United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 15-1951**
	)	**Issued: May 16, 2016**
DEFENSE COMMISSARY AGENCY, NEWPORT COMMISSARY, Newport, RI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 28, 2015 appellant filed a timely appeal from a September 2, 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.[2]

ISSUE

The issue is whether appellant has established that she sustained more than one percent permanent impairment of each lower extremity for which she received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted evidence with her appeal. The Board cannot consider this evidence as its jurisdiction is limited to the evidence of record that was before OWCP at the time it issued its final decision.

FACTUAL HISTORY

On July 20, 2011 appellant, then a 54-year-old store associate, filed a traumatic injury claim (Form CA-1) alleging that on July 8, 2011 she injured herself while lifting 50-pound bags of potatoes, which banged against her knees. She continued to work throughout the day lifting heavy boxes, twisting, turning, and entering and exiting the cold "chill" room. In an October 14, 2011 statement, appellant indicated that she sustained an occupational disease rather than a traumatic injury. She indicated that she started working as a cashier and in January 2011 she was placed in the produce department. Appellant attributed her knee condition to continuous heavy lifting and kneeling for over six months. She also alleged that the commissary managers violated her weight restriction of no lifting greater than 40 pounds. OWCP converted appellant's claim to an occupational disease claim and accepted it for pes anserinus bursitis, bilateral knees.

On December 18, 2011 appellant's work schedule changed from 24 hours per week to limited duty of 12 hours per week. Her job assignment changed from working in produce to cashiering. Appellant resigned from her position at the employing establishment on December 28, 2012.

On May 2, 2013 appellant filed a schedule award claim (Form CA-7). In a May 13, 2013 letter, OWCP requested that she provide a rationalized opinion from her treating physician as to whether her condition had reached maximum medical improvement and, if so, to provide an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). In a May 31, 2013 response, appellant indicated that her treating physician did not perform impairment ratings.

OWCP referred appellant, a copy of the case record, a list of questions, and a statement of accepted facts to Dr. Gilbert L. Shapiro, a Board-certified orthopedic surgeon, for a second opinion examination to determine her permanent impairment. In an August 29, 2013 report, Dr. Shapiro noted appellant's history of injury, her history of medical care, as well as his review of her medical records. He thereafter presented examination findings and diagnosed bilateral pes anserine bursitis and early chondromalacia of patella.[3] Dr. Shapiro opined that, short of additional steroid injection treatment into the bursa, appellant reached maximum medical improvement at her last visit to her treating physician on April 5, 2013. Under the sixth edition of the A.M.A., *Guides*, he opined that she had one percent permanent impairment to each lower extremity. Utilizing Table 16-3, Dr. Shapiro advised that classification was class 1 for bursitis with a default value of one percent impairment. He advised that the adjustment grid for functional history, physical examination, and clinical studies would not change the grade.

On September 27, 2013 Dr. Morley Slutsky, an OWCP medical adviser, reviewed the medical evidence including Dr. Shapiro's August 29, 2013 report. He opined that the date of maximum medical improvement was August 28, 2013, the date of Dr. Shapiro's impairment examination. The medical adviser noted that appellant's bilateral knee bursitis had stabilized on August 28, 2013 as there was no further treatment planned and the evaluation was used to calculate her final impairment. Under Table 16-3, he assigned class 1 with default value one

[3] Dr. Shapiro did not provide an opinion on the causal relationship of the chondromalacia of patella.

percent for bilateral knee bursitis. Under Table 16-6 through Table 16-8, the medical adviser indicated that appellant had grade modifiers 0 for Functional History (GMFH), grade modifier 1 for Physical Examination (GMPH), and that grade modifier for Clinical Studies (GMCS) was not applicable as the diagnostic tests were used to place her into the correct diagnostic test. Utilizing the net formula of (GMFH - CDX) (0 - 1) + (GMPE - CDX) (1-1), he found a net adjustment of -1 which yielded a grade B or one percent permanent impairment of each lower extremity.

Appellant subsequently submitted a June 14, 2013 report from Dr. Barry S. Saperia, a Board-certified orthopedic surgeon, who indicated that she sustained 10 percent permanent impairment of each lower extremity.[4] Dr. Saperia diagnosed the conditions of bilateral knee pes anserinus bursitis and bilateral chondromalacia patella as causally related to the repetitive stresses applied to her knees while working for the employing establishment's commissary.

In a May 2, 2014 report, Dr. Slutsky, the OWCP medical adviser, noted that there was no objective evidence to support that the work-related injury caused, accelerated, or aggravated the mild chondromalacia seen in the knees with diagnostic testing. The medical reports from 2011 found no significant evidence of chondromalacia patella and although crepitation was present, it was not painful. The physical therapy notes also did not mention pain in the patellofemoral joints. The medical adviser opined that the chondromalacia patella was not clinically symptomatic until two years after the date of injury or 2013.

