denied appellant's claim for a schedule award for the left leg based on Dr. Nitzberg's reports. Appellant requested an oral hearing. In a decision dated June 25, 2012, an OWCP hearing representative set aside the decision dated March 21, 2012 and remanded the matter for further medical development. He noted that OWCP failed to refer the matter to an OWCP medical adviser pursuant to OWCP procedures.

On August 10, 2012 appellant requested reconsideration regarding right leg impairment and submitted a July 27, 2012 report from Dr. Weiss who applied the sixth edition of the A.M.A., *Guides* to his May 29, 2001 examination findings. Dr. Weiss noted the findings from an April 6, 2012 right knee x-ray report which revealed medial joint space of less than one millimeter, lateral joint space of four millimeters and patellofemoral joint space of zero millimeters.[8] He found a combined 26 percent impairment of the right leg for primary joint arthritis of the knee and two percent impairment of the left leg.

On September 12, 2012 OWCP referred appellant's case record to an OWCP medical adviser, Henry J. Magliato, M.D., D.M.A., to review the record as to permanent impairment of appellant's bilateral lower extremities. In a September 17, 2012 report, the medical adviser reviewed Dr. Weiss' reports and concurred with Dr. Weiss' January 27, 2012 opinion. On October 9, 2012 OWCP requested that the medical adviser review Dr. Weiss' July 27, 2012 report which found appellant had 26 percent impairment of the right leg. It also asked that the

[8] The April 6, 2012 x-ray report is not in any of the consolidated claim files before the Board.

medical adviser review the report of Dr. Nitzberg in determining impairment for appellant's left leg for the accepted aggravation of left leg varicose veins. In an October 15, 2012 report, the medical adviser noted that Dr. Weiss' July 27, 2012 report found 26 percent impairment of the right leg but used physical findings from 2001 and only revised his calculations to conform to the sixth edition of the A.M.A., *Guides*. He noted that Dr. Weiss, in his July 27, 2012 report, noted appellant was a class 3 under primary knee joint arthritis but the medical adviser noted that the previous diagnosis of medial and lateral meniscectomies more closely approached the accepted conditions. The medical adviser further noted that Dr. Nitzberg's second opinion examination found that appellant had zero percent impairment. He noted that Dr. Nitzberg found very little wrong with the right lower extremity and appellant only reported "left leg weakness." The medical adviser opined that in view of such a large discrepancy between the second opinion's report and the findings in Dr. Weiss' latest revised report of July 27, 2012 appellant should be referred to a referee physician.

On December 6, 2012 OWCP referred appellant to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon selected to act as a referee physician.[9] Dr. Krisiloff indicated, in a January 8, 2013 report, that he reviewed the record and examined appellant. He noted the right leg had no obvious deformity or swelling in the knee joint which had normal range of motion with full extension. There was mild crepitation in the joint. For the left leg, there was no obvious venous insufficiency, no chronic discoloration or swelling, and vascular examination was otherwise normal. Dr. Krisiloff noted appellant's current complaints of pain in the right knee joint, occasional buckling and locking of the joint, and using a cane for distance walking. He took standing x-rays of the right knee which revealed arthritic changes in the knee joint with loss of articular cartilage space, especially along the medial joint line with the formation of a medial osteophyte and patellofemoral changes. Dr. Krisiloff's diagnoses included contusion of the right knee and aggravation of varicose vein condition in the left lower extremity, resolved. He found no evidence of impairment or disability with regard to the varicose vein condition of the left leg. Dr. Krisiloff found impairment due to the right knee joint based upon the diagnosis of primary arthritis as corroborated by x-rays. He noted appellant's prior evaluations regarding the knee was based upon a diagnosis of partial meniscus removal and patellofemoral arthritis, but he opined that appellant's disability was now due to his arthritic condition. Dr. Krisiloff opined that it was inappropriate to include the meniscus calculation in the impairment determination as it would be similar to adding the same problem twice and also opined that adding primary knee arthritis and patellofemoral arthritis would be redundant. He opined that appellant had 18 percent impairment of the right lower extremity in accordance with the A.M.A., *Guides* based on primary knee joint arthritis. Under Table 16-3, page 511, he noted that appellant had class 2 primary knee joint arthritis on the right. Dr. Krisiloff assigned a grade 2 modifier for functional history adjustment under Table 16-6, page 516, based on painful distance walking and use of a cane. He assigned a grade 1 modifier for physical examination adjustment under Table 16-7, page 517, based on his findings of mild alignment/deformity and minimal palpatory findings. Based on x-ray findings of significant loss of cartilage space, Dr. Krisiloff assigned a grade 2 modifier for clinical studies adjustment under Table 16-8, page 519. He utilized the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) or (2-2) + (1-2) +

