United States Department of Labor
Employees' Compensation Appeals Board

A.K., Appellant	)	
and	)	**Docket No. 17-1347**
	)	**Issued: October 16, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Yonkers, NY, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 5, 2017 appellant, though counsel, filed a timely appeal from a March 29, 2017 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 met his burden of proof to establish more than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On May 9, 2001 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a left knee injury sustained earlier that day when he stepped down onto the sidewalk while carrying a heavy mail sack. He stopped work on May 10, 2001 and received continuation of pay.

Dr. Stuart Springer, a Board-certified orthopedic surgeon, examined appellant on May 9, 2001 and noted that he had a misstep on stairs. He diagnosed acute locked left knee, ICD-9 Code 836.0.[3] Dr. Springer referred appellant for a left knee magnetic resonance imaging (MRI) scan to rule out a medial meniscus tear.

A May 22, 2001 left knee MRI scan revealed findings "suggestive" of a partial thickness tear in the posterior horn of the medial meniscus.

In a May 30, 2001 follow-up report, Dr. Springer discussed the May 22, 2001 MRI scan findings and noted that appellant was making a good early recovery. On physical examination there was nearly full range of motion of the left knee and no tenderness along the medial joint line. Dr. Springer was optimistic that appellant would continue doing a home exercise program and that his symptomology would continue to improve to the extent that appellant would be able to resume full duty. He advised that appellant would attempt a trial return to work, effective June 4, 2001.

OWCP accepted appellant's claim for left knee sprain.

The record does not contain any medical evidence dated between May 30, 2001 and February 15, 2013, at which time appellant was seen by Dr. Patrick V. McMahon, a Board-certified orthopedic surgeon.[4] In a February 15, 2013 report, Dr. McMahon noted that appellant reported that he started experiencing left knee pain approximately three weeks prior. He indicated that the physical examination of appellant's left knee showed no varus or valgus instability and good range of motion with minimal pain.

A February 22, 2013 left knee MRI scan revealed severe degenerative changes of the medial femorotibial and femoropatellar compartments, intra-articular effusion with a thickened

[3] ICD-9 Code 836.0 is for a tear of the medial cartilage or meniscus of the knee.

[4] Under a separate claim (File No. xxxxxx789), OWCP accepted a right elbow injury and granted a schedule award for five percent permanent impairment of appellant's right upper extremity. This injury is not the subject of the present appeal.

plica in the lateral femoropatellar compartment, tear of the body and posterior horn of the medial meniscus, and tendinosis of the quadriceps and patellar tendon.[5]

Dr. McMahon continued to see appellant for his left knee arthritis and treated the condition with pain medication and cortisone injections. Appellant complained of moderate-to-severe left knee pain and stiffness, and he noted that his symptoms were aggravated by activity.

An October 20, 2014 left knee MRI scan contained an impression of unchanged medial femorotibial and patellofemoral compartment osteoarthritis manifested by multifocal cartilage wear and marginal osteophyte formation, unchanged complex tear of the posterior horn and body segments of the medial meniscus, and no evidence of avascular necrosis. The reporting radiologist also compared the current findings with appellant's February 22, 2013 left knee MRI scan findings.

In a May 25, 2016 note, Dr. McMahon indicated that appellant's left knee condition had reached maximum medical improvement.

On June 14, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a report dated June 13, 2016, Dr. Ronald L. Mann, an attending Board-certified orthopedic surgeon, discussed appellant's factual and medical history and reported findings of his physical examination of appellant on May 9, 2016. Upon examination, appellant exhibited range of left knee motion from 0 to 130 degrees with positive crepitus, left knee tenderness, left quadriceps atrophy of one centimeter compared to the right quadriceps, and mildly decreased strength of the left knee compared to the right knee. He had a slightly limping gait pattern and used an assistive device. Dr. Mann indicated that appellant's left knee condition reached maximum medical improvement in late 2001. He noted that appellant's current symptoms and complaints were due to osteoarthritis of the left knee and its progression. Dr. Mann opined that the progression of this condition was due to appellant's size, weight, and activity, and was not due to the 2001 employment injury which, based on the medical records, had resolved in late 2001. He indicated that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), appellant had 20 percent permanent impairment of his left lower extremity due to osteoarthritis of the left knee. Dr. Mann noted that this left lower extremity permanent impairment was "based on the guidelines for moderately [sic] osteoarthritis of left knee with [eight millimeters] of cartilage loss…."

