United States Department of Labor
Employees' Compensation Appeals Board

N.D., Appellant	)	
and	)	**Docket No. 14-1757**
	)	**Issued: June 2, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Knoxville, TN, Employer	)	

Appearances:
Appellant, pro se
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 August 11, 2014 appellant filed a timely appeal from February 24 and June 5, 2014 merit decisions of the Office of Workers' Compensation Programs.[1] Pursuant to the Federal Employees' Compensation Act[2] (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 is entitled to an increased schedule award for any extremity.

[1] Appellant died on October 7, 2014 after the filing of this appeal. As he properly filed the appeal in his lifetime, all that is needed is a substitute appellant to carry the appeal forward as the Board's jurisdiction was invoked during his lifetime. *See Albert F. Kimbrell*, 4 ECAB 662, 666 (1952). Accordingly, appellant's daughter, K.D., is recognized by the Board as the substitute appellant for the purposes of carrying the appeal forward.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 23, 1989 appellant, then a 41-year-old letter carrier, filed an occupational disease claim alleging that he sustained osteoarthritis of the right knee due to factors of his federal employment. OWCP accepted the claim for traumatic arthropathy and unspecified monoarthritis of the bilateral lower extremities, a sprain of the right rotator cuff, other affections of the bilateral shoulder region, a sprain of the metacarpophalangeal joint of the left thumb, and a right biceps tendon rupture.

By decision dated December 16, 1993, OWCP granted appellant a schedule award for a 20 percent permanent impairment of the right lower extremity and a 35 percent permanent impairment of the left lower extremity.[3] In a decision dated October 19, 2006, it granted him a schedule award for a 30 percent permanent impairment of the right lower extremity and a 13 percent permanent impairment of the left lower extremity.

On December 9, 2008 OWCP granted appellant a schedule award for a nine percent permanent impairment of each upper extremity.[4] On February 9, 2010 it found that he was entitled to an award for an additional nine percent permanent impairment of the right lower extremity.

On June 5, 2012 OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right upper extremity.[5] On June 6, 2012 it denied his claim for an additional schedule award for the right arm.[6] By decision dated April 16, 2013, OWCP granted appellant a schedule award for a seven percent permanent impairment of the left thumb.

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[3] By decision dated December 7, 1989, OWCP granted appellant a schedule award for a 20 percent permanent impairment of the right lower extremity. On August 27, 1991 it vacated its December 7, 1989 decision after determining that he was not at maximum medical improvement. In a decision dated June 14, 1993 and finalized June 23, 1993, an OWCP hearing representative determined that appellant had no more than a 20 percent permanent impairment of the left lower extremity and 20 percent permanent impairment of the right lower extremity and instructed OWCP to provide him with a schedule award decision. In a decision dated July 30, 1993, OWCP denied modification of the June 14, 1993 decision. By decision dated December 16, 1993, it determined that appellant received an overpayment of compensation because it paid a schedule award prematurely and further found that he was not entitled to waiver. On July 1, 1994 an OWCP hearing representative found that OWCP properly calculated his entitlement to a lump sum for the remainder of his schedule award. On August 18, 1997 the Board set aside July 1, 1994 and December 16, 1993 decisions. The Board found that OWCP improperly determined that appellant was not entitled to wavier of recovery of an overpayment. Docket No. 95-516 (issued August 18, 1997).

[4] In decision dated March 30 and October 22, 2007, OWCP denied appellant's request for a lump sum schedule award.

[5] In decisions dated December 9, 2010 and March 16, 2011, OWCP denied appellant's request for an increased schedule award. In a nonmerit decision dated June 20, 2011, it denied his request for reconsideration of the March 16, 2011 decision. In its March 16, 2011 decision, OWCP had modified the December 9, 2010 decision to reflect that the only issue was whether appellant had a greater impairment of the right upper extremity. On February 1, 2012 it vacated the March 16, 2011 decision.

[6] On September 26, 2012 OWCP modified its June 5, 2012 decision to reflect that March 26, 2010 was the date of maximum medical improvement. In a nonmerit decision dated December 12, 2012, it denied appellant's request for reconsideration of its September 26, 2012 decision.

Appellant requested an increase schedule award on September 27, 2013. Medical reports were forwarded to OWCP.

On July 23, 2013 Dr. Susan N. Pick, a Board-certified orthopedic surgeon, evaluated appellant's permanent impairment of the bilateral knees. On examination she measured range of motion of the left knee as 10 to 80 degrees with mild lateral laxity and 3 to 4 millimeters of anterior posterior laxity. For the right knee, Dr. Pick measured range of motion of 10 to 50 degrees of flexion with a trace amount of medial laxity. X-rays revealed two degrees valgus alignment on the right and four degrees valgus alignment on the left. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009), she identified the diagnosis as a class 3 total knee replacement due to his fair result under Table 16-3 on page 511, which yielded a default value of 37 percent. Dr. Pick found a grade modifier 2 for functional history based on appellant's "use of assistive devices" and a grade modifier 3 for physical examination due to his loss of range of motion. She concluded that appellant had a 34 percent permanent impairment of the left lower extremity.