[9] On January 3, 2013 appellant's counsel requested proof that Dr. Krisiloff was properly selected to serve as a referee and on January 14, 2013 OWCP responded to the request.

(2-2) to find a net adjustment of -1 which would place appellant at grade B with 18 percent impairment of the right lower extremity.

In an March 8, 2013 report, an OWCP medical adviser, Andrew A. Merola, M.D., reviewed Dr. Krisiloff's report utilizing the sixth edition of the A.M.A., *Guides* and concurred with the impairment rating with respect to left and right lower extremities. He further stated that maximum medical improvement was reached on January 8, 2013.

In a decision dated March 26, 2013, OWCP denied appellant's claim for a schedule award for the left lower extremity.

In a separate decision dated March 26, 2013, OWCP granted appellant a schedule award for 18 percent impairment of the right lower extremity. It noted that he was previously granted an award for eight percent impairment of the right leg and therefore was entitled to an award for an additional 10 percent impairment. The award ran from January 8 to July 28, 2013.

On April 1, 2013 appellant requested an oral hearing that was held on April 1, 2013. He submitted an August 9, 2013 report from Dr. Weiss who disagreed with Dr. Krisiloff's findings and noted that Dr. Krisiloff did not measure joint space when determining impairment. Dr. Weiss opined that based on measurements of joint space on x-rays performed on April 6, 2012 and physical findings appellant had 26 percent impairment of the right leg.

In a decision dated November 4, 2013, an OWCP hearing representative affirmed OWCP's decision dated March 26, 2013.

LEGAL PRECEDENT

The schedule award provision of FECA[10] and its implementing federal regulations,[11] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[12] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[13] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[14]

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id.* at § 10.404(a).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[15] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment Class of Diagnosis condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[16] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[17] The grade modifiers are used on the net adjustment formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[18]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical consultant for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with OWCP medical consultant providing rationale for the percentage of impairment specified.[19]

ANALYSIS

OWCP accepted the claim for right knee contusion, cervical sprain, aggravation of left lower extremity varicose veins, muscle strain of the right groin, and crush injury to the right arm. Appellant had an authorized open arthrotomy of the right knee on February 11, 1998, a left varicose vein ligation and stripping on August 7, 1998, and a right knee arthroscopy on September 9, 1993 to repair a medial meniscus tear. OWCP found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Weiss, who found 26 percent impairment of the right leg and two percent impairment of the left leg, and OWCP referral physician, Dr. Rosman, a Board-certified orthopedist, who found that appellant had eight percent right leg impairment and no left leg impairment, and Dr. Nitzberg, a Board-certified vascular surgeon, who opined that appellant had no left leg impairment for his accepted aggravation of left varicose vein condition. Consequently, OWCP referred appellant to Dr. Krisiloff, a Board-certified orthopedist to resolve the conflict.[20] Dr. Krisiloff found that, under the sixth edition of the A.M.A., *Guides*, appellant had 18 percent impairment of the right lower extremity and no impairment to the left lower extremity. An OWCP medical adviser concurred with this finding and OWCP issued a schedule award for 18 percent impairment of the right leg, less eight percent previously awarded, and denied an award for the left leg.

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[15] A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[16] *Id.* at 494-531.

[17] *Id.* at 521.

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

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[20] *See* 5 U.S.C. § 8123(a) (if there is a 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).

