

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
E.I., Appellant)	
)	
and)	Docket No. 18-0377
)	Issued: August 27, 2018
U.S. POSTAL SERVICE, STONYBROOK POST)	
OFFICE, Stonybrook, NY, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 18, 2017 appellant, through counsel, filed a timely appeal from an October 10, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 has more than eight percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On February 15, 2013 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his right knee on February 13, 2013. He reported that after he placed mail in a mailbox, a snow bank collapsed as he stepped towards his vehicle. By decision dated July 25, 2013, OWCP accepted appellant's claim for tear of the right lateral meniscus and partial tear of the anterior cruciate ligament (ACL) on the right.

On April 24, 2013 appellant underwent a magnetic resonance imaging (MRI) scan of his right knee which demonstrated postsurgical changes of the medial meniscus, and vertical tear of the lateral meniscus, osteoarthritis, and high-grade partial tear of the ACL with mild anterior tibial translation. On October 18, 2013 his attending physician, Dr. John Brennan, a Board-certified orthopedic surgeon, performed right knee surgery authorized by OWCP. This surgery consisted of arthroscopy with partial medial and lateral meniscectomies and debridement. Appellant returned to full-duty work on November 2, 2013.

On September 11, 2014 appellant filed a recurrence of his medical condition (Form CA-2a). He reported that he developed gradual discomfort and decline in his right knee. Appellant alleged that he now had a total tear of his ACL on the right. By decision dated November 19, 2014, OWCP accepted his claimed recurrence and authorized a second right knee arthroscopy.

On November 21, 2014 Dr. Brennan performed right ACL reconstruction using allograft. On February 12, 2015 OWCP entered appellant on the periodic rolls for wage-loss compensation.

In a letter dated May 8, 2015, OWCP referred appellant, a statement of accepted facts (SOAF), and list of specific questions to Dr. David Benatar, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Benatar completed a report on May 26, 2015 and listed appellant's history of two work-related right knee surgeries, and a third including a meniscectomy when appellant was 25 years old. He reviewed appellant's medical history and performed a physical examination finding a minimally antalgic gait on the right with a small knee effusion. Dr. Benatar reported slight weakness to right knee extension, but full range of motion. He found significant medial tenderness and a strong McMurray's sign medially. Dr. Benatar also reported some atrophy, significant crepitus, mild pain on patellar grind, and minimal stability of the ACL. He concluded that appellant had disabling residuals related to his accepted condition, but that appellant could return to light duty with restrictions. Dr. Benatar also noted that appellant's current condition was an aggravation of a preexisting condition. He diagnosed arthritis and reported that appellant's arthritis had progressed.

On August 23, 2015 appellant elected to receive Office of Personnel Management retirement benefits rather than wage-loss compensation benefits from OWCP.

On August 24, 2015 appellant filed a claim for a schedule award (Form CA-7). In a development letter dated September 11, 2015, OWCP requested additional medical evidence in support of his claim for permanent impairment of a scheduled member. It afforded appellant 30 days for a response.

In a note dated September 9, 2015, Dr. Brannan reported that appellant had reached maximum medical improvement (MMI). He completed a separate note on September 9, 2015 and reported appellant's symptoms of pain, weakness, and stiffness in his right leg. Dr. Brannan found no right knee effusion and "reasonably good range of motion." He also reported that appellant's ligamentous examination was stable. Dr. Brannan diagnosed tear of the medial meniscus.

In a report dated January 8, 2016, Dr. Thomas P. Nipper, a Board-certified orthopedic surgeon, reviewed appellant's history of injury, his 1990 right knee surgery, and his two recent knee surgeries. He found that appellant had reached MMI. Dr. Nipper applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and found that, based on the diagnosis-based impairment methodology, appellant had 10 percent permanent impairment of his right lower extremity for successful ACL reconstructive surgery.⁴ He also found that appellant had an additional 3 percent permanent impairment for meniscectomy,⁵ totaling 13 percent permanent impairment of the right lower extremity.

On March 24, 2016 OWCP referred the medical record and the SOAF to its medical adviser to determine the extent of appellant's percentage of permanent impairment for schedule award purposes. In his May 25, 2016 report, OWCP's medical adviser reviewed the medical evidence of record and found that it was insufficient to form the basis of a schedule award. He recommended an additional medical evaluation for schedule award purposes.