For the right lower extremity, Dr. Pick identified the diagnosis as a class 4 total knee replacement based on appellant's poor result, which yielded a default value of 67 percent under Table 16-3. She found a grade modifier 3 for functional history and grade modifier 4 for physical examination based on loss of range of motion, for a total right lower extremity impairment of 63 percent.

In an impairment evaluation dated August 23, 2013, Dr. William L. Johnson, a Board-certified orthopedic surgeon, reviewed appellant's history of a prior left rotator cuff repair and a repair of the right rotator cuff "with the most recent arthroscopy in February 2013 showing a rupture of the rotator cuff proximal with no repairable tissue remaining." On examination he found 90 degrees of left shoulder abduction and flexion, a functional rotator cuff, and near full range of motion of the right shoulder. Referencing the A.M.A., *Guides*, for the left upper extremity, Dr. Johnson found a 5 percent impairment due to the prior rotator cuff tear and a 10 percent impairment due to the distal clavicle resection, for a total upper extremity impairment of 15 percent. For the right upper extremity, he found a 10 percent impairment of the acromioclavicular (AC) joint after a distal clavicle resection, a 5 percent impairment due to post-traumatic degenerative disc disease, and a 6 percent impairment for residuals symptoms of the rotator cuff tear, which he combined to find a 20 percent right upper extremity impairment.

OWCP referred the case to an OWCP medical adviser for review. It indicated that appellant had also received a schedule award for a five percent left upper extremity (elbow injury) impairment under file number xxxxx915 and a two percent left foot impairment under file number xxxxxx137.

On February 19, 2014 an OWCP medical adviser reviewed the impairment evaluations from Dr. Johnson and Dr. Pick. He found that Dr. Johnson combined shoulder impairments in rating the extent of appellant's impairment instead of using the single greatest impairment. The medical adviser determined that the most relevant diagnosis was the distal clavicle resection, which yielded a 10 percent impairment of each upper extremity. He noted that appellant had previously received a schedule award for a 7 percent impairment of the thumb, which he found converted to a 3 percent left upper extremity impairment, and then combined to find a 13 percent

total left upper extremity impairment. The medical adviser opined that appellant had no additional right upper extremity impairment.

For the left lower extremity, the medical adviser concurred with Dr. Pick's finding of a 34 percent left lower extremity impairment. He thus found that appellant was entitled to an additional 13 percent impairment of the left lower extremity. For the right lower extremity, the medical adviser determined that Dr. Pick improperly combined the diagnosis-based impairment of a total knee replacement with loss of range of motion of the knee. He found that appellant had no more than the previously awarded 36 percent permanent impairment of the left lower extremity.

By decision dated February 24, 2014, OWCP granted appellant a schedule award for an additional 10 percent permanent impairment of the left upper extremity and an additional 13 percent permanent impairment of the left lower extremity.

On March 3, 2014 appellant requested reconsideration. He argued that he was entitled to additional schedule awards for each extremity based on the findings of Dr. Pick and Dr. Johnson. Appellant enclosed a January 10, 2014 statement in which he argued that the reports of his attending physicians were entitled to more weight than the medical adviser who had not examined him.

By decision dated June 5, 2014, OWCP denied modification of its February 24, 2014 decision.

On appeal appellant argues that he should receive an additional 4 percent impairment of the right lower extremity as Dr. Pick found that he had a 63 percent impairment and he previously received an award for a 59 percent impairment. He further maintains that he is entitled to an additional 3 percent left lower extremity impairment as she found a 34 percent impairment of the left lower extremity and he previously received an award for a 31 percent impairment. Appellant additionally alleges that he is entitled to an additional 10 percent right upper extremity impairment and a 6 percent left upper extremity based on Dr. Johnson's reports. He indicates that OWCP overpaid him for the lower extremities and underpaid him for the upper extremities.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal regulations,[8] 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

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

ANALYSIS

In decision dated 1993 through 2010, OWCP paid appellant schedule awards totaling a 59 percent permanent impairment of the right lower extremity, a 48 percent permanent impairment of the left lower extremity, a 10 percent permanent impairment of the right upper extremity, a 9 percent left upper extremity impairment, and a 7 percent left thumb impairment, which equals a 3 percent left upper extremity impairment, which equaled a 12 percent total left upper extremity. It additionally noted that he had received a schedule award for an impairment of the left upper extremity and left foot in other file numbers.

In 2013, appellant claimed an increased schedule award and submitted impairment evaluations from Dr. Johnson addressing his upper extremity impairment and from Dr. Pick addressing his lower extremity impairment.

