United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 16-0589**
	)	**Issued: February 3, 2017**
U.S. POSTAL SERVICE, POST OFFICE, DeKalb, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 8, 2016 appellant, through counsel, filed a timely appeal from a January 7, 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 to consider the merits of the case.

[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.*

ISSUE

The issue is whether appellant established permanent impairment for more than one percent permanent impairment of the left lower extremity, for which he had received a schedule award.

On appeal counsel argues the decision is contrary to law and fact.

FACTUAL HISTORY

On December 24, 2010 appellant, then a 31-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his left lower leg when he slipped on ice. OWCP accepted the claim for left knee and lower leg contusion, left ligament, leg, and knee sprain, left chondromalacia, except patella, and pain lower leg joint. Appellant received wage-loss compensation benefits on the supplemental and periodic rolls from February 11, 2011 until June 29, 2013. She underwent authorized left knee arthroscopic surgery on February 21, 2013. Appellant was released to return to work with no restrictions effective June 19, 2013.

On September 19, 2013 appellant filed a claim for a schedule award. OWCP thereafter received a December 11, 2013 report from Dr. Neil Allen, a Board-certified internist and neurologist. Dr. Allen noted that he had examined appellant on November 6, 2013, provided a history of employment injury, and reviewed the medical evidence. He reported that his examination of appellant's left knee revealed reduced knee extension, antalgic gait, and severe tenderness on palpation of the medial joint and joint line. The range of motion for the left knee was 125 degrees flexion and 0 degree extension, with the right knee at 140 degrees flexion and -5 degrees extension. A review of a January 19, 2011 magnetic resonance imaging (MRI) scan of the left knee revealed subchondral fractures on the anteriomedial medial tibial plateau and anterior medial tibial plateau chronic cystic changes/geodes. Dr. Allen also reviewed a May 17, 2011 MRI scan which was unchanged from the earlier MRI scan of January 19, 2011 that showed joint space narrowing and loss of joint cartilage.

Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), he noted a class 1 for primary knee arthritis according to Table 16-3 for a diagnosis-based impairment with a default value of grade C or seven percent.[3] Dr. Allen found a grade modifier of one for Functional History (GMFH) according to Table 16-6[4] for lower limb score of 60 and an antalgic gait. He noted a grade modifier of one for findings on Physical Examination (GMPE) due to severe tenderness according to Table 16-7.[5] Dr. Allen noted that no grade modifier was assessed for Clinical Studies (GMCS) as he used the studies to determine class placement. Applying the net adjustment formula of (GMFH-CDX) + GMPE-CDX) or 1-1 + 1-1 = 0, he found no adjustment

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

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

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

in the default grade C impairment of seven percent.[6] Dr. Allen concluded that appellant had a seven percent left lower extremity permanent impairment.

On March 18 and September 24, 2014 OWCP referred the case to an OWCP medical adviser for review. In a report dated September 29, 2014, the medical adviser reviewed the medical record and performed an impairment rating. He asserted that Dr. Allen had misapplied the A.M.A., *Guides* in reaching seven percent impairment as it was unsupported by the objective evidence as there was no evidence to establish the cartilage interval necessary for the seven percent rating. A review of the medical record showed appellant had responded well to his surgery and had been released to full-duty work with no restrictions on June 19, 2013. Examination findings by appellant's treating physician showed residual medial joint line pain, no instability at the collateral or cruciate ligament, and knee range of motion was 0 to 125 degrees. Using Table 16-3,[7] the medical adviser found one percent impairment for class 1 for a diagnosis of plica resection with significant palpatory findings. He found no change using the net adjustment formula. The medical adviser determined June 19, 2013 to be the date of maximum medical improvement because this was the date appellant returned to work with no restrictions.

By decision dated February 23, 2015, OWCP granted appellant a schedule award for a one percent permanent impairment of the left lower extremity. The award ran from June 30 to July 20, 2013.

In a letter dated October 23, 2015, counsel requested reconsideration and submitted an August 26, 2015 report by Dr. Allen.

In an August 26, 2015 addendum, Dr. Allen noted that he based his opinion on a January 19, 2011 MRI scan which showed subchondral fractures on the anteriomedial tibial plateau and chronic anterior tibial plateau cystic changes/geodes. He explained that the cartilage interval was not necessary if there was a presence of subchondral fractures. Dr. Allen reiterated his finding of a default value of seven percent under Table 16-3, page 511 for the diagnosis of primary knee joint arthritis.

On December 14, 2015 OWCP referred the case to an OWCP medical adviser for review and an impairment determination. In a December 21, 2015 report, the medical adviser reviewed the medical evidence. He asserted that Dr. Allen had misapplied the A.M.A., *Guides* and his recommendation was inconsistent with orthopedic surgical principles. The medical adviser noted that neither the January 19 nor the May 17, 2011 MRI scans showed any aggravation of appellant's preexisting osteoarthritis and patella chondromalacia due to the December 24, 2010 employment injury as there were no signs of acute injury or internal derangement. In addition, the February 21, 2013 arthroscopic surgery reported no evidence of any acute injury of appellant's preexisting patella chondromalacia. Using Table 16-3, the medical adviser found a class one for contusion history with a default grade C or one percent impairment. He found a net adjustment of zero for one percent left lower extremity permanent impairment.

[6] *Id.* at 521.

[7] *Id.* at 509, Table 16-3.

