United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 16-0369**
	)	**Issued: March 11, 2016**
U.S. POSTAL SERVICE, POST OFFICE, North Ridgeville, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 22, 2015 appellant, through counsel, filed a timely appeal from a July 21, 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 this case.

ISSUE

The issue is whether appellant has more than four percent left leg or zero percent right leg permanent impairment.

FACTUAL HISTORY

On January 19, 2011 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 18, 2011 he sustained a left knee and back injury in the performance of duty. He indicated that he fell on ice after being chased by a dog.

[1] 5 U.S.C. § 8101 *et seq.*

By decision dated March 4, 2011, OWCP denied the claim for compensation, finding the medical evidence was insufficient to establish the claim. Appellant requested reconsideration and submitted a March 7, 2011 report from Dr. Kim Stearns, a Board-certified orthopedic surgeon. Dr. Stearns provided a history and indicated that a magnetic resonance imaging (MRI) scan revealed a partial tear of the left medial meniscus.

OWCP accepted the claim on March 14, 2011 for left knee sprain, and left knee medial meniscus tear. The record indicates that OWCP has also accepted a displacement of lumbar intervertebral disc without myelopathy. Appellant stopped work and began receiving wage-loss compensation. He underwent left knee surgery on July 7, 2011 and L4-5 surgery on August 15, 2012. The July 7, 2011 surgical report from Dr. Stearns indicated that appellant had a grade 3 chondral flap tear and the medial meniscus was found intact.

Appellant was referred for a second opinion examination by Dr. Manhal Ghanma, a Board-certified orthopedic surgeon. In a report dated October 17, 2012, Dr. Ghanma provided a history and results on examination. He noted 120 degrees of flexion in the left knee, positive Waddell's signs to rotation but negative to resisted leg lifts, no instability and normal motor strength. Dr. Ghanma reported knee reflexes were fine bilaterally but ankle reflexes were depressed bilaterally. He reported that left knee sprain had resolved, no medial meniscus tear was found at surgery, and the L4-5 disc herniation had been surgically excised. Dr. Ghanma indicated that appellant likely had some degenerative changes in the posterior horn of the left knee medial meniscus. He opined that appellant could return to work with a 50-pound lifting restriction based on lumbar disc surgery. On January 14, 2013 appellant returned to full-time work with restrictions.

Appellant submitted a January 2, 2013 report from a chiropractor, Dr. Brian Bennett, providing results on examination of the back and lower extremities. Dr. Bennett reported that clinical impressions were consistent with postsurgical lumbar disc surgery. By report dated June 7, 2013, he again provided results on examination of the back and lower extremities. Dr. Bennett reported that clinical impressions were consistent with appellant's work-related accident.

In a report dated May 23, 2013, Dr. Martin Fritzhand, a Board-certified urologist, provided a history and results on examination. He indicated flexion of the left knee was 150 degrees, with tenderness to patellar compression. Dr. Fritzhand reported pinprick and light touch were diminished over the medial aspect of the lower legs, the medial aspect of the left foot as well as the dorsum of the right foot. He opined that appellant had sensory loss in both legs and that appellant had ongoing discomfort in the low back and left knee. With respect to permanent impairment, Dr. Fritzhand identified Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) for a meniscal injury and found two percent left leg permanent impairment. He then indicated that under Table 16-11, appellant had five percent permanent impairment to each leg. Dr. Fritzhand opined that under *The Guides Newsletter*, appellant had a severe L5 nerve root impairment. He combined five percent and one percent under the Combined Values Chart of the A.M.A., *Guides* for six percent left leg, and five percent right leg permanent impairment.

OWCP referred the case to an OWCP medical adviser, Dr. Morley Slutsky, who is Board-certified in occupational medicine, for review. In a report dated September 9, 2013, Dr. Slutsky opined that appellant had one percent permanent impairment to the left leg under Table 16-3. He found there was no documented meniscal tear and the proper diagnosis was soft tissue lesion. As to an impairment based on a spinal nerve, the medical adviser noted that a January 2, 2013 report from a chiropractor found only a mildly reduced sensitivity in the left L5 dermatome affecting the left leg. The medical adviser then indicated that the chiropractor on June 7, 2013 found no new neurologic changes. According to Dr. Slutsky, appellant should be rated for moderate sensory loss with three percent permanent impairment. He concluded that appellant had four percent left leg permanent impairment.

On April 16, 2014 OWCP prepared a statement of accepted facts (SOAF), which recorded six prior claims from September 1, 1999 to May 25, 2010. OWCP indicated that the claim dated September 1, 1999 was accepted for aggravation of bilateral bunions of the fifth metatarsal heads, bilateral Morton's neuroma, and bilateral plantar fasciitis. By letter dated April 16, 2014, OWCP requested that the OWCP medical adviser review the SOAF and provide an opinion as to permanent impairment.