For the right upper extremity, Dr. Johnson discussed appellant's history of a rotator cuff repair and noted that a February arthroscopy showed a right rotator cuff rupture with no repairable tissue. On the right side, he found that appellant had a 6 percent impairment due to the rotator cuff tear, a 5 percent impairment due to post-traumatic degenerative disease, and a 10 percent impairment for status post distal clavicle resection. Dr. Johnson combined the impairment ratings and concluded that appellant had a 20 percent right upper extremity impairment. The A.M.A., *Guides*, however, provides, "If a patient has 2 significant diagnoses, for instance, rotator cuff tear and biceps tendinitis, the examiner should use the diagnosis with the highest causally-related impairment rating for the impairment calculation. Thus, when rating a rotator cuff injury/impairment or glenohumeral pathology/surgery, incident resection arthroplasty of the [AC] joint is not rated."[12] Dr. Johnson, consequently, should not have combined the impairments from the rotator cuff tear, distal clavicle resection, and arthritis. An OWCP medical adviser reviewed his report and determined that the rating for the distal clavicle resection yielded the highest impairment. Consequently, Dr. Johnson found a 10 percent impairment of the right upper extremity. Appellant had previously received schedule awards

[9] *Id*. at § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides* at 494-531.

[12] A.M.A., *Guides* at 387; *see also R.R.*, Docket No. 14-998 (issued August 26, 2014).

totaling a 10 percent right upper extremity impairment; therefore, appellant is not entitled to an additional award.

For the left upper extremity, Dr. Johnson found a 5 percent impairment for the rotator cuff tear and a 10 percent impairment for the distal clavicle resection, which yielded a combined impairment of 15 percent. As discussed, he incorrectly combined the impairment ratings. Upon review, the medical adviser used the diagnosis that provided the high rating, the distal clavicle resection, and found a 10 percent left upper extremity impairment. Dr. Johnson noted that appellant had previously received a schedule award for a seven percent left thumb impairment, which he converted to a three percent upper extremity impairment.[13] The medical adviser combined the upper extremity impairments to find a total left upper extremity impairment of 13 percent. He thus found that appellant was entitled to an award for an additional 10 percent left upper extremity impairment. OWCP, however, previously granted appellant schedule awards for a 9 percent left upper extremity impairment and a 7 percent left thumb impairment, which equals a 12 percent left upper extremity impairment.[14] Further, it indicated that he had received a prior award of five percent for the left upper extremity under file number xxxxxx915. Consequently, the case will be remanded to combine the case files and refer both records to the medical adviser to reconsider whether appellant is entitled to an additional schedule award for the left upper extremity.

For the left lower extremity, Dr. Pick noted that appellant had range of motion from 10 to 80 degree, mild lateral laxity and up to 4 millimeters of anterior posterior laxity. X-rays showed four degrees valgus alignment. Dr. Pick utilized the diagnosis of a class 3 impairment for a total knee replacement set forth in the knee regional grid at Table 16-3 on page 511, applicable for replacements that yield a fair result, with fair position, mild instability, and/or mild motion deficit. She applied a grade modifier 2 for functional history as appellant used assistive devices and a grade modifier 3 for physical examination based on his loss of range of motion. Dr. Pick did not apply a grade modifier for clinical studies as it appears that she used the clinical studies to determine the appropriate class. Application of the net adjustment formula discussed above,[15] yielded an adjustment one place to the left from the default value of 37 percent to an impairment rating of 34 percent. An OWCP medical adviser reviewed Dr. Pick's finding and concurred with her determination that appellant had a 34 percent left lower extremity impairment. The medical adviser found that he was entitled to an additional award for a 13 percent left lower extremity impairment. Appellant, however, previously received schedule awards for the left lower extremity totaling 48 percent, a two percent left foot impairment under file number xxxxxx915, and thus he is not entitled to an additional award for the left lower extremity.

For the right knee, Dr. Pick measured range of motion of 10 to 50 degrees of flexion with a trace amount of medial laxity. X-rays showed two degrees valgus alignment. Dr. Pick used the diagnosis of a class 4 total knee replacement applicable for poor results, applicable for knee replacements with poor position, moderate-to-severe instability, and/or moderate-to-severe

[13] *Id*. at 421, Table 15-12.

[14] *Id*. at 604.

[15] (GMFH - CDX) + (GMPE - CDX), or (2-3) + (3-3) = -1.

motion deficit.[16] She found grade modifier 3 for functional history and grade modifier 4 for physical examination due to loss of motion. Dr. Pick applied the grade modifiers to the default value of 67 percent and concluded that appellant had a 63 percent right lower extremity impairment. The medical adviser determined that her impairment rating for the right lower extremity was incorrect because she combined the diagnosis-based impairment with a rating for range of motion. It appears, however, that Dr. Pick used range of motion only to determine the appropriate grade modifier for physical examination. On remand, the medical adviser should reconsider the extent of appellant's right lower extremity impairment. Following such development as deemed necessary, OWCP should issue a new decision regarding the extent of the right lower extremity impairment.

On appeal, appellant argues that OWCP should award him the difference between his prior awards and the impairment ratings by Dr. Johnson and Dr. Pick. However, it is well established that, when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by a medical adviser.[17]

CONCLUSION

The Board finds that appellant has no more than a 48 percent permanent impairment of the left lower extremity and a 10 percent permanent impairment of the right upper extremity. The Board further finds that the case is not in posture for decision regarding the extent of his right lower extremity impairment and left upper extremity impairment.

[16] A.M.A., *Guides* at 511, Table 16-3.

[17] *See J.Q.*, 59 ECAB 366 (2008).

ORDER

IT IS HEREBY ORDERED THAT the June 5 and February 24, 2014 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 2, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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