United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 16-1093**
	)	**Issued: October 17, 2016**
U.S. POSTAL SERVICE, POST OFFICE, South Euclid, OH, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 29, 2016 appellant, through counsel, filed a timely appeal from a January 21, 2016 merit 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 more than 31 percent permanent impairment to his right leg, for which he has received schedule awards.

[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 September 3, 2002 appellant, then a 39-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that his right knee condition was causally related to his federal employment. On the claim form he attributed right knee osteoarthritis to years of carrying mail while walking four to five miles per day. Appellant indicated that he first became aware of the condition on March 1, 1995 and its relationship to his federal employment on February 1, 2001.

The record indicates that appellant had undergone right knee arthroscopic surgery on May 11, 1995 by Dr. John Bergfeld, an orthopedic surgeon. The postoperative diagnosis was degenerative arthritis with torn lateral meniscus and articular cartilage changes. Appellant also underwent right knee arthroscopic surgery on June 25, 2002. OWCP accepted aggravation of right knee arthritis on January 22, 2003. Appellant was paid wage-loss compensation from July 13 to September 13, 2002. He submitted a claim for compensation (Form CA-7) on April 4, 2003 requesting a schedule award.

OWCP referred appellant for a second opinion examination by Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon. In a report dated July 2, 2003, Dr. Kaffen provided a history and results on examination. As to permanent impairment, he applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and found that appellant had 20 percent right leg impairment due to loss of range of motion in the right knee. By report dated August 8, 2003, an OWCP medical adviser opined that appellant had 20 percent right leg impairment based on loss of knee range of motion.

By decision dated August 21, 2003, OWCP issued a schedule award for 20 percent permanent impairment to the right leg. The period of the award was 57.60 weeks from January 1, 2003.

Appellant filed a claim for a recurrence of disability (Form CA-2a) on December 4, 2009, asserting that he continued to have right knee pain. By decision dated March 2, 2010, OWCP denied the claim for a recurrence of disability.

In a report dated May 18, 2012, Dr. Robert Molloy, a Board-certified orthopedic surgeon, indicated that appellant underwent a total right knee arthroplasty surgery. On September 3, 2013 appellant submitted an August 15, 2013 report from Dr. John Dunne, an osteopath. Dr. Dunne provided a history and results on examination. He opined that under the sixth edition of the A.M.A., *Guides* appellant had 59 percent right leg permanent impairment. Dr. Dunne opined that under Table 16-3 appellant had a class 4, grade A impairment for total knee replacement of 59 percent.

The case was referred to an OWCP medical adviser, Dr. Morley Slutsky Board-certified in occupational medicine, for review. In a report dated October 9, 2013, he requested that additional evidence from Dr. Molloy be obtained. No additional evidence was received.

By decision dated January 10, 2014, OWCP found that appellant was not entitled to an additional schedule award.

Appellant's counsel requested a telephone hearing before an OWCP hearing representative on January 13, 2014.

On February 21, 2014 OWCP received medical reports from Dr. Molloy. The most recent report was June 26, 2013, in which Dr. Molloy provided results on examination and indicated that appellant had 0 degrees extension and 120 degrees of flexion, with no effusion. He wrote that appellant was doing well postoperatively.

In a decision dated September 17, 2014, an OWCP hearing representative remanded the case to OWCP for further development. The hearing representative indicated that the medical record should be referred to an OWCP medical adviser for review.

In a report dated September 22, 2014, Dr. Slutsky reviewed the medical evidence and opined that appellant had 21 percent right leg permanent impairment under Table 16-3. He found that the permanent impairment was a class 2, grade A impairment for total knee replacement.

OWCP found that a conflict existed in the medical evidence between Dr. Dunne and Dr. Slutsky with respect to the degree of permanent impairment in the right leg. It selected Dr. James Rutherford, a Board-certified orthopedic surgeon, as an impartial medical specialist. In a report dated January 22, 2015, Dr. Rutherford provided a history and results on examination. As to permanent impairment in the right leg, he opined that under Table 16-3 appellant had 31 percent permanent impairment, for a class 3, grade A impairment for total knee replacement. Dr. Rutherford explained that appellant had a fair result from the surgery, with mild motion deficit. He discussed the grade modifiers applied in determining a grade A impairment, indicating that grade modifier one was used for functional history and physical examination. As to functional history, Dr. Rutherford appellant limped a little, which would be a grade modifier one under 4 Table 16-6.