OWCP referred appellant's case to Dr. Herbert White, Jr., a Board-certified occupational medicine physician serving as an OWCP medical adviser, for review of the evidence of record and evaluation of his left lower extremity permanent impairment.

In a July 13, 2016 report, Dr. White discussed the medical evidence of record, including the findings on physical examination and diagnostic testing. He indicated that appellant's left

[5] Appellant stopped work for various periods beginning on February 8, 2013 and he filed a recurrence of disability claim (Form CA-2a) for disability beginning February 8, 2013 and continuing. In decisions dated August 20 and November 7, 2013, OWCP denied appellant's recurrence of disability claim due to his failure to submit sufficient medical evidence in support of his claim.

knee condition reached maximum medical improvement as of June 13, 2016. Dr. White advised that, under Table 16-3, Knee Regional Grid, A.M.A., *Guides* 511 (6th ed. 2009), appellant's diagnosis of primary knee joint arthritis (with full-thickness articular cartilage defect) fell under class 1, with a default value of seven percent.[6] He determined that appellant had a functional history grade modifier of 2 (antalgic gait with use of assistive device), a physical examination grade modifier of 2 (atrophy and decreased range of motion), and a clinical studies grade modifier of 3 (clinical studies confirming severe pathology). Application of the net adjustment formula required movement to the right of the default value of seven percent such that appellant had a total left lower extremity permanent impairment of nine percent under the A.M.A., *Guides* (6th ed. 2009).[7] Dr. White noted that, in his June 13, 2016 report, Dr. Mann obtained a rating of 20 percent permanent impairment of appellant's left lower extremity because he indicated that his left primary knee joint arthritis fell under class 2 on Table 16-3. Dr. White advised that Dr. Mann had indicated on June 13, 2016 that appellant had an eight millimeter cartilage interval in his left knee, but he noted that there were no reports in the record which provided any cartilage interval for appellant's left knee. Dr. White also noted that Dr. Mann did not indicate any grade modifiers when calculating that appellant had 20 percent permanent impairment of his left lower extremity under the A.M.A., *Guides*.

In an August 26, 2016 decision, OWCP granted appellant a schedule award for nine percent permanent impairment of his left lower extremity. The award ran for 25.92 weeks from June 13 to December 11, 2016. OWCP based its decision on Dr. White's July 13, 2016 impairment rating.

Appellant requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 22, 2017, counsel argued that there was a conflict in the medical opinion evidence between the impairment rating opinions of Dr. Mann and Dr. White.

In a March 29, 2017 decision, OWCP's hearing representative affirmed OWCP's August 26, 2016 decision. He found that the weight of the medical evidence rested with the opinion of Dr. White, an OWCP medical adviser who properly applied the A.M.A., *Guides* (6th ed. 2009) to find that appellant had nine percent permanent impairment of his left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of the FECA[8] and its implementing regulation[9] 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

[6] Dr. White referenced the October 13, 2014 MRI scan of appellant's left knee.

[7] Dr. White indicated that appellant had no permanent impairment rating for his left lower extremity under the range of motion rating method of the sixth edition of the A.M.A., *Guides*.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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 effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[11]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[12] After the Class of Diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[14]

In some instances, OWCP's medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*. In this instance, a detailed opinion by the medical adviser may constitute the weight of the medical evidence. As long as the medical adviser explains his or her opinion, shows values and computation of impairment based on the A.M.A., *Guides*, and considers each of the reported findings of impairment, his or her opinion may constitute the weight. If the attending physician misapplied the A.M.A., *Guides*, no conflict would exist because the attending physician's report would have diminished probative value and the opinion of the medical adviser would constitute the weight of medical opinion.[15]

[10] *Id*. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

[11] Federal (FECA) Procedure Manual, *id*. at Chapter 2.808.5a (February 2013); *see also id*. at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[12] *See* A.M.A., *Guides* 509-11.

[13] *Id.* at 515-22.

[14] *Id.* at 23-28.

[15] Federal (FECA) Procedure Manual, *supra* note 10 at *Developing and Evaluating Medical Evidence*, Chapter 2.810.8j (September 2010); *M.P.*, Docket No. 14-1602 (issued January 13, 2015).