On October 17, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Joseph Estwanik, a Board-certified orthopedic surgeon. In his November 10, 2016 report, Dr. Estwanik reviewed the SOAF and appellant's medical history. He noted that appellant's MRIs demonstrated medial meniscus tear, ACL tear, and near full cartilage loss in the medial compartment, 50 percent loss of cartilage in the lateral tibial compartment, and abnormality of the patellofemoral joint. Dr. Estwanik opined that appellant's loss of cartilage was preexisting and "unrelated to his current [w]orkers' [c]ompensation claim." On physical examination he found no significant patellofemoral crepitus, no effusion, and "a good Lachman test." Dr. Estwanik noted, "only trace movement but a good endpoint and good surgical result." He found that appellant had complete range of motion from 0 to 140 degrees. Dr. Estwanik noted pain with the medial McMurray's test, but no catching or locking. He further found tenderness from the medial joint palpation which was associated with appellant's "known and preexisting osteoarthritis." Additionally, Dr. Estwanik found that appellant's meniscectomy and ACL reconstruction were successful. He determined that appellant had reached MMI on May 1, 2015. Dr. Estwanik applied the A.M.A., *Guides* and found that appellant had a total 10 percent permanent impairment due to

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.* at 510, Table 16-3.

⁵ *Id.* at 509.

meniscal injury, which was 2 percent permanent impairment, and ligament repair with mild laxity, which was 8 percent permanent impairment.⁶ He concluded that appellant would eventually need a total knee replacement for this preexisting osteoarthritis.

OWCP's medical adviser reviewed Dr. Estwanik's report on December 3, 2016. He applied the A.M.A., *Guides* and found that appellant's impairment rating should be based on his partial medial and lateral meniscectomies, rather than based upon his ACL injury, with a default grade C of 10 percent impairment. The medical adviser found that appellant's functional history grade modifier was zero as he had no antalgic gait and no pain inventory. He reached grade modifier one for physical examination as appellant had minimal palpatory findings on examination. The medical adviser determined that the clinical studies adjustment grade modifier should not be used as clinical studies were used to determine the impairment class. He then applied the net adjustment formula of the A.M.A., *Guides* to reach a negative one adjustment or grade B impairment of eight percent permanent impairment of the right lower extremity due to partial medial and lateral meniscectomies. The medical adviser determined the date of MMI was November 10, 2016.

OWCP referred its medical adviser's report to Dr. Estwanik on December 6, 2016. Dr. Estwanik responded on December 12, 2016 and disagreed that the appropriate diagnosis-based estimate was the partial medial and lateral meniscectomies. He contended that the ACL tear was the most salient feature of appellant's accepted conditions. Dr. Estwanik noted, "It is well known in knee surgery data that an ACL tear is considered 'the beginning of the end of the knee.'"

On February 13, 2017 OWCP's medical adviser disagreed with Dr. Estwanik and noted that appellant's physical findings including good Lachman's test, trace movement, and a good surgical result. He opined that these findings indicated that appellant "does not have any residual instability of the ACL after ACL reconstruction." The medical adviser contended that to qualify for mild laxity appellant needed to demonstrate at least 5 millimeters of laxity and that Dr. Estwanik did not document this finding in his evaluation. He concluded that the key factor for calculating impairment should be meniscal injury and not ACL tear.

By decision dated February 21, 2017, OWCP granted appellant a schedule award for eight percent permanent impairment of his right lower extremity.

On March 1, 2017 OWCP received counsel's request for an oral hearing before an OWCP hearing representative. Appellant appeared at the oral hearing on August 16, 2017 and his counsel contended that OWCP's medical adviser failed to consider all the appropriate conditions for the basis of appellant's schedule award. Counsel asserted that appellant's employment injury aggravated his preexisting arthritis and that this condition should be considered in his impairment rating.

By decision dated October 10, 2017, OWCP's hearing representative found that appellant had not established more than eight percent permanent impairment of his right lower extremity. He determined that the weight of the medical evidence rested with OWCP's medical adviser regarding the application of the A.M.A., *Guides*. The hearing representative further determined

⁶ *Id.* at 509-10, Table 16-3.

that appellant had not established any additional employment-related conditions including preexisting arthritis as found by Dr. Estwanik which should be considered for schedule award purposes.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁰ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment (DBI) method of determining the percentage of permanent impairment. In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition, however, it appears that it should be Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³

ANALYSIS

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

⁷ *Supra* note 2.

⁸ 20 C.F.R. § 10.404.

⁹ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *P.R.*, *id.*; *Carol A. Smart*, 57 ECAB 340 (2006).

¹² A.M.A., *Guides* 515.

¹³ *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

OWCP accepted appellant's claim for tear of the right lateral meniscus and tear of the anterior cruciate ligament. It authorized two surgeries, arthroscopy with partial medial and lateral meniscectomies as well as right ACL reconstruction using allograft. OWCP granted appellant a schedule award for eight percent permanent impairment of his right lower extremity based on his partial medial and lateral meniscectomies. OWCP's hearing representative further found that appellant was not entitled to have his preexisting right knee arthritis considered in his permanent impairment for schedule award purposes.