In a report dated April 18, 2014, Dr. Slutsky again found four percent left leg permanent impairment. As to the right leg, he found there was no impairment as there was no MRI scan evidence, intraoperative findings, or clinical evidence by other physicians of right lumbar nerve root deficits. Dr. Slutsky opined that Dr. Fritzhand's findings of right leg issues were inconsistent with objective evidence. With respect to conditions from the 1999 claim, he found there were no recent evaluations regarding these conditions.

By decision dated December 3, 2014, OWCP issued a schedule award for four percent left leg permanent impairment. The period of the award was 11.52 weeks from May 23, 2013. OWCP found there was no permanent impairment to the right leg.

Appellant, through counsel, requested a hearing before an OWCP hearing representative. At the June 9, 2015 hearing, appellant argued that the medical adviser, Dr. Slutsky, should not have relied on reports from the chiropractor.

By decision dated July 21, 2015, the hearing representative affirmed the December 3, 2014 decision. She found that it was appropriate for the medical adviser to utilize the chiropractor's reports, and his reports represented the weight of the medical evidence.

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] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be

[2] 5 U.S.C. § 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).

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

ANALYSIS

In the present case the accepted conditions, with respect to a January 18, 2011 slip and fall, are left knee sprain, left knee medial meniscus tear, and displacement of lumbar intervertebral disc without myelopathy. The attending physician, Dr. Fritzhand, provided a May 23, 2013 report that found appellant had six percent left leg permanent impairment, and a five percent permanent impairment to the right leg. OWCP, however, found that the weight of the medical evidence was represented by the medical adviser, Dr. Slutsky. In his September 9, 2013 and April 18, 2014 reports, Dr. Slutsky found appellant had four percent left leg permanent impairment. In the April 18, 2014 report, he also found appellant was not entitled to a schedule award for the right leg.

Dr. Slutsky found that, for the left leg, appellant would have one percent permanent impairment under Table 16-3. In this regard he provided a more reasoned opinion than Dr. Fritzhand, who used the diagnosis of a meniscal injury. Under Table 16-3, a meniscal injury would be appropriate for a partial medial meniscectomy, meniscal tear, or meniscal repair.[5] As noted by Dr. Slutsky, the July 7, 2011 surgical report from Dr. Stearns clearly reported that the meniscus was found intact. Dr. Fritzhand does not explain why the diagnosis under Table 16-3 for meniscal injury would be appropriate. Dr. Slutsky used a soft tissue lesion, with a grade B impairment of one percent.[6]

As to the issue of an additional impairment based on sensory loss, the Board finds the medical adviser's opinion is of diminished probative value. Dr. Slutsky finds that Dr. Fritzhand's use of a "severe" sensory deficit for the L5 nerve root was not appropriate, citing the examination results of chiropractor's reports dated January 2 and June 7, 2013. It is well established that 5 U.S.C. § 8101(2) provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[7] Dr. Bennett did not diagnose a subluxation as demonstrated by an x-ray, nor has OWCP accepted a subluxation.

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

[6] *Id.*

[7] 5 U.S.C. § 8101(2).

Since Dr. Bennett did not diagnose a subluxation as demonstrated by x-rays, he is not considered a physician under FECA and his reports are of no probative medical value.[8] An evaluation by a chiropractor of an impairment to an extremity is of no probative medical value to the schedule award issue.[9] If appellant had submitted the reports of Dr. Bennett in support of a claim for a schedule award, OWCP would properly find the reports of no probative medical value. It is inappropriate for OWCP to rely in part on Dr. Bennett's reports in determining the degree of permanent impairment for the left leg in this case. Dr. Fritzhand is a physician and provided results on examination. Dr. Bennett is not a physician under FECA and his findings on examination are of no probative medical value as to a permanent impairment to the lower extremities.

As to the right leg, the OWCP medical adviser found the findings of Dr. Fritzhand were "inconsistent with objective evidence." Dr. Fritzhand provided results on examination with respect to sensory loss in both legs, and noted pinprick and light touch results. If the OWCP medical adviser felt that such findings were insufficient, then he could have requested clarification from Dr. Fritzhand or referral for a second opinion on the issue of permanent impairment to the lower extremities.[10]

The Board finds that the reports from OWCP medical adviser Dr. Slutsky are not sufficient to resolve the issue presented. The case will be remanded to OWCP to properly determine the employment-related permanent impairment to the legs. After such further development as is necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

[8] *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[9] *J.W.*, Docket No. 13-1212 (issued September 20, 2013) (reports from a chiropractor regarding an impairment to the upper extremity were of no probative value, and a functional capacity evaluation (FCE) by a physical therapist was also of no probative value); *see also Thomas J. Grejda*, Docket No. 03-1097 (issued October 1, 2003).

[10] *See generally, H.K.*, Docket No. 13-1925 (issued April 9, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 21, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 11, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board