United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 16-0587**
	)	**Issued: August 23, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Marshall, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2016 appellant, through counsel, filed a timely appeal from a December 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 has established more than 21 percent permanent impairment of her right lower extremity, for which she received a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 18, 2012 appellant, then a 56-year-old modified city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she twisted her right knee when she stepped down off a sidewalk. She stopped work on the date of injury and returned to work full duty on April 20, 2012. OWCP accepted the claim for right knee medial meniscus tear, sprain, and contusion. Appellant stopped work on July 24, 2012 to undergo an authorized right knee arthroscopic surgery with partial medial meniscectomy. OWCP paid her compensation benefits and retained her on the periodic compensation rolls.

Under OWCP File No. xxxxxx181 OWCP also accepted aggravation of right knee osteoarthritis as of April 18, 2012. This claim was consolidated with the current claim (OWCP File No. xxxxxx967) as the master file.

On May 6, 2013 appellant underwent an authorized right knee arthroplasty (total knee replacement).

In a June 25, 2013 report, Dr. Phillip Kinman, an orthopedic surgeon, indicated that appellant was doing well following right knee joint replacement. He noted that she reported increasing problems with the left knee following the right knee replacement surgery and that the left knee x-rays disclosed arthritis. Dr. Kinman opined that both knees developed arthritis as a result of her many years of walking a mail route but that the left knee arthritis seemed to be increased.

In an August 26, 2013 report, Dr. Kinman reiterated that appellant had developed arthritis in both knees as a result of many years of walking on her mail route. He indicated that when appellant was last seen, she had more pain with her left side which was related to work-type problems but also due to throwing her weight on this side after the total right knee replacement.

In a September 14, 2013 report, an OWCP medical adviser reviewed the medical record and opined that appellant's left knee condition was not consequential to the accepted right knee medial meniscus tear and aggravation of arthritis of the right knee. He indicated that there was no documented evidence of arthritis in the left knee. If appellant had left knee arthritis, then it was likely due to factors other than work. The medical adviser explained that a right knee arthroplasty would not cause an exacerbation of arthritis because the knee could handle physiologic and supraphysiologic loads.

In an October 4, 2013 letter, OWCP requested that Dr. Kinman review OWCP's medical adviser's September 14, 2013 report regarding a consequential injury and provide objective medical evidence regarding left knee arthritis.

In an October 11, 2013 letter, Dr. Kinman's office indicated that he had retired as of September 3, 2013. All the medical records from his office pertaining to appellant's left knee condition were attached.

OWCP referred the medical record, a statement of accepted facts, and a list of questions to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon, for a second opinion medical examination of appellant to determine whether she sustained an injury to her left knee as a result

of the work injury on or about April 18, 2012 and whether she continued to have residuals/disability as a result of the accepted, work-related right knee injury.

In a January 23, 2014 report, Dr. Mindrebo noted that right x-ray films of the right knee dated May 21 and December 10, 2013 provided by appellant showed a well-fixed right knee prosthesis. A June 25, 2013 x-ray showed advanced arthritis in the left knee. Examination findings of the right knee showed full flexion and a well-healed incision. There was no instability or crepitus. Dr. Mindrebo opined that appellant reached maximum medical improvement with respect to the right knee. He opined that there was no employment-related left knee condition referable to the April 18, 2012 work incident. Dr. Mindrebo also opined that no further treatment was required for the right knee besides periodic x-rays to monitor the knee replacement.

In a March 26, 2014 supplemental report, Dr. Mindrebo opined that the left knee arthritis was not causally related to walking at work. He explained that the left knee arthritis was congenital or resulted from inflammatory disease. Dr. Mindrebo explained that, while appellant had to initially place more weight on the left knee while recovering from right knee replacement, it was a temporary situation and insufficient to aggravate or worsen the left knee arthritis.

In a January 27, 2014 report, Dr. Gregory M. Whitsett, an orthopedic surgeon, indicated that the right knee x-rays of that date showed the knee replacement in place with no complications. Right knee had range of motion of 0 to 120 degrees and was well-balanced ligamentously. There was no effusion and appellant was neurovascularly intact distally.

Effective August 25, 2014, appellant elected retirement benefits from the Office of Personnel Management.

On October 30, 2014 appellant submitted a Form CA-7 claim for compensation requesting schedule award compensation benefits.

In a December 16, 2014 report, Dr. Neil Allen, an internist and neurologist, provided examination findings of November 19, 2014. He opined that appellant had reached maximum medical improvement and her current symptoms were pain, instability, clicking, swelling, and limited mobility. Examination revealed stiff, antalgic gait, negative for atrophy at calf. Global tenderness through the joint, but negative for crepitus. Range of motion was 110 degrees of flexion -5 degrees of extension on right side and grade 1 posterior drawer and grade 1 Lachman's. Based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] (hereinafter A.M.A., *Guides),* and citing to tables and figures, Dr. Allen opined that appellant had 31 percent right lower extremity impairment. Under Table 16-3, page 511, he determined class 3 grade C for total knee replacement with a "fair" result (37 percent), with modifiers of 1 for functional history (antalgic gait), 1 for physical examination (mild palpatory findings, negative atrophy, full range of motion), and 4 for clinical studies for a net minus 3 adjustment. This equated to class 3, grade A or 31 percent impairment of the right lower extremity.

