United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 15-0534**
	)	**Issued: May 12, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Daniel B. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument July 23, 2015

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 20, 2015 appellant, through counsel, filed a timely appeal from a December 23, 2014 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 met his burden of proof to establish that he has more than 31 percent permanent impairment of his left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On October 3, 2012 appellant, then a 59-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained acceleration of left knee osteoarthritis due

[1] 5 U.S.C. § 8101 *et seq.*

to performing his work duties over time. On May 11, 2011 he underwent medial unicondylar replacement of his left knee. By decision dated December 28, 2012, OWCP accepted that appellant sustained work-related aggravation of preexisting osteoarthritis of his left knee.[2]

Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, examined appellant on May 29, 2012. In a January 31, 2013 report,[3] he discussed appellant's work activities and history of medical treatment and reported the findings of the May 29, 2012 examination. Dr. Hartunian indicated that on physical examination it was revealed that appellant could sit and stand independently and ambulated in a normal heel-toe manner without a noticeable limp. There was no palpable tenderness over the left knee joint lines, no left knee effusion or swelling, and normal sensory findings apart from a small area of decreased sensation on the left knee surgery scar. Range of motion of the left knee was determined to be 122 degrees after three measurements were taken with a goniometer, whereas range of motion of the right knee was 132 degrees. Dr. Hartunian indicated that, on ligament stress testing, the left knee was stable in full extension to varus-valgus stress, but that at 10 degrees of flexion there was mild medial laxity (grade 1) with a definite endpoint. Examination of the left hip, ankle, and foot showed full range of motion of these joints, no pain on palpation or extremes of motion, and no ligament laxity. Dr. Hartunian diagnosed status post medial unicondylar joint replacement of the left knee for end-stage degenerative arthritis of medial femorotibial joint, mild medial collateral ligament laxity of the left knee without clinical impairment, and quadriceps and patellar tendinitis of the left knee (overuse response due to ligament laxity).

In his January 31, 2013 report, Dr. Hartunian applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] to determine that appellant had 34 percent permanent impairment of his left lower extremity. Under Table 16-3 (Knee Regional Grid) on page 511, he noted that the diagnosis-based impairment of total knee replacement most closely matched appellant's condition post uni-compartmental left knee replacement that he underwent. Appellant's condition was consistent with class 3 as the physical examination findings indicated mild medial ligament instability/laxity. Dr. Hartunian noted that, under Table 16-7 on page 517, the physical examination findings were not used to determine a grade modifier for physical examination because they were previously used to determine the class of appellant's left lower extremity impairment. Under Table 16-8 on page 518, the grade modifier for clinical studies was excluded because postoperative x-rays confirmed the diagnosis for the left knee. Dr. Hartunian noted that, under Table 16-6 on page 516, the grade modifier for functional history as determined by gait derangement was 0 because appellant did not have an antalgic limp. When determined by the American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire, appellant had a grade modifier 2 for functional history.[5] Dr. Hartunian noted that, according to text on page 515 of the A.M.A., *Guides*, the highest class modifier is used when the assessed components

[2] Appellant did not stop working for the employing establishment.

[3] Dr. Hartunian inadvertently dated the report January 31, 2012, but its content and context shows that it was meant to be dated January 31, 2013.

[4] A.M.A., *Guides* (6th ed. 2009).

[5] Dr. Hartunian attached an AAOS Lower Limb Questionnaire which appellant completed on May 29, 2012.

have differing values. He asserted that the grade modifier 2, due to the results of the AAOS Lower Limb Questionnaire, yielded the highest grade modifier and therefore a grade modifier 2 was assigned for functional history. Application of the net adjustment formula yielded a -1 adjustment and resulted in a class 3, grade B impairment of 34 percent for appellant's left lower extremity. Dr. Hartunian indicated that appellant's left knee condition reached maximum medical improvement in May 2012.

On February 11, 2013 appellant filed a claim for a schedule award due to his accepted work-related conditions.

OWCP sent Dr. Hartunian's January 31, 2013 report and the case file to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, for review and a determination regarding whether appellant had permanent impairment of his left lower extremity.

