United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 16-1727**
	)	**Issued: February 2, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilmington, DE, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 24, 2016 appellant, through counsel, filed a timely appeal from an August 19, 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.

[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 has more than 21 percent permanent impairment of the right lower extremity.

FACTUAL HISTORY

On January 23, 2016 appellant, then a 53-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2006 he sustained a right knee contusion and strain when he was struck by a motor vehicle while walking between buildings. OWCP accepted the claim for a tear of the right medial meniscus.[3]

On March 7, 2006 Dr. Michael J. Axe, a Board-certified orthopedic surgeon, performed a partial synovectomy and partial medial meniscectomy of the right knee. In an impairment rating dated March 14, 2008, he advised that appellant had 7 percent impairment due to mild cruciate laxity, 7 percent impairment due to his meniscectomy, and 5 percent impairment due to crepitus and pain of the patellofemoral joint, for a total of 19 percent permanent impairment of the right lower extremity using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On May 28, 2008 an OWCP medical adviser reviewed Dr. Axe's findings and opined that appellant had 2 percent impairment due to his partial meniscectomy, 9 percent impairment due to mild cruciate laxity, and 5 percent impairment due to arthritis, for 14 percent right lower extremity permanent impairment.

By decision dated June 18, 2008, OWCP granted appellant a schedule award for 14 percent permanent impairment of the right lower extremity.[4]

Appellant, on July 29, 2013, underwent a right total knee arthroplasty. Dr. Steven M. Dellose, a Board-certified orthopedic surgeon, performed a revision of the right total knee replacement on November 24, 2014.

In a November 19, 2015 report, Dr. Dellose discussed appellant's history of bilateral knee replacements and a right bursa excision and exostectomy on April 16, 2015. On right knee examination, he found no effusion, tenderness, instability, loss of motion, or crepitus. Dr. Dellose advised that x-rays showed a knee replacement with good alignment and balance and "no evidence of loosening or wear." He diagnosed right knee pain and a right artificial knee

[3] OWCP initially accepted the claim for a tear of the anterior cruciate ligament of the right knee. However, it subsequently modified acceptance to reflect that appellant sustained a tear of the medial meniscus of the right knee.

[4] By decision dated December 23, 2009, OWCP denied appellant's request to expand his claim to include a consequential left knee condition. In a decision dated September 25, 2013, it found that he had not established a recurrence of disability as it found that he had not demonstrated a consequential left knee condition. Following a preliminary review, an OWCP hearing representative vacated the September 25, 2013 decision after finding a conflict in medical opinion. After further development, in a decision dated April 6, 2015, OWCP determined that the medical evidence was insufficient to show that appellant had sustained a left knee condition caused or aggravated by his January 20, 2006 employment injury.

joint. Dr. Dellose noted that appellant had "minimal complaints and has continued to improve despite chronic swelling. Pain and balance are some of his complaints." Dr. Dellose advised that he would reach maximum medical improvement (MMI) a year after the November 24, 2014 surgery. He related, "[Appellant] still has some issues with this and I would rate this as a mediocre moderate result."

Dr. Robert W. Macht, a Board-certified orthopedic surgeon, performed an impairment evaluation on December 13, 2015. He reviewed appellant's history of injury and the medical treatment. On examination, Dr. Macht found 105 degrees of flexion passively, 100 degrees of flexion actively, and a loss of 12 degrees right knee extension after measuring range of motion three times. He related, "[Appellant] has decreased sensation to light touch in the region just below the patella on the right. No instability is noted. There is minimal weakness. [Appellant] has slight pain with motion." Dr. Macht measured one centimeter of atrophy on the left versus the right thigh. He diagnosed status post total right knee replacement. Dr. Macht noted that, under Table 16-23 on page 549, 12 degrees of flexor contracture yielded 20 percent impairment, or moderate motion loss. He identified the diagnosis as a class 4 total knee replacement based on appellant's loss of motion, using Table 16-3 on page 511 of the A.M.A., *Guides*. Dr. Macht applied a grade modifier of 1 for functional history and a grade modifier of 2 for physical examination. He moved the default value for a class 4 total knee replacement of 67 percent two places to the left to find 59 percent permanent right lower extremity impairment. Dr. Macht opined that appellant reached MMI.

On January 8, 2016 appellant, through counsel, requested reconsideration of the June 18, 2008 schedule award decision. On January 15, 2016 he filed a claim for an increased schedule award (Form CA-7).

An OWCP medical adviser reviewed the evidence on April 21, 2016 and found that appellant had reached MMI on December 13, 2015. He identified the diagnosis as a class 2 total knee replacement under Table 16-3 with good position and function and no instability. The medical adviser noted that, in Dr. Dellose's November 19, 2015 report, he had found no loss of motion, pain, instability of the ligaments, or crepitus, and that x-rays showed good alignment. He questioned Dr. Macht's identification of appellant's knee replacement as class 4 given the physician's finding of no instability. The medical adviser further noted that Dr. Dellose found no loss of motion while Dr. Macht measured 105 degrees flexion and a loss of 12 degrees extension. He found Dr. Dellose's examination findings "more consistent" as he did not understand how appellant could have gone from no loss of range of motion in one month to that of Dr. Macht's range of motion deficit findings. Using the examination findings of Dr. Dellose, the medical adviser applied a grade modifier of 1 for functional history due to continued pain and a grade modifier of 1 for physical examination based on mild palpatory findings and one centimeter of atrophy. He noted that clinical studies were used to determine the diagnosis. Applying the net adjustment yielded an adjustment of two or 21 percent permanent impairment of the right lower extremity.

