United States Department of Labor
Employees' Compensation Appeals Board

R.N., Appellant	)	
and	)	**Docket No. 17-1406**
	)	**Issued: February 2, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, 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:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 14, 2017 appellant, through counsel, filed a timely appeal from a May 16, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has established more than 28 percent permanent impairment of his right lower extremity, for which he previously received schedule awards.

[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.*

FACTUAL HISTORY

On May 5, 2004 appellant, then a 42-year old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 28, 2004 he injured his back and front of his right knee while delivering mail when a dog knocked him off a stoop and he landed on his right knee. OWCP accepted his claim for right knee and leg sprain and tear of lateral meniscus of the right knee; OWCP File No. xxxxxx747. The record reflects that appellant received wage-loss compensation on the supplemental rolls from January 31 to April 6, 2005 and on October 4, 2005. Appellant separated from his federal employment on August 22, 2008.

Appellant previously received schedule awards in prior OWCP cases. In OWCP File No. xxxxxx129, OWCP accepted a tear of the medial meniscus of his right knee on July 22, 2002, when he twisted his knee while delivering mail. Appellant received a schedule award for two percent permanent impairment of the right lower extremity based on a partial medial meniscectomy on March 26, 2004. In OWCP File No. xxxxxx678, OWCP accepted that on June 24, 1999 appellant sustained a left knee chondromalacia of the patella. Appellant received a schedule award for an additional 26 percent permanent impairment of the right lower extremity and 27 percent permanent impairment of the left lower extremity under this claim.

On June 15, 2015 appellant filed a claim for a schedule award (Form CA-7) in this claim, OWCP File No. xxxxxx747.

In a March 25, 2015 note, Dr. Robert L. Zoeller, a Board-certified physiatrist, indicated that appellant had reached maximum medical improvement (MMI). In a December 9, 2015 note, he diagnosed severe degenerative joint disease, right greater than left knee. Dr. Zoeller noted that appellant had six surgeries on his right knee and one on his left, and that he was a candidate for future knee replacements. He opined that appellant had reached MMI in August 2008 with regard to his employment-related injury with the exception of the anticipated total knee replacement in the future. Dr. Zoeller indicated that under Table 16-23 the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,*[3] appellant had 10 percent permanent impairment of the right lower extremity.[4] He noted this was based on persistent pain, loss of range of motion (ROM), and persistent functional limitations.

On August 12, 2016 OWCP referred the case to OWCP's medical adviser for review of the request for an additional schedule award. It noted that appellant had previously been awarded 2 percent permanent impairment of the right lower extremity, an additional 26 percent permanent impairment for the right lower extremity, and 27 percent permanent impairment of the left lower extremity. In an accompanying statement of accepted facts (SOAF), the claims examiner listed appellant's multiple previous surgeries as: an August 22, 2002 arthroscopy of the right knee with shaving, debridement, and partial medial menisectomy; a March 27, 2003 arthroscopy of the right knee with removal of loose body and debridement; a March 10, 2005, arthroscopic lateral meniscectomy and shaving/debridement, right knee; a March 30, 2006 arthroscopy of left knee with debridement of chondral fissure; and a December 4, 2015 right total

[3] A.M.A., *Guides* (6th ed. 2009).

[4] *Id.* at 549, Table 16-23.

knee replacement with removal of tibial hardware. The SOAF listed appellant's accepted conditions in the current claim as right knee sprain, but also noted that his claims in other cases were accepted for aggravation of chondromalacia patella, left knee; chondromalacia patella, left knee; medial meniscus tear of the right knee; and dog bites to the right leg and right ankle.

In an August 21, 2016 report, OWCP's medical adviser diagnosed right knee sprain. Using Table 16-3 of the A.M.A., *Guides*, for knee strain with mild motion deficits, he determined that appellant had a class 1 Class of Diagnosis (CDX) impairment which had a default value of seven percent.[5] The medical adviser then applied a grade modifier of 1 for Functional History (GMFH), noting that appellant had an antalgic gait but did not use any gait aids. He found a grade modifier of 1 for Physical Examination (GMPE) due to mild motion deficit as evinced by flexion of 90 degrees. With regard to Clinical Studies (GMCS), the medical adviser found a grade modifier of 1 for mild pathology in x-rays of both knees on April 30, 2008, which showed no evidence of medial or lateral compartment narrowing involving either knee. He then applied the formula found in the A.M.A., *Guides* and determined that this resulted in a net adjustment of zero ((GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) = (1-1) + (1-1) + (1-1) = 0). The medical adviser therefore concluded that appellant had seven percent permanent impairment of the right lower extremity. He noted that this rating was different from Dr. Zoeller who used a different method of impairment rating. The medical adviser noted that Dr. Zoeller used the ROM method, but that since there was a diagnosis-based impairment (DBI) method available, this was the preferred method. He noted that for classification of strain, the A.M.A., *Guides*, do not permit ROM method as an option. The medical adviser then noted as there was already an award for 28 percent total permanent impairment of the right lower extremity, no additional award was merited.

On August 25, 2016 OWCP asked a district medical adviser to clarify his opinion. In an August 25, 2016 response, the medical adviser evaluated appellant's impairment for partial medial meniscectomy. He noted that, pursuant to Table 16-3, appellant had a diagnostic impairment of class 1 for a partial medial meniscectomy.[6] The medical adviser made adjustment of 1 for functional history and 1 for physical examination, as noted before. With regard to clinical studies, he noted that there were no studies to support the diagnosis. The medical adviser noted if there was a magnetic resonance imaging which showed a medial meniscus tear (which he most probably had) then it is still not used for adjustment, but rather for diagnosis and proper classification of the DBI grid. He then found zero net adjustment based on the adjustment formula of (GMFH-CDX) + (GMPE-CDX) = (1-1) + (1-1) = 0. The medical adviser determined that appellant had two percent permanent impairment to his right lower extremity based on partial medial meniscectomy. Since the impairment rating for the right knee sprain was higher than the rating for medial meniscus tear, the impairment rating for the right knee sprain was used for rating impairment. Accordingly, the medical adviser determined that appellant had seven percent permanent impairment of the right lower extremity, which was included in the previous award of 28 percent.