In a report dated April 4, 2013, Dr. Slutsky determined that appellant had 31 percent permanent impairment of his left lower extremity under the standards of the sixth edition of the A.M.A., *Guides.* He noted that the A.M.A., *Guides* provided that there was a preference for using a diagnosis-based method to evaluate permanent impairment. Dr. Slutsky indicated that he agreed with Dr. Hartunian's use of the diagnosis of total left knee replacement for his rating calculations, as derived from Table 16-3 of the A.M.A., *Guides,* because this was the closest diagnosis to appellant's left knee unicondylar replacement surgery. With respect to the functional history grade modifier, he noted that Dr. Hartunian's report did not document that appellant had an antalgic gait or required the use of a single gait aid or external orthotic device and indicated that this circumstance yielded a grade modifier 0. Dr. Slutsky noted that the score for the AAOS Lower Limb Questionnaire equaled a grade modifier 2. Because there was a significant discrepancy between these two grade modifier scores, the functional history grade modifier was unreliable and was not applicable to the grade modifier adjustment calculation.

In his April 4, 2013 report, Dr. Slutsky further noted that appellant's left knee range of motion restrictions and collateral ligament instability were used to assign the correct diagnostic class and therefore could not be used to assign a physical examination grade modifier. There were no other objective deficits documented for the left knee and therefore the physical examination grade modifier was 0. Dr. Slutsky noted that diagnostic studies would be used to place appellant's condition in the correct diagnostic class and therefore the clinical studies grade modifier would not be applicable. He noted that calculation of the net adjustment formula with the 0 score for the physical examination grade modifier meant that the final net adjustment was -2 as opposed to the final net adjustment of -1 as determined by Dr. Hartunian. Therefore, appellant fell under class 3, grade A for total knee replacement under Table 16-3 on page 511 and had a total left knee impairment of 31 percent. Dr. Slutsky determined that the date of maximum medical improvement for appellant's left knee was May 29, 2012, the date of Dr. Hartunian's examination. He noted that the examination was approximately one year after appellant's surgery and that his left knee condition had stabilized and was not expected to change significantly.

OWCP provided appellant 30 days to submit additional medical evidence in support of his schedule award claim. In an April 17, 2013 report, Dr. Hartunian noted that he disagreed

with Dr. Slutsky that the grade modifier for functional history was not applicable. He indicated that the functional history adjustment as determined by gait derangement was a grade modifier 0 because appellant had no antalgic limp. When determined by the AAOS Lower Limb Questionnaire completed by appellant, there was a grade modifier 2. Dr. Hartunian noted that, when the assessed components have differing values, the A.M.A., *Guides* requires that the highest class modifier be used. He noted that the value was determined under the AAOS Lower Limb Questionnaire and that a grade modifier 2 for functional history was properly assigned. Dr. Hartunian repeated his earlier assertion that the physical examination grade modifier was not applicable in appellant's case and that Dr. Slutsky improperly assigned a grade modifier 0 for physical examination. He noted that appellant's range of motion and instability findings had been used to assign the correct diagnostic class and that, given that there were no other findings on which to base the physical examination grade modifier, the modifier was not applicable.

OWCP asked Dr. Slutsky to review Dr. Hartunian's April 17, 2013 report and to indicate whether it changed his assessment of appellant's left lower extremity impairment. In a May 31, 2013 report, Dr. Slutsky noted that he agreed with Dr. Hartunian that appellant should be placed in the diagnostic class of total knee replacement (class 3) under Table 16-3 on page 511. He indicated that the functional history grade modifier was unreliable and would not be used for final rating purposes. Dr. Slutsky noted that although Dr. Hartunian indicated that he used the AAOS score as it produced the higher functional history grade modifier, the AAOS score was not used as the primary determinant of the functional history grade modifier and may not be used to determine the final rating. He indicated that the AAOS score was used only to assist the examiner to further define the functional history grade modifier and its use was not mandatory. Appellant had a grade modifier 0 for functional history based on gait, a score which was two grade modifier scores less than the AAOS score of 2. Therefore, the two scores reflected a much better objective functional ability than he was documenting on the AAOS score. Dr. Slutsky indicated that the two scores were unreliable and that the functional history grade modifier should not be used. He noted that this is similar to the advice given when the functional history grade modifier (based upon Table 16-6) was two grade modifiers higher than that of the clinical studies grade modifier or the physical examination grade modifier. In that case the examiner is not allowed to use the functional history grade modifier due to it being unreliable. Dr. Slutsky provided a discussion of the physical examination and clinical studies grade modifiers similar to the one contained in his April 4, 2013 report. He concluded that appellant had 31 percent permanent impairment of his left lower extremity.