The Board finds that, under the circumstances of this case, the opinion of Dr. Krisiloff was not that of an impartial medical specialist because there was no conflict of medical opinion at the time of OWCP's referral to Dr. Krisiloff. The reports from Dr. Weiss dated June 3, September 19, 2011, January 27 and July 27, 2012, while they applied the sixth edition of the A.M.A., *Guides,* were based on the findings from his May 29, 2001 examination, over 11 years earlier.[21] As these reports are not based on current findings, they are of diminished probative value and insufficient to create a conflict in medical evidence.[22]

Even though the report of Dr. Krisiloff is thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion, his report can still be considered for its own intrinsic value[23] and can still constitute the weight of the medical evidence.[24] In his January 8, 2013 report, Dr. Krisiloff reviewed the medical records and examined appellant and found that he had 18 percent rating impairment of the right leg and no impairment of the left leg under the sixth edition of the A.M.A., *Guides*. The Board finds that he properly applied these standards to reach his conclusion about the permanent impairment of appellant's right and left lower extremities.

Dr. Krisiloff took contemporaneous standing x-rays of the right knee that revealed current arthritic changes in the knee joint with loss of articular cartilage space, especially along the medial joint line with the formation of a medial osteophyte and patellofemoral changes. He opined that appellant had 18 percent impairment of the right leg under the A.M.A. *Guides* for primary knee joint arthritis. Dr. Krisiloff referenced Table 16-3, page 511, for which class 2, default grade C, primary knee joint arthritis is 20 percent leg impairment. He assigned a grade 2 modifier for functional history under Table 16-6, page 516 (based on painful distance walking and use of a cane); a grade 1 modifier for physical examination under Table 16-7, page 517 (based on mild alignment/deformity, minimal palpatory findings); a grade 2 modifier for clinical studies under Table 16-8, page 519 (based on x-ray findings of significant loss of cartilage space). Dr. Krisiloff utilized the net adjustment formula to find a net adjustment of -1 which placed appellant at a grade B (instead of the default grade C) with a right lower extremity impairment of 18 percent. He opined that the most appropriate diagnoses for rating purposes was the primary joint arthritis as appellant's disability was now due to his arthritic condition. Dr. Krisiloff opined that it was unreasonable to include impairment for the meniscal injury or patellofemoral arthritis as it would be duplicative. With regard to the left leg and previous varicose vein surgery, he found no evidence of current impairment noting that there was no

[21] Additionally, Dr. Weiss references an April 6, 2012 x-ray report of the right knee as a basis for his revised impairment rating but this report cannot be located in any of the consolidated claim files before the Board.

[22] *See J.K.*, Docket No. 11-1765 (issued April 12, 2012) (where the Board found that a physician's report in 2011 was of diminished probative value upon which to base a current permanent impairment rating as his findings were based on an examination performed in 2006).

[23] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[24] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (the Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (the Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

obvious venous insufficiency, no chronic discoloration or swelling in the leg, and vascular examination was otherwise normal.

An OWCP medical adviser reviewed Dr. Krisiloff's report, concurred in his findings, and correlated them to provisions in the A.M.A., *Guides*. The Board finds that an OWCP medical adviser properly applied the A.M.A., *Guides*, to the findings presented by Dr. Krisiloff in rating impairment to appellant's bilateral lower extremities. There is no other current medical evidence applying the sixth edition of the A.M.A., *Guides*, showing any greater impairment. The weight of the medical evidence therefore does not establish more than 18 percent total right leg impairment and zero percent impairment to the left leg under the A.M.A., *Guides*.

Appellant submitted an August 9, 2013 report from Dr. Weiss who reviewed and disagreed with Dr. Krisiloff's findings and reiterated his findings and opinion as set forth in his report of July 27, 2012. While Dr. Weiss' August 9, 2013 report, used the sixth edition of the A.M.A., *Guides*, he yet again based his rating on the stale findings from his May 29, 2001 examination. As this report is not based on current findings, it is of diminished probative value.

On appeal, appellant through counsel asserts that Dr. Krisiloff's report was vague and speculative and insufficient to be the weight of the evidence. As noted above, Dr. Krisiloff provided a well-rationalized report based upon a proper factual background and current medical findings. This evaluation establishes that appellant has no more than an 18 percent impairment of the right lower extremity and zero percent impairment of the left lower extremity. Appellant further asserts that the referee physician was not properly selected through PDS. This argument is without merit since, as explained above, there existed no medical conflict at the time appellant was referred to Dr. Krisiloff, such that he was not a referee physician.

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

The Board finds that appellant has not established that he has more than 18 percent impairment of the right lower extremity and zero percent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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