By decision dated May 10, 2016, OWCP granted an additional seven percent right leg impairment. The period of the award ran for 20.16 weeks from December 13, 2015 to May 2, 2016. In a May 11, 2016 decision, OWCP granted appellant's January 8, 2016 request

for reconsideration, noting that it had modified its June 18, 2008 schedule award decision to reflect the additional seven percent impairment of the right lower extremity.

Appellant, through counsel, again requested reconsideration on May 23, 2016. He argued that it was improper for OWCP's medical adviser to select the physical examination findings of one physician over another. Counsel asserted that OWCP should have referred appellant for a second opinion examination.

In a decision dated August 19, 2016, OWCP denied modification of its May 10, 2016 decision. It found that appellant had not provided additional medical evidence supporting that his award was erroneous and noted that the impairment rating was based on the findings of his attending physician.

On appeal counsel argues that OWCP's medical adviser should not have accepted the physical findings of one of his physicians over the other without sending him for a second opinion examination. He asserts that Dr. Macht performed more exact measurements rather than making general findings and thus his examination results should have been utilized. In the alternative, counsel requests that OWCP refer appellant for a second opinion examination.

LEGAL PRECEDENT

The schedule award provision of FECA,[5] and its implementing federal regulation,[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

The sixth edition requires identifying 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).[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The sixth edition of the A.M.A., *Guides* provides that diagnosis-based impairment is the primary method for evaluating impairment to the lower limb. Impairment is determined first by identifying the relevant diagnosis, then by selecting the class of the impairment: no objective

[5] *Supra* note 2 at § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 494-531.

problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss. This provides a default impairment rating, which can be adjusted slightly up or down using grade modifiers or nonkey factors, such as functional history, physical examination, and clinical studies.[10]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

ANALYSIS

OWCP accepted that appellant sustained a tear of the right medial meniscus on January 20, 2006 when he was struck by a motor vehicle while walking between buildings. Appellant underwent a partial synovectomy and partial medial meniscectomy of the right knee on March 7, 2006. On June 18, 2008 OWCP granted 14 percent permanent impairment for the right lower extremity impairment due to his partial meniscectomy, mild cruciate laxity, and arthritis.

On July 29, 2013 appellant underwent a total right knee replacement and on November 24, 2014 underwent a revision right knee arthroplasty. In a report dated November 19, 2015, Dr. Dellose discussed appellant's complaints of chronic swelling and right knee pain. He opined that appellant had a "mediocre moderate" surgical result. On examination, Dr. Dellose found no swelling, pain, instability, crepitus, or reduced right knee motion. He further interpreted x-rays as showing good alignment. Dr. Dellose diagnosed right knee pain following a revision.

Appellant submitted a December 13, 2015 impairment evaluation from Dr. Macht. Dr. Macht diagnosed status post right knee replacement. He measured range of motion of 105 degrees flexion and a loss of 12 degree extension. Using range of motion method, Dr. Macht advised that 12 degrees flexor contracture yielded 20 percent impairment (or moderate) under Table 16-23 on page 549. On examination he found a loss of sensation below the patella, mild weakness, minimal pain with motion, and no instability. Using the diagnosis-based estimate, Dr. Macht identified the diagnosis as total knee replacement using the knee regional grade set forth at Table 16-3 as a class 4 total knee replacement based on appellant's moderate motion loss. He applied a grade modifier of 1 for functional history and a grade modifier of 2 for

[10] A.M.A., *Guides* 497.

[11] 5 U.S.C. § 8123(a).

[12] 20 C.F.R. § 10.321.

physical examination to the default value of 67 percent which moved the rating to places to the left to equal 59 percent permanent impairment of the right lower extremity.

An OWCP medical adviser reviewed the examination findings of both Dr. Dellose and Dr. Macht and concluded that the findings of Dr. Dellose were more reliable. He identified the diagnosis as a class 2 total knee replacement with good position and function and no instability. The medical adviser applied a grade modifier of 1 for functional history based on appellant's complaints of pain and a grade modifier of 1 for physical examination based on mild palpatory findings and some atrophy. Applying the net adjustment factor yielded an adjustment of two to the left from the default class, to equal 21 percent right leg impairment rating. The medical adviser used the findings of Dr. Dellose in reaching his impairment rating. The Board notes, however, that Dr. Dellose found that appellant's surgical result was "mediocre moderate," which is inconsistent with OWCP's medical adviser's finding of "good." Further, Dr. Macht found the range of motion deficit of moderate placed appellant in a poor result.

The Board finds that a conflict exists between appellant's physicians and OWCP's medical adviser, regarding the result of the total knee replacement.[13] Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[14] The Board will remand the case to OWCP to resolve the conflict regarding the extent of appellant's right lower extremity impairment under the A.M.A., *Guides*. After such further development as deemed necessary, it should issue an appropriate decision.

CONCLUSION

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

[13] *See M.O.*, Docket No. 14-1077 (issued July 2, 2015).

[14] 5 U.S.C. § 8123(a); *see also A.F.*, Docket No. 16-0686 (issued August 22, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 2, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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