OWCP granted appellant a schedule award on November 7, 2013 for 31 percent permanent impairment of his left lower extremity. The award ran for 89.28 weeks from May 29, 2012 to February 12, 2014 and was based on the impairment rating of Dr. Slutsky, an OWCP medical adviser. OWCP indicated that the date of maximum medical improvement was May 29, 2012, the date of Dr. Hartunian's examination.

Appellant requested reconsideration of his schedule award claim on October 10, 2014 and submitted a September 29, 2014 report of Dr. Hartunian. In this report Dr. Hartunian further discussed his determination that the grade modifier for physical examination was not applicable in appellant's case. He noted that appellant exhibited two pertinent physical findings of his left knee, namely restricted range of motion and instability, and noted that Dr. Slutsky had correctly indicated that these findings could not be used to assign a grade modifier for physical

examination because they already had been used to derive the diagnostic class. Dr. Hartunian indicated, however, that Dr. Slutsky improperly assigned a grader modifier 0 for physical examination because the A.M.A., *Guides* section 1.8(f) provides on page 15 that a grade modifier 0 for physical examination will be assigned for those patients who may have had findings in the past, but are now healthy (with no expectation that they will have recurrent findings). He noted that appellant would not be considered healthy for the purpose of assessing the grade modifier for physical examination because of the range of motion limitations and instability of his left knee. Dr. Hartunian pointed out that the A.M.A., *Guides* specifically prohibits the assignment of a grade modifier 0 for physical findings in appellant's case given that he was not healthy and the only relevant physical examination findings (limited range of motion and instability) had already been used to assign the diagnostic class. Therefore, the proper assignment for the physical examination grade modifier was "N/A" (not applicable).

Dr. Slutsky reviewed Dr. Hartunian's September 29, 2014 report and responded on December 19, 2014 that the reference made by Dr. Hartunian to page 15 of the A.M.A., *Guides* was a "nonspecific" reference and did not apply because there were specific references regarding physical examination grade modifiers in Table 16-7 on page 517. He indicated that, if a given knee had has good physical findings with no significant deficits, the physical examination grade modifier was 0 "just like any other [lower extremity rating] in the [sixth edition of the A.M.A., *Guides*]." Dr. Slutsky noted that appellant's left knee findings, including lack of specific tenderness, and normal alignment, meant that he should be assigned a grade modifier 0 for physical examination. He indicated that the remaining physical findings of appellant's left knee (beyond the range of motion and stability findings which were key factors) were used to assign a physical examination grade modifier for lower extremity joint replacement calculations as could be seen in example 16-11 on page 527 (knee replacement). Dr. Slutsky concluded that the permanent impairment of appellant's left lower extremity remained 31 percent.

By decision dated December 23, 2014, OWCP affirmed its November 7, 2013 decision noting that appellant did not meet his burden of proof to establish that he has more than 31 percent permanent impairment of his left lower extremity, for which he received a schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

appropriate standard for evaluating schedule losses.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.[9]

The A.M.A., *Guides* provides a diagnosis-based method for evaluating permanent impairment.[10] For lower extremity impairments, the evaluator identifies the impairment Class of Diagnosis (CDX) which is then adjusted by grade modifiers for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Under Chapter 2.3 of the A.M.A., *Guides*, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[12]

OWCP 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.[13]

ANALYSIS

OWCP accepted that appellant sustained an occupational disease in the form of aggravation of preexisting osteoarthritis of his left knee. On May 11, 2011 appellant underwent left knee medial unicondylar replacement. On November 7, 2013 OWCP granted him a schedule award for 31 percent permanent impairment of his left lower extremity. The award was based on the impairment rating of Dr. Slutsky, a Board-certified occupational physician serving as an OWCP medical adviser, who evaluated the findings of Dr. Hartunian, an attending Board-certified orthopedic surgeon. On December 23, 2014 OWCP determined that appellant had not established that he has more than 31 percent permanent impairment of his left lower extremity. The Board finds that he has more than 31 percent permanent impairment of his left lower extremity and that he is entitled to compensation for an additional six percent impairment of his left lower extremity.