Appellant's attending physician, Dr. Nipper, determined that appellant was entitled to a schedule award for 10 percent permanent impairment of his right lower extremity for successful ACL reconstructive surgery.¹⁴ He also found that appellant had an additional 3 percent permanent impairment for meniscectomy¹⁵ totaling 13 percent permanent impairment of the right lower extremity. Dr. Nipper did not provide any findings on physical examination supporting the selection of ACL as the appropriate diagnosis for rating or in support of any aspect of his impairment rating. Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others who review the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁶ As Dr. Nipper's report does not comply with these requirements, OWCP properly undertook further development of the claim to determine appellant's percentage of permanent impairment for schedule award purposes.¹⁷

As a consequence of the deficits in Dr. Nipper's report, OWCP referred appellant for a second opinion evaluation with Dr. Estwanik. Dr. Estwanik noted the extent of appellant's right knee arthritis as found on x-ray and MRI scan. He reported that this condition was preexisting and not related to appellant's employment injury such that he did not consider it for schedule award purposes. Dr. Estwanik also provided findings on physical examination including evaluation of appellant's ACL which demonstrated a good Lachman test, only trace movement, but a good endpoint and good surgical result. He determined that appellant had eight percent permanent impairment of his right lower extremity based on deficiencies in the ACL and also awarded two percent impairment for meniscal injuries. OWCP's medical adviser reviewed the medical records and determined that appellant's schedule award should be based solely on his partial lateral and medial meniscectomies.

Dr. Estwanik disagreed with this evaluation method and asserted that appellant's ACL deficits were the appropriate rating method as the ACL tear was the most salient feature of

¹⁴ *Supra* note 4.

¹⁵ *Id.* at 509.

¹⁶ *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

¹⁷ *D.H.*, Docket No. 18-0024 (issued May 7, 2018).

appellant's accepted conditions. He noted, "It is well known in knee surgery data that an ACL tear is considered 'the beginning of the end of the knee.'" OWCP's medical adviser again reviewed Dr. Estwanik's findings and noted that he did not clearly indicate that appellant had five millimeters of laxity which was necessary to establish a class 1 impairment due to ACL injury.

The February 21, 2017 schedule award decision was based on OWCP's medical adviser's opinions dated December 3, 2016 and February 13, 2017. The medical adviser did not explain whether appellant's preexisting condition of arthritis had been considered or whether it should be considered in the impairment rating.¹⁸ Furthermore, the medical adviser did not provide a citation to the A.M.A., *Guides* or other medical authority for his specific requirement of five millimeters of ACL laxity. The A.M.A., *Guides* specifically require "mild laxity" for impairment ratings due to ACL injuries and specifically note that surgery is not a rating factor.¹⁹ The A.M.A., *Guides* further provide that the physical examination adjustment for knee instability grade 1, is slight instability, "[g]rade 1 Lachman's test; slight laxity patellar mechanism."²⁰

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.²¹ The Board is unable to determine from the current record whether Dr. Estwanik 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*. The Board is unable to determine based on the physical findings contained in the record which diagnosis should be utilized as the basis for appellant's schedule award. Dr. Estwanik opined, based on his own findings and his own physical examination of appellant, that the diagnosis of ACL injury with mild laxity was appropriate for rating purposes. OWCP's medical adviser defined mild laxity as at least five millimeters of laxity and determined that Dr. Estwanik's report did not specifically support this finding. OWCP procedures required that in reviewing medical evidence for the purposes of a schedule award, OWCP's medical adviser should determine the percentage of permanent impairment based on the standards of the sixth edition of the A.M.A., *Guides* and provide medical reasoning for the percentage of impairment specified.²² The record before the Board does not include a medical report determining the appropriate percentage of permanent impairment based

¹⁸ *R.R.*, Docket No. 16-0589 (issued February 3, 2017).

¹⁹ *Supra* note 4.

²⁰ *Id.* at 517, Table 16-7.

²¹ *Supra* note 18; *B.K.*, 59 ECAB 228 (2007). See also Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.808.5(d) (March 2017) (schedule awards may include preexisting impairments as there is no apportionment under FECA).

²² Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.808.6.f (March 2017).

on all the conditions of appellant's right lower extremity, which contrary to OWCP's hearing representative findings, should consider his preexisting arthritis.²³

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 right lower extremity based on the accepted employment injuries and his preexisting arthritis and utilizing the proper tables and figures of the A.M.A., *Guides*. After such further development as necessary, OWCP shall issue a *de novo* decision on the extent of impairment to appellant's right lower extremity.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this opinion of the Board.

Issued: August 27, 2018
Washington, DC

Christopher J. Godfrey, 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

²³ See *supra* note 18; *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).