United States Department of Labor
Employees' Compensation Appeals Board

B.F., Appellant	)	
and	)	**Docket No. 15-0826**
	)	**Issued: November 5, 2015**
DEPARTMENT OF THE AIR FORCE, WRIGHT PATTERSON AIR FORCE BASE, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 2, 2015 appellant, through counsel, filed a timely appeal from a January 28, 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 the case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 3, 2005 appellant, then a 49-year-old configuration and data management specialist, sustained bilateral knee injuries on February 3, 2005, when she was struck by a van and pinned between two vehicles while on temporary-duty assignment in Texas. She stopped work on February 3, 2005. OWCP accepted appellant's claim for contusion of the bilateral knees, sprain/strain of an unspecified site of the bilateral knees and legs, bilateral myalgia and myositis, old collateral ligament injury, tear of the medial meniscus of the left knee, enthesopathy of the bilateral knees unspecified, and right chondromalacia patellae.

Appellant underwent a left knee magnetic resonance imaging (MRI) scan on March 21, 2005 which revealed bruising secondary to crushing injury, bruising of lateral aspect of the patella, possible lateral meniscus tear, small joint effusion, and chondromalacia patella. A right knee MRI scan revealed a bruising of the anterior aspect of the tibia secondary to trauma, chondromalacia patella, and degenerative disease of the knee with subchondral cyst in the medial femoral condyle.

Appellant came under the treatment of Dr. Jan E. Saunders, an osteopath Board-certified in orthopedic surgery. On March 23, 2006 Dr. Saunders performed an authorized left knee arthroscopy with patellar chondroplasty and abrasion chondroplasty of the medial femoral condyle and trochlea. A grade 2 medial collateral ligament tear and partial anterior cruciate ligament disruption was observed. On July 6, 2006 Dr. Saunders performed an authorized arthroscopy of the right knee with chondroplasty of the medial femoral condyle, trochlea, and patella.

On April 17, 2012 appellant filed a claim for a schedule award. She submitted an August 3, 2012 report from Dr. Martin Fritzhand, an osteopath, who noted that appellant had reached maximum medical improvement in January 2008. On examination, Dr. Fritzhand reported arthroscopic portal scars bilaterally, 1 to 2+ crepitus bilaterally, and tenderness on palpation of both the medial and lateral joint lines of the left knee. Appellant had pain on patellar compression of the right knee, and knee flexion was diminished to 90 degrees bilaterally. Muscle strength was intact, the right calf had two inches of atrophy, and pinprick and light touch were diminished over the lower legs. Dr. Fritzhand noted that appellant was unable to weight-bear, ambulate, or stand for more than short periods. He advised that she had difficulty going up and down stairs and was unable to squat or kneel.

Pursuant to the sixth edition of the American Medical Association, *Guides*[2] *to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Fritzhand found that appellant had 16 percent impairment of the left leg and 7 percent impairment of the right leg.

Under Table 16-3, page 511 of the A.M.A., *Guides*, Knee Regional Grid, Primary Knee Joint Arthritis, appellant had two-millimeter cartilage interval for the left knee. Dr. Fritzhand noted x-rays of the left knee document the cartilage interval. He noted two-millimeter cartilage interval for the left knee was a class 2 impairment, grade C, with default impairment of 20 percent of the leg. Pursuant to Table 16-6, Dr. Fritzhand found grade modifier for functional

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

history was 1 (AAOS 18); pursuant to Table 16-7, the grade modifier for physical examination was 1; and pursuant to Table 16-8, the grade modifier for clinical studies was 1. Appellant utilized the net adjustment formula to find a net adjustment of -2 which would place appellant at grade A with 16 percent permanent impairment to the left leg.

For the right knee, Dr. Fritzhand used Table 16-3, Knee Regional Grid, Strain/Tendinitis, with mild motion deficits to assess impairment. He found appellant was a class 1 impairment with a default grade C. Dr. Fritzhand opined that she sustained seven percent permanent impairment to the right leg.

In a report dated May 4, 2013, an OWCP medical adviser, Dr. Morley Slutsky reviewed Dr. Fritzhand's report and disagreed with his findings. He determined that the right leg impairment was four percent. Dr. Slutsky disagreed with the diagnosis of knee strain/tendinitis Dr. Fritzhand had used for rating purposes. He stated that neither the right knee MRI scan nor intraoperative findings supported knee strain/tendinitis. Instead, Dr. Slutsky found the most impairing diagnosis in the right knee region was patellofemoral arthritis (with full-thickness articular cartilage defect) which he found to be consistent with the clinical findings at maximum medical improvement, which was patellofemoral crepitus and pain with compression. He noted that appellant did not have objective evidence of knee sprain or tendinitis either diagnostically or intraoperatively. Dr. Slutsky noted that she was a class 1 for patellofemoral arthritis with full-thickness articular cartilage defect with default impairment of three percent for grade C. He noted that the grade modifier for Functional History (GMFH) was 1, the grade modifier for Physical Examination (GMPE) was 2 and the grade modifier for Clinical Studies (GMCS) was 1. Dr. Slutsky applied the net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) of (1-1) + (2-1) + (1-1) for a net adjustment of 1 and a final grade of D for four percent impairment of the right leg.

