United States Department of Labor
Employees' Compensation Appeals Board

T.N., Appellant	)	
and	)	**Docket No. 15-0690**
	)	**Issued: November 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, 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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 10, 2015 appellant, through counsel, filed a timely appeal from a January 21, 2015 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 that she has more than two 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 July 7, 2012 appellant, then a 31-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 6, 2012 she strained her right knee while walking down a set of stairs. By decision dated September 19, 2012, OWCP accepted the claim for right knee strain. The claim was subsequently expanded to include right lateral collateral ligament sprain of the knee and right tear of medial meniscus of the knee.

In a September 7, 2012 diagnostic report, Dr. David H. Garelick, a Board-certified orthopedic surgeon and appellant's treating physician, reported that a magnetic resonance imaging (MRI) scan of the right knee revealed that major ligaments and tendons were intact. The study further revealed a tear of the posterior horn medial meniscus extending to the inferior surface and a likely occult tear of the posterior horn lateral meniscus that extended to the superior surface. Moderate to marked degenerative changes of the patellar cartilage were also found.

In an October 15, 2012 medical report, Dr. Garelick recommended right knee arthroscopy surgery. The surgery was approved by OWCP.

In a November 15, 2012 operative report, Dr. Garelick noted a preoperative diagnosis of medial meniscus tear of right knee and a postoperative diagnosis of medial meniscus tear of right knee, post patella femoral chondromalacia. Appellant underwent right knee arthroscopy, partial medial meniscectomy, and chondroplasty patella. Dr. Garelick reported that operative findings showed the femoral trochlea was relatively pristine, however, there was grade 3 chondromalacia throughout the entire undersurface of the patella. There were no loose bodies in the lateral gutter and the ACL and PCL were intact and normal. The lateral meniscus and lateral femoral condyle were also pristine. There were some grade 2 and grade 3 changes throughout the entire lateral tibial plateau. Dr. Garelick stated that an easy transition was made in the medial joint space and there was a just a minimal undersurface tear of the middle horn of the medial meniscus. The medial femoral condyle and medial tibial plateau were pristine.

On January 21, 2013 Dr. Garelick released appellant to full-duty work without restrictions status post right knee arthroscopy.

In a February 4, 2013 report, Dr. Garelick noted that an OWCP field nurse was present during appellant's examination that day. He assessed status post right knee arthroscopy and determined that she could continue to work full duty. Dr. Garelick found that appellant was at maximum medical improvement (MMI) as of that date. No further medical treatment, surgical treatment, or therapeutic services were needed as related to her knee.

On August 9, 2013 appellant filed a claim for a schedule award (Form CA-7).

By letter dated August 20, 2013, OWCP requested that appellant submit a report from her attending physician addressing her work-related conditions, date of MMI, objective findings, subjective complaints, and an impairment rating rendered according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

In support of her claim, appellant submitted an August 23, 2013 medical report and impairment rating from Dr. Neil Allen, Board-certified in internal medicine. Dr. Allen reported that appellant was on duty as a letter carrier when she stepped off a stair and twisted her right knee. He noted a diagnosis of right knee sprain, right lateral collateral ligament, and right tear of the meniscus. Dr. Allen provided findings on physical examination and noted normal gait, normal range of motion, and negative for atrophy. He further stated that palpation revealed mild tenderness through the joint line and mild crepitus with knee extension over the lateral aspect of the joint. Dr. Allen noted review of Dr. Garelick's September 7, 2012 MRI scan of the right knee which revealed a tear of the posterior horn of the medial meniscus extending into the inferior surface and a likely occult tear of the posterior horn of the lateral meniscus that extended to the superior surface. Moderate to marked degenerative changes of the patellar cartilage were noted and major ligaments and tendons were intact.

Using the sixth edition of the A.M.A., *Guides*,[3] Dr. Allen opined that appellant had eight percent permanent impairment of the right lower extremity. According to Table 16-3 (Knee Regional Grid) on page 511, he utilized the MRI scan findings to determine class 1 diagnosis-based impairment (DBI), which yielded a default value of 10 percent. Dr. Allen noted that physical examination revealed negative for instability, negative Lachman's, normal range of motion, and negative for muscle atrophy. He assigned a grade modifier of 1 for physical examination based on mild palpatory findings which were consistently documented and supported by observed abnormalities.[4] Dr. Allen determined that functional history yielded a grade modifier of 1 based on the AAOS Lower Limb Questionnaire score of 72 and normal gait.[5] Clinical studies were assigned a grade modifier of 0 based on x-rays of the right knee which revealed no evidence of fracture or dislocation and tiny joint effusion.[6] Utilizing the net adjustment formula, Dr. Allen calculated eight percent permanent impairment of the right lower extremity.[7]

On December 19, 2013 OWCP routed Dr. Allen's report and the case file to Dr. Garelick, in his role as an OWCP district medical adviser (DMA), for review and a determination on whether appellant sustained a permanent partial impairment of the right lower extremity and date of MMI.

In a December 23, 2013 report, Dr. Garelick reported that appellant's chart was re-reviewed for the purpose of determining permanent partial impairment of the lower right extremity due to a medial meniscus tear and knee sprain which had been accepted as work related. On November 15, 2012 appellant underwent a right knee arthroscopy and partial medial meniscectomy. Dr. Garelick noted that Dr. Allen's August 23, 2013 report noted subjective complaints of right knee pain. Physical examination was normal except for tenderness to

[3] A.M.A., *Guides* (2009).

[4] *Id.* at 517, Table 16-7.

[5] *Id.* at 516, Table 16-6.

[6] *Id.* at 511, Table 16-3.