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

[6] *Id.*

By decision dated September 6, 2016, OWCP determined that OWCP's medical adviser properly applied the A.M.A., *Guides,* and that the medical evidence did not support an increased schedule award.

On September 14, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

At the hearing held on April 4, 2017 counsel for appellant argued that he was not paid for his 26 percent permanent impairment of the right knee. He also disputed the fairness of applying the sixth edition of the A.M.A., *Guides* to this case.

By decision dated May 16, 2017, the hearing representative affirmed the finding that appellant had not established greater than 28 percent permanent impairment of his right lower extremity. The hearing representative also determined that the weight of the medical evidence rested with the opinion of the medical adviser who used the DBI method to rate appellant's permanent impairment.[7]

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[8] Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides*, as the uniform standard applicable to all claimants.[9] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[10]

With respect to knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The CDX impairment is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for functional history (GMFH, Table 16-6), physical examination

[7] In OWCP File No. xxxxxx678, appellant received schedule awards for 27 percent permanent impairment of left lower extremity and an additional 26 percent permanent impairment of the right lower extremity. As properly noted by the hearing representative, there is no copy of the schedule award issued in OWCP File No.xxxxxx678 in the record. However, as also noted by the hearing representative, the record indicates that appellant elected a lump sum payment for his schedule award which covered the period December 24, 2006 through August 31, 2009, which is longer than the 1,108.8 days that would be payable for a combined 55 percent impairment of the lower extremities.

[8] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found.

[9] 20 C.F.R. § 10.404(a).

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

(GMPE, Table 16-7), and clinical studies (GMCS, Table 16-8). The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11]

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[12]

ANALYSIS

OWCP accepted that on April 28, 2004 appellant suffered a work-related sprain to his right knee and leg and a tear of the lateral meniscus of the right knee. Appellant had previously received schedule awards for the right lower extremity totaling 28 percent permanent impairment. The issue is whether appellant has established a greater permanent impairment for purposes of an increased schedule award.

The Board finds that appellant has not established more than 28 percent permanent impairment of the right lower extremity for which he previously received schedule awards.

The Board has previously held that the DBI methodology is the primary method of lower extremity permanent impairment evaluation.[13] Dr. Zoeller did not explain why the use of the ROM method was appropriate in the present case. The ROM method is used to determine actual impairment values of the lower extremities only when it is not possible to otherwise define impairment.[14] For this reason, the Board finds that Dr. Zoeller's opinion is insufficient to establish the degree of right lower extremity impairment in this case. The Board also notes that Dr. Zoeller's opinion does not make it absolutely clear which lower extremity was being evaluated.

OWCP's medical adviser indicated that he had applied Table 16-3, the DBI table, to the knee examination findings by Dr. Zoeller. He found that based on a class 1 impairment due to strain of the knee, mild motion deficits, appellant had a default rating of seven percent. The medical adviser properly applied that grade modifiers of 1 for functional history, 1 for physical examination, and 1 for clinical studies. This resulted in no adjustment from the default impairment. The medical adviser also reviewed appellant's case for a partial medial meniscectomy under Table 16-3, but determined that this would only provide appellant with a schedule impairment of two percent. As the schedule award based on knee strain was higher, the medical adviser utilized that figure, and determined that appellant had seven percent permanent impairment of his right lower extremity.

[11] The net adjustment is up to +2 (grade E) or -2 (grade A).

[12] *T.S.*, Docket No. 16-1406 (issued August 9, 2017).

[13] *See E.L.*, Docket No. 17-0834 (issued August 11, 2017).

[14] *See P.M.*, Docket No. 16-0367 (issued March 27, 2017).

The Board finds that the weight of the evidence is represented by the opinion of OWCP's medical adviser, who properly explained his application of Table 16-3 to determine appellant's right lower extremity impairment. Based on the evidence of record, appellant has not established more than 28 percent permanent impairment of the right lower extremity.

Appellant's contention on appeal, that he is entitled to an additional schedule award, has not been established based on the analysis of the medical evidence above. Counsel contends on appeal that the schedule award claim should not have been calculated under the sixth edition of the A.M.A., *Guides* since calculation under the fifth edition of the A.M.A., *Guides* would have resulted in a higher award. However counsel acknowledges that pursuant to FECA Bulletin No. 09-03, all schedule award decisions after May 1, 2009 must utilize the sixth edition of the A.M.A., *Guides.*[15] Even though appellant's prior schedule award was previously rated impairment under the fifth edition of the A.M.A., *Guides*, he requested an additional schedule award. As appellant was seeking an additional schedule award OWCP properly sought further medical review under the sixth edition.[16] The schedule award was not issued until after May 1, 2009. The Board finds that it properly based its decision on the sixth edition of the A.M.A., *Guides.*

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 established that he had more than 28 percent permanent impairment of his right lower extremity for which he previously received schedule awards.

[15] FECA Bulletin No. 09-03 states: Correspondence with treating physicians, consultants and second opinion specialists should reflect the use of the new edition for decisions issued after May 1, 2009. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[16] *See P.M.*, Docket No. 10-2029 (issued July 22, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2017 is affirmed.

Issued: February 2, 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