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

In a March 27, 2015 report, an OWCP medical adviser reviewed the record, the statement of accepted facts, and Dr. Allen's December 16, 2014 report. He opined that appellant had 21 percent right lower extremity impairment. Under Table 16-3, page 511, the medical adviser determined class 2 grade C for total knee replacement with a "good" result (25 percent), with modifiers of 1 for functional history, 1 for physical examination and 1 for clinical studies for a net minus 3 adjustment. This equated to class 2, grade A or 21 percent impairment. The medical adviser placed appellant at maximum medical improvement as of January 22, 2014, the date of Dr. Mindrebo's examination. He stated that he used the diagnosis of a total knee arthroplasty with good result as Dr. Mindrebo indicated that appellant had no instability while Dr. Allen indicated that appellant had instability in the prosthesis and 110 degrees range of motion. The medical adviser explained that a total knee examination is different than a native knee examination and that Dr. Mindrebo has more experience with total knee examinations since he is an orthopedic surgeon and confirmed that the knee was stable. He additionally noted that Dr. Allen gave a grade modifier 4 to appellant's clinical studies, but the total knee was done for degenerative joint disease which is primarily diagnosed using radiographs. Per Dr. Allen's note, the radiographs showed mild degenerative joint disease; therefore, it should have been a grade modifier 1.

By decision dated April 7, 2015, OWCP awarded appellant a schedule award for 21 percent permanent impairment of the right lower extremity. The award ran 60.48 weeks from January 22, 2014 to October 23, 2015. The date of maximum medical improvement was August 26, 2014.

On April 17, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP Branch of Hearings and Review hearing representative, which was held on November 4, 2015. At the hearing, counsel argued that the medical adviser did not provide rationale for a rating based on a good result rather than a fair result for the knee replacement surgery. No additional evidence was received into record.

By decision dated December 11, 2015, OWCP's hearing representative affirmed OWCP's April 7, 2015 decision. He found that OWCP properly referred the case to OWCP's medical adviser and relied on his opinion in granting the schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.[4] 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

[4] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[5]

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[6] With respect to knee impairment, the A.M.A., *Guides* provide a regional grid at Table 16-3. The class of impairment Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH), Table 16-6, Physical Examination (GMPE), Table 16-7, and Clinical Studies (GMCS), Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[7] The permanent impairment must be causally related to an accepted employment injury.[8]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[9] The medical adviser's opinion can constitute the weight of the medical evidence in a schedule award case where the percentage estimate by the attending physician is not properly based on the A.M.A., *Guides*.[10]

Section 8123(a) provides that, 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.[11] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

ANALYSIS

The Board finds that there is an unresolved conflict in the medical opinion evidence.

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[5] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.,* Docket No. 09-2231 (issued May 14, 2010).

[6] *Supra* note 2 at section 1.3, The ICF: A Contemporary Model of Disablement.

[7] The net adjustment is up to +2 (grade E) or -2 (grade A).

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

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

[10] *Linda Beale*, 57 ECAB 429 (2006).

[11] *R.C.,* Docket No. 12-437 (issued October 23, 2012).

[12] 20 C.F.R. § 10.321.

OWCP accepted the conditions of right knee medial meniscus tear, sprain and contusion. Under claim number xxxxxx181, it had accepted that appellant sustained an aggravation of right knee osteoarthritis as of April 18, 2012 and that claim was consolidated with the current claim. Compensation benefits were paid, including a July 24, 2012 right knee arthroscopic surgery with partial medial meniscectomy and a May 6, 2013 right knee arthroplasty (total knee replacement). OWCP issued a schedule award for 21 percent permanent impairment of the right lower extremity on April 7, 2015.

There remains an unresolved conflict as to the impairment related to her right lower extremity between appellant's treating physician and OWCP's medical adviser. In a December 16, 2014 report, Dr. Allen opined that appellant had 31 percent right lower extremity impairment based on a total knee replacement with a fair result. In a March 27, 2015 report, the medical adviser opined that appellant had 21 percent right lower extremity impairment based on a total knee replacement with a good result. Under Table 16-3, page 511 of the A.M.A., *Guides,* a total knee replacement is classified as good result when the knee is in good position, stable, and functional. A fair result is obtained when the knee replacement is in fair position, mild instability and/or mild motion deficit. The dispute between Dr. Allen and OWCP's medical adviser centers on whether appellant's total knee replacement had a "good" or "fair" result when rating appellant pursuant to Table 16-3, page 511 of the A.M.A., *Guides*.

If there is disagreement between OWCP's medical adviser and appellant's physician, OWCP will appoint a third physician who shall make an examination.[13] For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.[14] The Board finds that the two medical opinions of Dr. Allen and OWCP's medical adviser are of equal weight. Accordingly, there remains an unresolved conflict in the medical evidence.

The Board finds that a conflict exists in the medical evidence with regard to the amount of appellant's impairment of her right lower extremity. The Board will remand the case for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence.

[13] 5 U.S.C. § 8123(a); *see Y.A.,* 59 ECAB 701 (2008).

[14] *Darlene R. Kennedy,* 57 ECAB 414 (2006).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further consideration consistent with this opinion.

Issued: August 23, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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