

**United States Department of Labor
Employees' Compensation Appeals Board**

J.W., Appellant)	
)	
and)	Docket No. 16-0821
)	Issued: November 9, 2016
DEPARTMENT OF THE ARMY, BLUEGRASS)	
ARMY DEPOT, Richmond, KY, Employer)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 March 15, 2016 appellant, through counsel, filed a timely appeal from a January 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 sustained permanent impairment to a scheduled member or function of the body causally related to his March 18, 2005 employment injury warranting 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

This case has previously been before the Board.³ The facts and circumstances as outlined in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On March 24, 2005 appellant, then a 67-year old security officer sustained a knee injury when a screw punctured his right knee as he knelt down on a mat during handcuff training. OWCP accepted the claim for right knee puncture wound, strain/sprain of the left knee, and left knee tear of the medial meniscus.

On February 8, 2013 OWCP referred appellant to Dr. Stanley Collis, a Board-certified orthopedic surgeon, for a second opinion examination regarding whether appellant had residuals of his accepted conditions. OWCP provided Dr. Collis with the medical record, a statement of accepted facts, and a list of questions to be answered.

In a February 26, 2013 report, Dr. Collis noted the history of injury, advising that on March 18, 2005 appellant injured his prepatellar bursa when a screw punctured his right knee. He noted that currently the knee had some puffiness, stiffness, minimal effusion, and weakness of the quadriceps. Appellant had full right knee extension and could flex the knee to about 60 degrees. Ligaments were stable and intact. He diagnosed advanced degenerative arthritis in the medial compartment of the right knee and opined that appellant's condition was due to age and was not a residual effect of the injury. With respect to the accepted condition of punctured right knee, Dr. Collis advised that the skin healed well, there was no point tenderness in the area of the puncture, and that the prepatellar bursa seemed to be intact. Dr. Collis concluded that, based on examination, record review, and x-rays, there was no evidence of an ongoing work-related injury.

By letter dated April 29, 2013, OWCP asked Dr. Collis for clarification because his report only addressed the right knee. In a May 2, 2013 report, Dr. Collis stated that appellant did not complain of any work-related left knee problems. He stated that the right knee aggravation was only temporary and was fully resolved. Dr. Collis also reiterated that appellant's right knee arthritis was developmental due to his genes and was not work related.

OWCP subsequently sought further evaluation from Dr. Collis. In an August 6, 2013 report, Dr. Collis noted examining appellant on that date and related the history of the left knee injury. Dr. Collis noted that upon physical examination the left knee had normal configuration and that it looked normal in appearance. He further noted that appellant had full flexion, full extension with no apparent pain, and no instability of the left knee. Dr. Collis diagnosed minimal arthritis of the medial compartment of the left knee and attributed any left knee discomfort to his minimal left knee arthritis, his weight, and the fact that he was using his left knee more frequently because of the developmental arthritis of the right knee. Dr. Collis concluded that appellant did not have any work-related problems with either the left or right knee.

³ Docket No. 14-1762 (issued December 23, 2014).

By decision dated March 6, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that he no longer had residuals of the accepted conditions. By decision dated December 23, 2014, the Board affirmed OWCP's termination decision.

In an October 21, 2014 report, a physician assistant advised that appellant had reached maximum medical improvement.⁴

In a March 2, 2015 claim for compensation (Form CA-7), appellant requested a schedule award.

By letter dated March 4, 2015, OWCP advised appellant of the type of evidence needed to establish permanent impairment for a schedule award.

In a March 30, 2015 letter, the employing establishment contended that appellant should not be able to receive a schedule award as he had refused an offer of suitable employment.⁵

By decision dated April 7, 2015, OWCP denied appellant's request for a schedule award.

In a letter dated April 22, 2015, appellant, through counsel, requested an oral telephone hearing.

Appellant submitted a March 20, 2015 report from Dr. Martin Fritzhand, Board-certified in urology, who provided an impairment rating. He found that appellant had reached maximum medical improvement in January 2015 and, using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) (A.M.A., *Guides*), found 34 percent permanent impairment to the right leg and two percent permanent impairment to the left leg. Examination revealed a limping antalgic gait with the use of a cane, difficulty forward bending at the waist to 80 degrees, inability to squat, negative McMurray and Lachman signs, well-preserved muscle strength, normal left knee flexion, diminished right knee flexion to 90 degrees, no atrophy, diminished pinprick and light touch over the medial aspect of the lower legs, and a brisk reflex over the left patellar tendon. Dr. Fritzhand used Table 16-3 for meniscal injury at a class 1 impairment. Using Table 16-6 he found a grade 2 modifier for functional history, grade 1 modifier for physical examination, and grade 1 modifier for clinical studies. This moved the rating from grade C to grade D for two percent permanent impairment of the left lower extremity.