OWCP referred appellant to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether the bilateral chondromalacia patella was causally related to the accepted work injury and the extent of her work-related impairment. In an October 9, 2014 report, Dr. Geary noted the history of injury, her medical course, his review of the records, and the statement of accepted facts. He noted examination findings of swelling at pes bursa and tenderness to palpation and diagnosed bilateral pes bursitis related to the work injury. Dr. Geary found no evidence that appellant's chondromalacia was related to the work injury. He noted that she had no discrete injury to the patella and that chondromalacia was more of a chronic condition than an acute one. Dr. Geary opined that appellant reached maximum medical improvement on April 5, 2013, when she declined injections and had no further formal intervention since then. He calculated one percent permanent impairment of each lower extremity utilizing Table 16-3 of the A.M.A., *Guides* for pes bursitis.

By decision dated December 8, 2014, OWCP issued a schedule award for one percent permanent impairment of the left lower extremity and one percent permanent impairment of the right lower extremity. The period of the award ran for 5.76 weeks from August 28 to October 7, 2013. Appellant was paid at the basic compensation rate of 66 and 2/3 percent.[5]

[4] Dr. Saperia did not provide an explanation as to how he derived his impairment rating in accordance with the sixth edition of the A.M.A., *Guides.*

[5] On the May 2, 2013 Form CA-7, appellant listed one dependent, a son, born on January 31, 1989. However, there is no evidence that the son, who turned 23 years of age on January 31, 2012 was incapable of self-support by reason of a mental or physical disability.

On December 22, 2014 OWCP received appellant's December 18, 2014 request for an oral hearing, postmarked December 19, 2014. In a December 18, 2014 letter, appellant alleged that the chondromalacia patella in both her knees was causally related to the work injury. A July 23, 2014 prescription note and a July 23, 2014 physical therapy report were submitted in support of her claim.

In a December 18, 2014 letter, Dr. Charles H. Cummings, an osteopath and Board-certified family practitioner, indicated that he has treated appellant for bilateral bursitis and chondromalacia patella in relation to her July 9, 2011 workers' compensation injury since May 2012.

A hearing was held on June 22, 2015. Appellant testified as to the positions held while working for the employing establishment. She also submitted her undated statement discussing medical reports and indicating that her produce manager had violated her 40-pound lifting restriction. Appellant alleged that she was required to lift 50 pounds or more of heavy produce for over six months. Duplicate copies of evidence previously of record were also submitted.

Subsequent to the hearing, additional evidence was received. In a July 10, 2015 statement, appellant indicated that several physicians, whom she listed, related her 2011 produce job to her bilateral bursitis and chondromalacia patella. She also noted several inaccuracies in the medical adviser's May 2, 2014 report.[6]

In a July 7, 2015 letter, Dr. Cummings indicated that appellant has been diagnosed with both pes anserinus bursitis and chondromalacia patella, which was the direct and proximate result of repetitive stress applied to both knees.

In a July 7, 2015 letter, Dr. Glenn A. Dubler, a Board-certified orthopedic surgeon, reported that appellant had been under his care for several years for bilateral knee problems. He diagnosed pes anserine bursitis and chondromalacia patella of both knees and opined that those conditions were causally related to occupational activity beginning with the July 9, 2011 work injury.

A July 10, 2015 x-ray report of the left and right knee indicated normal examination of the left knee and no evidence of bone or joint abnormality of the right knee. Physical therapy reports were also received.

By decision dated September 2, 2015, an OWCP hearing representative affirmed OWCP's December 8, 2014 decision regarding the degree of permanent impairment, but set

[6] Appellant also requested a copy of the audio recording of the June 22, 2015 hearing, which OWCP's hearing representative denied as the recording was the property of the reporting contractor and could not be made available to the parties involved. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(d) (October 2011).

aside the December 8, 2014 decision and remanded for further action regarding determination of appellant's pay rate.[7]

LEGAL PRECEDENT

The schedule award provision of FECA,[8] and its implementing federal regulations,[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to rate permanent impairment.[11]

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on GMFH and if electrodiagnostic testing were done, GMCS.[12] The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[13]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the 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.[14]

Appellant also has the burden to establish any additional conditions for which compensation is claimed as causally related to the employment injury.[15] As part of this burden, she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Causal relationship is a medical issue and the medical

[7] The issue of whether OWCP properly determined appellant's pay rate for purposes of calculating her schedule award is not before the Board on appeal as it is currently in an interlocutory posture. The Board only has jurisdiction to consider and decide appeals from final decisions. There shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case. 20 C.F.R. § 501.2(c)(3). *See also M.F.*, Docket No. 15-1367 (issued October 6, 2015).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.* at § 10.404(a).

