United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 16-1768**
	)	**Issued: January 30, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Marysville, CA, Employer	)	

Appearances:
Appellant, pro se
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 August 30, 2016 appellant filed a timely appeal from a March 3, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's March 3, 2016 decision was August 30, 2016. Since using September 1, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark or other carriers' date marking is considered the date of filing. The date of the other carriers' date marking is August 30, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has more than 15 percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

On December 14, 2006 appellant, then a 43-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 2006 she hyperextended her left knee in the performance of duty. She did not stop work. OWCP accepted the claim for a tear of the left medial meniscus and primary osteoarthritis of the left knee.

Appellant underwent a left knee arthroscopy on July 12, 2007. Dr. Lee P. Tocchi, an attending Board-certified orthopedic surgeon, performed a left subtotal meniscectomy of the medial meniscus and a chondroplasty of the medial femoral condyle, medial tibial plateau, trochlea, and patella on March 6, 2009. On May 16, 2014 he performed a repeat subtotal medial meniscectomy and chondroplasty of the medial femoral condyle, trochlea, and patella.

In a progress report dated November 5, 2014, Dr. Tocchi noted that appellant had some varus valgus instability and a "slightly antalgic" gait. On June 17, 2016 he advised that appellant experienced some left knee hyperextension, instability, and locking. On examination, Dr. Tocchi found 120 to 125 degrees flexion, full extension, varus valgus instability, swelling, and crepitus of the patellofemoral joint. He diagnosed primary osteoarthritis of the left knee.

Appellant on July 20, 2015 claimed a schedule award (Form CA-7). She indicated that she had retired from the employing establishment in 2010.[3] In a July 20, 2015 telephone call, appellant informed OWCP that Dr. Tocchi could not evaluate permanent impairment.

On August 21, 2015 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the extent of any left knee permanent impairment. In a report dated October 23, 2015, Dr. Swartz reviewed her history of a November 2006 left knee work injury and resulting surgeries. On examination he found medial tenderness, some crepitus, and no instability of the left knee. Dr. Swartz noted that appellant used a cane. He measured range of motion as negative 15 to 90 degrees and a loss of circumference of the left thigh and calf. Dr. Swartz determined that appellant had "crepitus with motion in the left knee and limited motion" and noted that the operative report of May 16, 2014 found grade 4 chondromalacia. He referred appellant for standing x-rays of the knees bilaterally.

X-rays of the left knee, obtained on December 3, 2015, revealed a progressive loss of joint space medially with osteophytosis compared with 2012 diagnostic studies. The x-rays revealed 4.2 millimeters of medial compartment joint space, 4.8 millimeters of lateral compartment joint space, 4 millimeters of medial femoral patellar joint space, and 1 millimeter of lateral femoral patellar joint space.

[3] Appellant also noted that she had received a schedule award for her right knee under another OWCP file number.

In a supplemental report dated December 20, 2015, Dr. Swartz reviewed the x-ray findings. Referencing Table 16-3 on page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that one millimeter of patellofemoral cartilage interval constituted a class 2, or 15 percent lower extremity impairment. Dr. Swartz applied a grade modifier of one for functional history as appellant had pain with ambulation but did not limp or use a cane. He determined that was basically an antalgic gait. He applied a grade modifier of three for physical examination findings of severe motion loss. Dr. Swartz utilized the net adjustment formula and found no adjustment from the 15 percent default value. He concluded that appellant had 15 percent permanent impairment of the left lower extremity and that she had reached maximum medical improvement on October 23, 2015.

An OWCP medical adviser reviewed the opinion of Dr. Swartz on January 12, 2016 and concurred with his findings.

By decision dated March 3, 3016, OWCP granted appellant a schedule award for 15 percent permanent impairment of the left lower extremity. The period of the award ran for 43.2 weeks from October 23, 2015 to August 20, 2016.

On appeal, appellant questions why she received a greater schedule award for her right knee impairment under another file number when physicians determined that her left knee condition was more severe than her right knee condition. She also maintains that Dr. Swartz did not perform an adequate examination and inaccurately determined that she did not limp, use a cane, or have instability. Appellant notes that in a report dated November 15, 2014, Dr. Tocchi found that she had a mildly antalgic gait.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulation,[5] 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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH),

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 3013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

Physical Examination (GMPE) and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

OWCP accepted that appellant sustained a left medial meniscal tear and left knee osteoarthritis due to a November 18, 2006 employment injury. Appellant underwent arthroscopic surgery on July 12, 2007. On March 6, 2009 and May 16, 2014 Dr. Tocchi performed a subtotal meniscectomy of the medial meniscus and chondroplasty.

On July 20, 2015 appellant claimed a schedule award and advised OWCP that Dr. Tocchi could not provide an impairment evaluation. OWCP referred her to Dr. Swartz for a second opinion examination.

Dr. Swartz, in his impairment evaluation on October 23, 2015, measured range of motion of the left knee as negative 15 to 90 degrees and found reduced left thigh and calf circumference. He further found medial tenderness and crepitus of the left knee without instability. Dr. Swartz noted that appellant used a cane. He reviewed the findings from the May 16, 2014 operative report diagnosing grade 4 chondromalacia and referred appellant for standing knee x-rays. Left knee x-rays dated December 3, 2015 showed 4.2 millimeters of medial compartment joint space, 4.8 millimeters of lateral compartment joint space, 4 millimeters of medial femoral patellar joint space, and 1 millimeter of lateral femoral patellar joint space. In his December 20, 2015 addendum, Dr. Swartz found that, under Table 16-3 on page 511 of the A.M.A., *Guides*, one millimeter of patellofemoral cartilage interval yielded a class 2, or 15 percent permanent impairment of the leg. He applied a grade modifier of one for functional history due to appellant's pain while walking without a limp or use of a cane and a grade modifier of three for reduced motion on physical examination. Dr. Swartz used the net adjustment formula and concluded that appellant had 15 percent permanent impairment of the left leg.[9] An OWCP medical adviser reviewed Dr. Swartz' reports on January 12, 2016 and agreed with his impairment rating.

The Board finds that the case is not in posture for decision. Dr. Swartz properly determined that one millimeter of patellofemoral cartilage interval yielded a default value of 15 percent under Table 16-3 of the A.M.A., *Guides*. As argued by appellant on appeal, however, the physician noted that she used a cane in his original report but, in his December 20, 2013 addendum, indicated that she did not use a cane. Based on this finding, Dr. Swartz determined that appellant had a grade modifier of one for functional history. Table 16-6 on page 516 of the A.M.A., *Guides* provides that the use of a single gait aid such as a cane or crutch constitutes a grade two modifier for functional history. The Board, consequently, finds that the case should be remanded for OWCP to obtain clarification from Dr. Swartz regarding the appropriate grade

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

[9] Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) or (1-2) + (3-2) = 0, yielded a zero adjustment. A grade modifier for clinical studies is not applicable as it was used to place appellant in the appropriate class. *See* A.M.A., *Guides* 521.

modifier for functional history applicable in this case. Following such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: January 30, 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