With regard to left leg, Dr. Slutsky found that appellant had eight percent impairment. He agreed with Dr. Fritzhand's diagnosis of primary knee joint arthritis. However, Dr. Slutsky did not agree that there was evidence of two millimeters of primary knee joint narrowing for a class 2 category as Dr. Fritzhand did not provide a radiology report supporting this finding nor did he document actually reviewing left knee x-rays in his report. He noted that appellant's intraoperative findings supported full-thickness articular cartilage defect in the primary knee joint which was a class 1, default seven percent impairment for grade C. Dr. Slutsky noted the grade modifier for functional history was 1, the grade modifier for physical examination was 2 due to calf atrophy, and the grade modifier for clinical studies was not applicable. He used the net adjustment formula and noted a final net adjustment of 1 which yielded a grade D impairment of eight percent for class 1 primary knee joint arthritis.

In a decision dated April 7, 2014, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity and four percent impairment of the right lower extremity.

On April 29, 2014 appellant requested an oral hearing which was held on November 14, 2014.

In a decision dated January 28, 2015, an OWCP hearing representative affirmed the decision dated April 7, 2014.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing federal regulations[4] 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.[5] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[6] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[7]

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).[8] 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, physical examination and clinical studies.[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] 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.[11]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical consultant for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical consultant providing rationale for the percentage of impairment specified.[12]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a).

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

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

[8] A.M.A., *Guides* 3, section 1.3, The ICF: A Contemporary Model of Disablement.

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

[10] *Id.* at 521.

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

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

ANALYSIS

OWCP accepted the claim for contusion of the bilateral knees, sprain/strain of an unspecified site of the bilateral knees and legs, bilateral myalgia and myositis, old collateral ligament injury, tear of the medial meniscus of the left knee, enthesopathy of the bilateral knees unspecified, and right chondromalacia patellae. It authorized arthroscopic surgery which was performed on the left knee on March 23, 2006 and the right knee on July 6, 2006. On April 7, 2014 appellant was granted a schedule award for eight percent permanent impairment of the left lower extremity and four percent impairment of the right lower extremity using the sixth edition of the A.M.A., *Guides*.

OWCP based its schedule award decision on the August 3, 2012 report of Dr. Fritzhand and the May 3, 2013 report of Dr. Slutsky. The Board has carefully reviewed the medical adviser's report and notes that, while the doctor found eight percent ratable impairment for the left lower extremity and four percent ratable impairment for the right lower extremity, it is not clear to what extent he considered the medical evidence of record in reaching his opinion.

With regard to the left lower extremity, Dr. Slutsky agreed with Dr. Fritzhand's diagnosis of primary knee joint arthritis, but Dr. Slutsky did not agree that there was evidence of two millimeters of primary knee joint narrowing for a class 2 category. He found no evidence of a radiology report supporting this finding nor did he believe Dr. Fritzhand had documented actually reviewing left knee x-rays in his report.

However, Dr. Fritzhand's report dated August 3, 2012 provided that, under Table 16-3, page 511 of the A.M.A., *Guides*, Knee Regional Grid, Primary Knee Joint Arthritis, appellant had two-millimeter cartilage interval for the left knee. He specifically noted that x-rays of the left knee documented the cartilage interval. Dr. Fritzhand noted that two-millimeter cartilage interval for the left knee was a class 2 impairment, grade C, with default impairment of 20 percent of the leg. He noted that, pursuant to Table 16-6, the grade modifier for functional history was 1 (AAOS 18); pursuant to Table 16-7, the grade modifier for physical examination was 1; and pursuant to Table 16-8, the grade modifier for clinical studies was 1. Dr. Fritzhand utilized the net adjustment formula to find a net adjustment of -2 which would place appellant at grade A with 16 percent permanent impairment to the left leg. These findings would allow for an impairment rating greater than the eight percent impairment granted for the left lower extremity. With regard to the right leg, Dr. Slutsky did not fully explain the basis for his disagreement with Dr. Fritzhand regarding the strain or tendinitis diagnosis in view of the multiple accepted conditions.

Proceedings under FECA are not adversary in nature nor were OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done. Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[13]

[13] *John W. Butler*, 39 ECAB 852 (1988).

In view of the disparity in the evaluations of the medical adviser and Dr. Fritzhand and the failure of the medical adviser to adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*, the Board finds that OWCP should further develop the medical evidence to determine the extent of the permanent impairment of her lower extremities pursuant to the A.M.A., *Guides*. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision regarding the degree of permanent impairment of appellant's bilateral lower extremities.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development in accordance with this decision of the Board.

Issued: November 5, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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