Diagnosis-based impairment is the primary method for evaluating impairment to the lower limbs. Impairment is determined first by identifying the relevant diagnosis, then by selecting the class of impairment: no objective problem, mild problem, moderate problem, severe problem, or very severe problem approaching total function loss. This provides a default

[8] *K.H.*, Docket No. 09-341 (issued December 30, 2009). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

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

[10] *Supra* note 4 at 493-531.

[11] *Id.* at 515-22.

[12] *Id.* at 23-28.

[13] *See supra* note 9 at Chapter 2.808.6d-f (February 2013).

impairment rating, which can be adjusted slightly up or down using grade modifiers or nonkey factors, such as functional history, physical examination, and clinical studies.[14]

The impairment values for a total knee replacement are found in Table 16-3 (Knee Regional Grid) of the sixth edition of the A.M.A., *Guides*.[15] A good result -- good position, stable, functional -- has a default impairment value of 25 percent. A fair result -- fair position, mild instability, and/or mild motion deficit -- has a default impairment value of 37 percent. A poor result has a default impairment value of 67 percent. A poor result with chronic infection has a default impairment value of 75 percent.

In a report dated January 31, 2013, Dr. Hartunian found that appellant had 34 percent permanent impairment of his left lower extremity. In several reports Dr. Slutsky determined that appellant had 31 percent permanent impairment of his left lower extremity.

The Board notes that Dr. Hartunian and Dr. Slutsky agreed that, under Table 16-3, appellant should be placed in class 3 for left total knee replacement based on his physical examination findings and clinical studies. Both physicians used appellant's physical examination findings of left knee range of motion restriction and instability to place him in the correct diagnostic class with a class 3, grade C default value of 37 percent.[16]

Dr. Hartunian found that appellant had a grade modifier 2 due to the fact that his AAOS Lower Limb Questionnaire score showed a moderate deficit equal to a grade modifier 2 under the inventory measure of Table 16-6 on page 516 of the A.M.A., *Guides.* Dr. Slutsky noted that appellant's AAOS score fell under a grade modifier 2, but also noted that under the gait derangement measure of Table 16-6 he had a grade modifier 0 for no antalgic limp. Because there was a difference of two grade modifiers between these two functional history measures, Dr. Slutsky determined that appellant's functional history was unreliable and was not applicable to the net adjustment calculation.

The Board finds that Dr. Slutsky properly determined that appellant should not be assigned a grade modifier for functional history as it was not applicable. The A.M.A., *Guides* provides that the evaluating physician may use outcome instruments and inventories, such as the AAOS Lower Limb Questionnaire, as part of the process of evaluating functional symptoms.[17] The A.M.A., *Guides* further provides that, if there are multiple components to a grade modifier, the evaluator should choose the most objective grade modifier with the highest value associated with the diagnosis being rated.[18] If the grade modifier is found to be unreliable or inconsistent, it should be disregarded and eliminated from the calculation.[19] As the functional history differed

[14] *Supra* note 4 at 497.

[15] *Id.* at 511.

[16] *Id.*

[17] *Id.* at 516, section 16.3a. *See id.* at 555, section 16.9, Appendix 16-A: Lower Limb Questionnaire. *See also G.C.*, Docket No. 13-1493 (issued September 18, 2014).

[18] *Supra* note 4 at 521, section 16.3d.

[19] *Id.*

by two or more grades from that defined by physical examination or clinical studies, Dr. Slutsky properly determined that functional history was unreliable and should be excluded from the grading process.[20] Assigning the grade modifier with the highest value would not be appropriate in this case.

With respect to evaluating the grade modifier for physical examination of appellant's left knee, Dr. Slutsky indicated that he used range of motion and stability findings to place appellant in the correct diagnostic class of total knee replacement and that no other objective deficits were documented for his left knee. Therefore, he determined that appellant had a grade modifier 0 for physical examination. However, Dr. Hartunian found that, because range of motion and stability findings were used to place appellant in the correct diagnostic class and there were no other objective deficits, a grade modifier for physical examination was not applicable and would not be used in the net adjustment calculation.