For total right knee replacement Dr. Fritzhand used Table 16-3. He found a class 3 impairment. Using Table 16-6 and 16-8 Dr. Fritzhand found a grade 2 modifier for functional history and grade modifier 3 for clinical studies. He advised that this moved the grade from C to B for 34 percent permanent impairment of the right lower extremity.

At the November 12, 2015 oral hearing, counsel contended that Dr. Fritzhand's March 20, 2015 report established appellant's entitlement to a schedule award. The hearing representative noted that there was no current medical evidence that established that there were

⁴ The record indicates that appellant underwent a total right knee arthroplasty on July 23, 2014. The operative report is not in the record before the Board and OWCP did not authorize the procedure.

⁵ OWCP has not issued a decision finding that appellant refused suitable work under 5 U.S.C. § 8106(c).

any ongoing residuals related to the accepted puncture wound of the right knee. Counsel agreed and requested that only the left leg impairment be considered.

By letter dated December 9, 2015, the employing establishment contended that appellant had no ongoing entitlement to compensation for continuing disability or schedule award payments due to his refusal of suitable work without good cause. The employing establishment resubmitted its March 30, 2015 letter.

By decision dated January 15, 2016, OWCP's hearing representative affirmed the previous decision. She found that Dr. Fritzhand had failed to explain what objective findings established a continuing left knee condition causally related to the work injury and found his report was insufficient to create a medical conflict with the reports of Dr. Collis regarding whether appellant had continuing injury-related residuals or impairment.

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.⁶ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be 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.⁷ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁸

Under OWCP procedures, medical evidence to support a schedule award should include a report that shows that the impairment has reached a date of MMI, describe the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability, and give a percentage of impairment under the A.M.A., *Guides*.⁹ The report should include a history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.¹⁰ If the claimant's physician provides an impairment report, the case should be referred to an OWCP medical adviser for review.¹¹

⁶ 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).

⁷ A. George Lampo, 45 ECAB 441 (1994).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013) and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(b) (February 2013).

¹⁰ *Id.* at Chapter 2.808.6(a)(1).

¹¹ *Id.* at Chapter 2.808.6(e), (f).

ANALYSIS

The Board finds that this case is not in posture for a decision. OWCP found that appellant was not entitled to a schedule award for permanent impairment of his left and right lower extremities. Appellant's counsel acknowledged that appellant did not wish to pursue a right leg schedule award as the evidence did not show current work-related residuals.

In denying the schedule award claim, the hearing representative noted that Dr. Collis opined in his second opinion examination reports that appellant no longer had continuing residuals of the March 19, 2015 work injury. The Board notes, however, that OWCP did not ask Dr. Collis to address permanent impairment and that his reports predate appellant's schedule award claim. As his reports did not address the issue of permanent impairment, they are not relevant to this issue.¹² Furthermore, the fact that appellant's compensation was terminated does not necessarily preclude appellant from entitlement to a schedule award.¹³

As noted, appellant submitted a March 20, 2015 report from Dr. Fritzhand in support of his request for a schedule award. The report provided a history, specific results on examination, and a review of medical records. Using the sixth edition of the A.M.A., *Guides*, Dr. Fritzhand identified Table 16-3, the knee regional grid, and provided an opinion that appellant had two percent left leg permanent impairment for the diagnosis of meniscal injury. He applied the grade modifiers of functional history, physical examination, and clinical studies. OWCP's hearing representative made a medical determination as to whether appellant had established any permanent impairment, but did not provide a copy of Dr. Fritzhand's report to an OWCP medical adviser. OWCP procedures provide that an OWCP medical adviser should verify the calculations of the attending physician and determine the percentage of impairment according to the A.M.A., *Guides*, sixth edition.¹⁴

Consequently, the Board finds that further development of the medical evidence is required to determine whether appellant is entitled to a schedule award for impairment to his left leg. The case will be remanded for further development in accord with OWCP procedures. After such further development as deemed necessary, OWCP shall issue an appropriate merit decision.¹⁵

CONCLUSION

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

¹² See *P.S.*, Docket No. 12-0649 (issued February 14, 2013).

¹³ See *M.K.*, Docket No. 16-0243 (issued May 9, 2016).

¹⁴ See *supra* note 11. See also *M.M.*, Docket No. 16-0981 (issued August 29, 2016).

¹⁵ Following the March 9, 2014 termination of wage-loss compensation and medical benefits, appellant filed a claim for schedule award. The hearing representative referenced in her January 15, 2016 decision that appellant had also failed to establish any continuing disability or impairment. The Board finds that the issue of continuing disability is not at issue on appeal. The only issue presently before the Board is whether appellant established permanent impairment due to an accepted condition sufficient to warrant a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 9, 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