[7] *Id.* at 521.

palpation at the medial joint line. Dr. Garelick reported that Dr. Allen recommended eight percent permanent impairment of the right lower extremity which appeared to be based on MRI scan findings for a medial and lateral meniscal tear. However, the operative report established that there was only a medial meniscus tear present as the lateral meniscus was pristine. Thus, Dr. Garelick opined that Dr. Allen's impairment rating should be disregarded. He determined that appellant should be awarded two percent impairment of the right lower extremity for partial medial meniscectomy as noted in Table 16-3, page 509 of the A.M.A., *Guides*. Dr. Garelick found no change to the award with use of the net adjustment formula and concluded that the MMI occurred three months postsurgery on February 15, 2013.

By decision dated May 9, 2014, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. It found that the weight of the medical evidence rested with Dr. Garelick serving as the DMA. The date of MMI was noted as February 15, 2013. The award covered a period of 5.76 weeks from February 15 to March 27, 2013.

On May 15, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

At the December 1, 2014 hearing, counsel argued that the case required further medical development because Dr. Garelick improperly dismissed Dr. Allen's report and substituted his own judgment for the examination findings. He further argued that Dr. Allen utilized and referenced the proper tables of the A.M.A., *Guides* when calculating eight percent permanent impairment of the right lower extremity.

By decision dated January 21, 2015, the hearing representative affirmed OWCP's May 9, 2014 schedule award decision, noting that the weight of the medical opinion evidence rested with Dr. Garelick serving as the DMA.

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.[8] 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

[8] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.[9] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2nd prtg. 2009).[10]

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). For lower extremity impairments, the evaluator identifies the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[13]

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.[14]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's claim for knee sprain, lateral collateral ligament, right, and right tear of the medial meniscus. It approved surgery for right knee arthroscopy and partial medial meniscectomy, performed by treating physician Dr. Garelick on November 15, 2012. Appellant subsequently filed a claim for a schedule award (Form CA-7) and submitted an impairment rating from treating physician Dr. Allen for eight percent permanent impairment of the right lower extremity. Dr. Allen noted his review of Dr. Garelick's September 7, 2012 MRI scan of the right knee, which revealed a meniscal tear.

On December 19, 2013 OWCP routed Dr. Allen's report and the case file to Dr. Garelick in his role as an OWCP DMA, for review and a determination on whether appellant sustained permanent partial impairment of her right lower extremity and the date of MMI. In a December 23, 2013 report, Dr. Garelick disagreed with Dr. Allen's impairment rating and

[9] *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).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] *Supra* note 2 at 493-531.

[12] *Id*. at 521.

[13] *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

determined that appellant should be awarded two percent impairment of the right lower extremity. By decision dated May 9, 2014, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. It found that the weight of the medical evidence rested with Dr. Garelick serving as OWCP's DMA and the date of MMI was February 15, 2013.

The Board notes that Dr. Garelick served as both a treating physician and OWCP's DMA. OWCP procedures describe the functions of a DMA as interpreting medical reports, rendering medical evaluations in his or her own right, and providing guidance or instruction to claims staff regarding general medical issues which are presented in compensation claims. The Board has found that where a DMA was previously associated with a case, the appearance of impropriety should have been avoided.

In *Harry E. Megill*,[15] the Board explained that the DMA, who had previously acted as the impartial medical examiner (IME), should have disqualified himself from participating in, or consulting upon the final determination of medical issues which he had previously passed upon in his former capacity as IME. To avoid the appearance of impropriety in OWCP's decision making, and to clearly separate the function of the physician's duties as an IME from those of a DMA, the case was remanded for referral to a DMA who had not previously been associated with the case.

Similarly, in *Frank P. Mayfield*,[16] a case in which the DMA had previously been employed as an employing establishment physician and had examined appellant concerning his application for disability retirement, the Board cited *Megill*[17] and found that the DMA should have disqualified himself. The Board noted that in his role as an employing establishment physician, the DMA had participated in medical determinations concerning appellant's application for disability retirement.

In the present claim, Dr. Garelick found that an MRI scan of appellant's right knee revealed a tear of the posterior horn medial meniscus extending into the inferior service and a likely occult tear of the posterior horn lateral meniscus that extended to superior surface. He performed a right knee arthroscopy in November 2012, authorized by OWCP. On February 4, 2013 Dr. Garelick opined that appellant was able to return to full-duty work and that she had reached MMI as of that date. Less than one year later, in December 2013, he was asked to serve as DMA. In a December 23, 2015 report, Dr. Garelick disagreed with Dr. Allen's impairment rating and determined that appellant had only two percent permanent impairment of the right lower extremity.

The Board finds that Dr. Garelick's prior association with appellant creates an appearance of impropriety, as he performed appellant's right knee arthroscopy and followed appellant as her treating physician less than one year before serving as OWCP's DMA. To avoid

[15] 34 ECAB 1397 (1983).

[16] Docket No. 89-3 (issued March 27, 1989).

[17] *See supra* note 18.

an appearance of impropriety, Dr. Garelick should have been disqualified in OWCP's development of the case.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[18] It began to develop the evidence by seeking an opinion from Dr. Garelick serving as OWCP's DMA.[19] However, in light of Dr. Garelick's prior association with appellant, the claim requires further development.

On remand, OWCP should request that another DMA review Dr. Allen's impairment rating and provide a reasoned opinion regarding the nature and extent of appellant's permanent impairment and date of MMI in accordance with the sixth edition of 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 a decision.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.[20]

Issued: November 1, 2016
Washington, DC

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

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

[18] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

[19] *C.B.*, Docket No. 11-1937 (issued April 6, 2012).

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