The Board finds that Dr. Slutsky improperly derived a grade modifier 0 for physical examination. Both Dr. Slutsky and Dr. Hartunian noted that the range of motion and stability findings for appellant's left knee were used to place him in the class for the diagnosis-based impairment of total knee replacement. The sixth edition of the A.M.A., *Guides* provides that, if a grade modifier or nonkey factor is used for primary placement in the regional grid, it may not be used again in the impairment calculations. For example, if a class of a diagnosis-based impairment is determined using range of motion findings as a factor, range of motion findings are not considered again when calculating the grade modifier for physical examination.[21] Because Dr. Slutsky used range of motion and stability findings to determine the class of appellant's diagnosis-based impairment and indicated that no other objective deficits were documented, it was improper for him to provide a grade modifier 0 for physical examination.[22] Therefore, the physical examination grade modifier is not applicable and is excluded from the net adjustment formula calculation.[23]

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[20] If the functional history is determined to be unreliable or inconsistent with other documentation, it is excluded from the grading process. *Id.* at 516.

[21] *Id.* at 515-16.

[22] The A.M.A., *Guides* provides that the assignment of a physical examination grade modifier 0 will be for those patients who may have had findings in the past, but are now healthy (with no expectation that they will have recurrent findings). *Id.* at 15. Appellant would not fall into this category due to the range of motion restriction and instability of his left knee.

[23] The Board notes that the example Dr. Slutsky cites on page 527 of the A.M.A., *Guides* for total knee replacement does not establish that a grade modifier should be assigned for physical examination. In the example, the left knee was assigned class 2 while the right knee was assigned class 3. Physical examination was not used to assign the class for the left knee so physical examination was assigned a grade modifier 0 for the net adjustment formula calculation. With respect to the right knee, the example noted that range of motion was used to assign the class and thus could not be considered for grade assignment. The example provided a grade modifier 1 for physical examination, however, based on atrophy or weakness, which was not used in assigning the class. It noted that range of motion would be a grade modifier 2, but had to be excluded. Dr. Slutsky's reports explained that range of motion and stability testing were used to place the left knee into the correct diagnostic class and no other deficits were documented. Therefore, he incorrectly relied on this example as support for assigning a physical examination modifier 0.

Dr. Hartunian and Dr. Slutsky agreed that the grade modifier for clinical studies was not applicable and would not be used in the net adjustment calculation as diagnostic testing was used to place appellant in the correct diagnostic class.[24]

Given that functional history, physical examination, and clinical studies are not applicable in the present case and are not used in the net adjustment calculation, the default value of C (37 percent) for appellant's class 3 left total knee replacement provides the total value for permanent impairment of his left lower extremity, which is 37 percent.[25] Appellant previously received a schedule award for 31 percent permanent impairment of his left lower extremity. The Board finds that he shall be compensated for an additional six percent impairment of his left lower extremity.[26]

CONCLUSION

The Board finds that appellant has established that he has 37 percent permanent impairment of his left lower extremity.

[24] *Supra* note 4 at 519-20, Table 16-8.

[25] The Board finds that OWCP properly determined that appellant's date of maximum medical improvement was May 29, 2012, the date of Dr. Hartunian's examination. In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as maximum medical improvement. *See supra* note 9 at Chapter 2.808.5b. Assuming maximum medical improvement has been attained, the date of maximum medical improvement is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP. A retroactive determination of the date of maximum medical improvement is not *per se* erroneous, but such a determination is only proper when the medical evidence establishes that the employee did in fact reach maximum medical improvement by such date. *Id.* at Chapter 2.808.7b. In the present case, the medical evidence shows that May 29, 2012 was properly chosen as appellant's date of maximum medical improvement.

[26] After the July 23, 2015 oral argument, counsel submitted an August 13, 2015 letter in which he argued that a conflict in the medical opinion evidence could not be created between an attending physician and an OWCP medical adviser. In a September 9, 2015 response, the Director of OWCP argued that a conflict in the medical opinion evidence could in fact be created between an attending physician and an OWCP medical adviser. The Board notes that the present case does not involve a conflict in the medical opinion evidence and discussion of this matter is not relevant to the adjudication of the present case.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2014 decision of the Office of Workers' Compensation Programs is modified to reflect that appellant has 37 percent permanent impairment of his left lower extremity.[27]

Issued: May 12, 2016
Washington, DC

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

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

[27] James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.