ANALYSIS

OWCP accepted that on May 9, 2001 appellant sustained a left knee sprain while stepping off a curb carrying a heavy mail sack. Appellant filed a Form CA-7 claim for a schedule award and, in an August 26, 2016 decision, OWCP granted him a schedule award for nine percent permanent impairment of his left lower extremity. The award was based on the July 13, 2016 impairment rating of Dr. White, an OWCP medical adviser, who evaluated the findings of appellant's attending physician, Dr. Mann. In a March 29, 2017 decision, OWCP's hearing representative affirmed OWCP's August 26, 2016 schedule award decision.

The Board finds that appellant has not met his burden of proof to establish more than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

The Board notes that Dr. White properly determined that appellant had nine percent permanent impairment of his left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. In his July 13, 2016 report, Dr. White correctly indicated that appellant's left knee condition reached maximum medical improvement as of June 13, 2016. He properly determined that, under Table 16-3 (Knee Regional Grid) on page 511, appellant's diagnosis of primary knee joint arthritis (with full-thickness articular cartilage defect) fell under class 1, with a default value of seven percent.[16] Dr. White determined under the appropriate tables that appellant had a functional history grade modifier of 2, a physical examination grade modifier of 2, and a clinical studies grade modifier of 3.[17] He properly indicated that application of the net adjustment formula required movement to the right of the default value of seven percent such that appellant had a total left lower extremity permanent impairment of nine percent.[18]

The record contains a June 13, 2016 report in which Dr. Mann, an attending physician, indicated that, based on the A.M.A., *Guides*, appellant had 20 percent permanent impairment of his left lower extremity due to osteoarthritis of the left knee. Dr. Mann noted that this left lower extremity permanent impairment was "based on the guidelines for moderately [sic] osteoarthritis of left knee with [eight millimeters] of cartilage loss…."

The Board finds, however, that Dr. Mann's impairment rating is of limited probative value because he did not explain how it was derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*. The Board has held that an opinion on permanent impairment is

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

[17] *See id.* at 515-20, Tables 16-5 through 16-8.

[18] *See supra* note 13. Dr. White also properly indicated that appellant had no permanent impairment of his left lower extremity under the range of motion rating method of the sixth edition of the A.M.A., *Guides*. Table 16-3 does not provide for use of the range of motion rating method to rate a claimant's lower extremity impairment. The A.M.A., *Guides* provides that the diagnosis-based impairment rating method is the primary method of evaluating lower extremity permanent impairment. The range of motion rating is used to determine actual impairment values of the lower extremity only when it is not possible to otherwise define impairment. *See* A.M.A., *Guides* 497-500, 509-11; *E.M.*, Docket No. 14-0311 (issued July 8, 2014).

of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[19]

In his July 13, 2016 report, Dr. White, in his role as an OWCP medical adviser, explained why Dr. Mann's impairment rating was not was derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*. He noted that, in his June 13, 2016 report, Dr. Mann obtained a rating of 20 percent permanent impairment of appellant's left lower extremity because he indicated that appellant's left primary knee joint arthritis fell under class 2 on Table 16-3. Dr. White advised that Dr. Mann had indicated on June 13, 2016 that appellant had an eight millimeter cartilage interval in his left knee, but he properly noted that there were no reports in the record which provided any such evidence of a cartilage interval for appellant's left knee. Therefore, he explained that Dr. Mann did not provide adequate justification for placing appellant's left knee arthritic condition under class 2 on Table 16-3.[20] Dr. White also noted that Dr. Mann did not indicate any grade modifiers, as required by the A.M.A., *Guides*, when calculating that appellant had 20 percent permanent impairment of his left lower extremity.[21]

For these reasons, the weight of the medical opinion evidence with respect to appellant's left lower extremity permanent impairment rests with the opinion of Dr. White, an OWCP medical adviser.[22] The record does not contain a rationalized medical report showing that appellant has more than nine percent permanent impairment of his left lower extremity, for which he received a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on 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 has not met his burden of proof to establish more than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

[19] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[20] The Board notes that, per Table 16-3, placement under class 2 for primary knee joint arthritis requires confirmation of a two millimeter cartilage interval of the knee. *See* A.M.A., *Guides* 511, Table 16-3.

[21] *See id.* at 515-20, Tables 16-5 through 16-8 regarding the calculation of grade modifiers.

[22] *See supra* note 15 regarding the role of the OWCP medical adviser in evaluating permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2017
Washington, DC

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

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

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