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

[12] A.M.A., *Guides* 533.

[13] *Id*. at 521.

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

[15] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also G.B.*, Docket No. 14-1241 (issued June 22, 2015).

evidence required to establish causal relationship is rationalized medical evidence.[16] Rationalized medical evidence is medical evidence which includes a physician's detailed medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[17] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[18]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she has more than one percent permanent impairment of each lower extremity for which she received a schedule award.

OWCP accepted that appellant sustained pes anserinus bursitis of bilateral knees due to her federal employment in the produce section of the employing establishment. Appellant filed a schedule award claim and was seen by a second opinion physician, Dr. Shapiro, who opined that she sustained one percent permanent impairment of each lower extremity as a result of the pes anserinus bursitis. OWCP medical adviser, Dr. Slutsky, reviewed the case record and concurred with Dr. Shapiro's impairment rating. In his September 27, 2013 report, he opined that the date of maximum medical improvement was August 28, 2013, the date of Dr. Shapiro's impairment examination. Dr. Slutsky advised that appellant's bilateral knee bursitis had stabilized on August 28, 2013. There was no further treatment planned and the evaluation was used to calculate her final impairment. Under Table 16-3, Dr. Slutsky assigned class 1 with default value one percent for bilateral knee bursitis. Under Table 16-6 through Table 16-8, Dr. Slutsky indicated that appellant had grade modifiers 0 for GMFH, grade modifier 1 for GMPE, and that the grade modifier for GMCS was not applicable as the diagnostic tests were used to place her into the correct diagnostic test. Utilizing the net formula of (GMFH - CDX) (0 – 1) + (GMPE - CDX) (1-1), he properly found a net adjustment of -1 which yielded a grade B or one percent permanent impairment of each lower extremity.

There is no other probative medical evidence of file to support a greater impairment than that previously awarded. Dr. Geary opined that appellant's bilateral chondromalacia patella was not causally related to her employment and calculated one percent permanent impairment of each lower extremity under the A.M.A., *Guides.* While Dr. Saperia opined in his June 14, 2013 report that she sustained 10 percent permanent impairment of each lower extremity, he did not provide an explanation as to how he derived at his impairment rating in accordance with the sixth edition of the A.M.A., *Guides.*

[16] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[17] *Leslie C. Moore*, 52 ECAB 132 (2000).

[18] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

There are no other reports of record addressing appellant's accepted impairment, with findings correlated to the A.M.A., *Guides.* Thus, appellant has not established a greater impairment than the one percent impairment of each lower extremity, for which she received a schedule award.

While appellant asserted that her bilateral chondromalacia patella condition was causally related to her federal employment, neither Dr. Dubler nor Dr. Cummings provided a rationalized opinion explaining how her work duties caused or contributed to her chondromalacia patella condition. In his December 18, 2014 and July 7, 2015 reports, Dr. Cummings concluded that her knee conditions were the direct and proximate result of repetitive stress applied to both knees. However, his opinion lacked medical explanation or rationale. Dr. Dubler, in his July 7, 2015 report, merely concluded that appellant's knee conditions were causally related to her occupational activity. As neither physician provided a rationalized medical opinion explaining how her work duties in the produce department caused or contributed to chondromalacia patella, they are insufficient to establish that her chondromalacia patella condition was related to her federal employment activities.[19]

The other evidence of record, including x-ray and physical therapy reports do not establish that appellant's bilateral chondromalacia patella was causally related to her federal employment. The x-ray reports do not contain an opinion on causal relation and are therefore not probative regarding this issue.[20] Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered physicians as defined under FECA.[21] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[22] Physical therapy reports do not constitute medical evidence. Thus, any findings and opinions contained in those reports, are not sufficient for purposes of establishing entitlement to FECA benefits.[23] Consequently, appellant has offered insufficient medical evidence to establish a bilateral chondromalacia patella condition causally related to factors of her federal employment.

On appeal, appellant asserts that the medical evidence submitted supports her claim. As noted, the evidence of record is insufficient to establish causal relationship. Appellant has the burden to establish causal relationship through the submission of rationalized medical opinion evidence.[24]

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

[19] *Supra* note 16.

[20] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *A.D.*, 58 ECAB 149 (2006).

[21] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[22] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[23] *K.W.*, *id.*

[24] *John J. Montoya*, 54 ECAB 306 (2003).

CONCLUSION

The Board finds that appellant has not established that she sustained more than one percent permanent impairment of each lower extremity, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2016
Washington, DC

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

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

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