The medical evidence was referred to an OWCP medical adviser for review. By report dated April 9, 2015, an OWCP medical adviser, Dr. Daniel D. Zimmerman, a Board-certified internist, concurred that the right leg impairment was 31 percent. He opined that date of maximum medical improvement was January 22, 2015, the date of Dr. Rutherford's examination.

By decision dated April 20, 2015, OWCP issued a schedule award for an additional 11 percent permanent impairment to the right leg. The period of the award was 31.68 weeks from January 22, 2015.

Appellant, through counsel, requested a hearing before an OWCP hearing representative on May 7, 2015. A hearing was held on November 18, 2015. Counsel argued that Dr. Rutherford's report should be clarified, as the permanent impairment should be 37 percent with a gait disturbance, citing a Board case *W.B.*[3]

[3] Docket No. 14-1982 (issued August 26, 2015).

By decision dated January 21, 2016, the hearing representative affirmed the April 20, 2015 OWCP decision. The hearing representative found that Dr. Rutherford represented the weight of the medical evidence and had properly applied the A.M.A., *Guides*.

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.[4] 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.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[6]

With respect to a knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The class of impairment Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH), Table 16-6, Physical Examination (GMPE), Table 16-7 and Clinical Studies (GMCS), Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[7]

5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[8] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial referee physician, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[9] It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

[4] 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).

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

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

[7] The net adjustment is up to +2 (grade E) or -2 (grade A).

[8] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[9] *William C. Bush*, 40 ECAB 1064 (1989).

[10] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

ANALYSIS

In the present case, OWCP found a conflict in the medical evidence with respect to the degree of permanent impairment in the right leg based on appellant's right knee condition. The Board notes that under Table 16-3, the diagnostic criteria of "total knee replacement" may be placed in class 2 (good result, with a default grade C permanent leg impairment of 25 percent), class 3 (fair result, with 37 percent default permanent impairment), or class 4 (poor result, 67 percent default leg permanent impairment).[11] Once the class is determined the default (grade C) impairment may be adjusted according to application of grade modifiers. While Dr. Dunne and Dr. Slutsky, the medical adviser, agreed that there was a grade A impairment for total knee replacement, they clearly disagreed as to the result of the surgery and therefore the class of impairment to be assigned. Dr. Dunne found a poor result for surgery, while Dr. Slutsky found a good result.

The impartial medical specialist, Dr. Rutherford, provided a rationalized opinion that the proper application of Table 16-3, based on examination results, was a class 3 permanent impairment for a fair result. He noted mild motion deficit which was consistent with a fair result. Dr. Rutherford explained that applying the net adjustment formula resulted in a grade A (-2) impairment, which was consistent with both Dr. Dunne and Dr. Slutsky. At the hearing counsel referred to *W.B.,* wherein the Board found that, based on the medical evidence, the claimant's impairment was 37 percent under Table 16-3. In that case, the Board found that there was no conflict in the medical evidence, and none of the grade modifiers were applicable, but this does not establish that in all cases a fair result from a total knee replacement must result in the default impairment of 37 percent. Each case is dependent on the medical evidence of record. Dr. Rutherford explained that for functional history the grade modifier was one, based on Table 16-6. Under this table an antalgic limp that is correctable with footwear or orthotics is a grade one.[12] This was consistent with his examination findings. Using the net adjustment formula (GMFH - CDX) the result is 1-3 or -2, without use of physical examination or clinical studies.[13] Therefore, the impairment was properly found to be a grade A, class 3 permanent impairment of 31 percent.

The Board finds that the special weight of the medical evidence was represented by the impartial medical specialist, who provided a rationalized medical opinion that the right leg permanent impairment under the sixth edition of the A.M.A., *Guides* was 31 percent. As noted above, a rationalized opinion from an impartial medical specialist is given special weight. The Board finds that the evidence of record does not establish more than 31 percent right leg permanent impairment.

[11] A.M.A., *Guides* 511, Table 16-3.

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

[13] It appeared that Dr. Rutherford had used range of motion in determining the diagnostic class, and therefore range of motion would not be used to determine a grade modifier for physical examination. A.M.A., *Guides* 516. Dr. Rutherford did not cite to clinical studies and did not apply a grade modifier in this regard.

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

CONCLUSION

The Board finds that appellant had not established more than 31 percent permanent impairment to his right leg, for which he has received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 21, 2016 is affirmed.

Issued: October 17, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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