By decision dated January 7, 2016, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Under section 8107 of FECA[8] and section 10.404 of the implementing federal regulations,[9] schedule awards are payable for permanent impairment of specified body members, functions, or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 appropriate standard for evaluating schedule losses.[10] The sixth edition of 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).[11] Under the sixth edition, the evaluator identifies the impairment for the Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[12] The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS - CDX).[13] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[14]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[15]

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404

[10] *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[11] A.M.A., *Guides* 3 (6th ed., 2009), section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[12] *Id.* at 383-419.

[13] *Id*. at 411.

[14] *See B.M.*, Docket No. 09-2231 (issued May 14, 2010); *Beatrice L. High*, 57 ECAB 329 (2006); *Dale B. Larson*, 41 ECAB 481 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (January 2010). This portion of OWCP's procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013). *See C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS

OWCP accepted appellant's claim for left knee and lower leg contusion, left ligament, leg, and knee sprain, left chondromalacia, except patella, and pain lower leg joint. It authorized left knee arthroscopic surgery for chondroplasty. By decision dated February 23, 2015, OWCP granted appellant a schedule award for a one percent permanent impairment of the left lower extremity. Counsel requested reconsideration. On January 7, 2016 OWCP denied modification of its schedule award determination. The issue on appeal is whether appellant established more than one percent permanent impairment.

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

In support of his request for an increased schedule award, appellant submitted impairment ratings from Dr. Allen dated December 11, 2013 and August 26, 2015. Referring to Table 16-3, page 511 of the A.M.A., *Guides*, Dr. Allen found seven percent diagnosis-based impairment of the left lower extremity based on class 1, presumably for primary knee arthritis, with a default value of seven percent.[16] In the August 26, 2014 addendum, he noted that his impairment rating was based upon a January 19, 2011 MRI scan which noted subchondral fractures. Dr. Allen explained that, according to Table 16-3, page 511, appellant qualified for a class 1 impairment (for primary knee arthritis with osteochondral fracture) with a default value of seven percent permanent impairment.

In a report dated September 29, 2014, OWCP's medical adviser reviewed the medical record and performed an impairment rating. He asserted that Dr. Allen, in his December 11, 2013 impairment rating, had misapplied the A.M.A., *Guides* in assessing seven percent impairment as the recommendation was unsupported by the objective evidence. Using Table 16-3, page 509, the medical adviser found one percent impairment for plica resection with significant palpatory findings. He found no change using the net adjustment formula and determined the date of maximum medical improvement as June 19, 2013. In a December 21, 2015 report, the medical adviser reviewed Dr. Allen's August 6, 2015 addendum and asserted that Dr. Allen had again misapplied the A.M.A., *Guides*. He explained that the preexisting chondromalacia was not affected by the work injury. The medical adviser found a class 1 for contusion history with a default grade C or one percent impairment using Table 16-3, page 516. He found a net adjustment of zero for one percent left lower extremity permanent impairment.

The medical adviser noted that the January and May 2011 MRI scans both showed preexisting degenerative arthritis and chondromalacia of the patella. He further noted that the work-related injury had not aggravated the preexisting osteoarthritis. In determining the amount of a schedule award for a member of body that sustained an employment-related impairment, preexisting impairments of the same member are to be included if the work injury affected any residual usefulness in whole or in part.[17]

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

[17] *See supra* note 14.

In denying modification of the February 23, 2015 schedule award determination, OWCP relied on the medical adviser's reports dated September 29, 2014 and December 21, 2015. In both reports, the medical adviser asserted that Dr. Allen had improperly applied the A.M.A., *Guides* in his impairment determination, and that Dr. Allen's recommendation was inconsistent with orthopedic surgical principles. The medical adviser however did not explain whether appellant's preexisting condition had been considered or whether it should be considered in the impairment rating. The lack of a well-rationalized opinion and generalization in discounting Dr. Allen's impairment determination is insufficient to deny an increased schedule award claim.

As noted above, OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as employment related and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate as there is no apportionment.[18] The Board is unable to determine from the current record whether Dr. Allen or OWCP's medical adviser appropriately applied the A.M.A., *Guides* in determining appellant's permanent impairment for schedule award purposes, therefore this case must be remanded for further development and appropriate impairment rating under the A.M.A., *Guides*.[19]

The Board will remand the case to OWCP for further medical development. OWCP should refer appellant to a second opinion specialist to properly determine the impairment to appellant's left lower extremity based on the accepted employment injuries and utilizing the proper tables and figures of the A.M.A., *Guides*. The referral physician should give consideration to the impact of the accepted employment injuries on appellant's preexisting left knee condition when determining the impairment rating. After such further development as necessary, OWCP shall issue a *de novo* decision on the extent of impairment to appellant's left lower extremity.

CONCLUSION

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

[18] *B.K.*, 59 ECAB 228 (2007). *See also* Federal (FECA) Procedure Manual, *supra* note 15 at Chapter 2.808.5(d) (February 2013) (schedule awards may include preexisting impairments as there is no apportionment under FECA).

[19] *See C.S.*, Docket No. 14-1085 (issued August 27, 2014) (finding that when the medical adviser does not provide sufficient explanation for his rating that his report is not entitled to constitute the weight of the medical opinion evidence).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 7, 2016 is set aside and the case remanded for further development consistent with the above opinion.

Issued: February 3, 2017
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