United States Department of Labor
Employees' Compensation Appeals Board

F.T., Appellant	)	
and	)	**Docket No. 16-1326**
	)	**Issued: March 12, 2018**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Chicago, IL, 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 14, 2016 appellant, through counsel, filed a timely appeal from a May 3, 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 met his burden of proof to establish permanent impairment, warranting a schedule award.

FACTUAL HISTORY

On October 10, 2011 appellant, then a 59-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, on September 30, 2011, he injured his lower back when he was tripped by a passenger while in the performance of duty.

In an October 14, 2011 attending physician's report (Form CA-20), Dr. Benjamin Von Fischer, an emergency medicine specialist, diagnosed lumbar strain and left knee sprain, which he attributed to the claimed September 30, 2011 employment incident.[3]

On November 18, 2011 OWCP accepted appellant's claim for left knee and lumbar sprains. It paid appellant compensation for intermittent wage loss during the period November 6, 2011 through January 13, 2012.

OWCP subsequently received evidence indicating that appellant had a preexisting left knee condition and had previously undergone a left knee arthroscopy/meniscectomy.

A January 11, 2012 left knee magnetic resonance imaging (MRI) scan revealed extensive medial meniscal degeneration, tear, and fragmentation. There was also evidence of chondromalacia of the patella, degenerative narrowing of the joint space, particularly in the medial component, and a moderately large joint effusion.

In a February 10, 2012 report, Dr. David M. Sack, Board-certified in occupational medicine, was asked to review appellant's medical records as Assistant Medical Director of the TSA workers' compensation case management program, including the recent left knee MRI scan He opined that it was reasonable to attribute a meniscus tear to the September 30, 2011 employment incident, but not the underlying degenerative arthritis.

In an April 30, 2012 report, OWCP's district medical adviser indicated that appellant's left knee arthritis predated the September 30, 2011 employment injury. He also advised that given appellant's previous left knee arthroscopy/meniscectomy, it was more likely than not that the current medial meniscal tear was secondary to his preexisting degenerative arthritis.

In a June 8, 2012 report, appellant's treating physician, Dr. Daniel T. Kuesis, a Board-certified orthopedic surgeon, diagnosed left knee degenerative joint disease (DJD) and recommended a left total knee arthroplasty.[4]

[3] Dr. Von Fischer noted that appellant's left knee x-ray revealed degenerative spurring, and his lumbar spine x-ray showed disc space narrowing at L5/S1.

[4] Dr. Kuesis noted that appellant's prior history included bilateral knee arthroscopy.

In a June 15, 2012 report, Dr. Sack indicated that appellant clearly had preexisting DJD, and the proposed total knee arthroplasty was intended to treat his DJD, a condition not accepted under the current claim. He did not question the need for surgery, but merely whether the underlying condition was employment related. Dr. Sack recommended referral for a second opinion examination to address any remaining questions as to the relationship between appellant's left knee DJD and the September 30, 2011 employment injury and/or the appropriateness of the proposed surgery.

Appellant continued to follow-up with Dr. Kuesis in July and August 2012. Dr. Kuesis reiterated his diagnosis of left knee DJD and continued to recommend left total knee replacement.

In a September 24, 2012 report, Dr. Theodore J. Suchy, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed lumbar spine strain -- resolved and left knee medial compartment DJD. He opined that there was a causal relationship between the resolved lumbar strain, which was at maximum medical improvement (MMI). Dr. Suchy also indicated that regarding the left knee, it was his opinion that appellant suffered a temporary exacerbation of his preexisting condition medial compartment arthritis. Regarding the period of exacerbation, he advised that it was temporary and lasted 8 to 10 weeks. Dr. Suchy further explained that appellant's continued symptomatology was a manifestation of the natural progression of his well-documented preexisting medial compartment DJD. He recommended visco-supplementation and eventual medial compartment arthroplasty due to appellant's preexisting left knee arthritic condition.

OWCP declared a conflict in medical opinion and referred appellant for an impartial medical examination.

On May 14, 2013 appellant underwent a left total knee arthroplasty, which Dr. Kuesis performed.

In a June 12, 2013 report, Dr. John N. Stamelos, a Board-certified orthopedist and impartial medical examiner, noted appellant's history of injury and treatment, examined appellant and provided findings. He determined that visco-supplementation would have been an appropriate treatment for the natural history of osteoarthritis of appellant's left knee, but it was not related to the work condition. Dr. Stamelos explained that appellant had a temporary exacerbation or a setback that did not lead to, aggravate, or extend his current condition regarding his preexisting left knee arthritis. Regarding the duration of such temporary aggravation, he opined that the effusion would have resolved sometime in February or March 2012. Dr. Stamelos noted that, after that time, he then was dealing with a preexisting arthritic condition of his left knee with variable symptoms. He further explained that appellant delayed having a knee replacement until May 2013, even though he was symptomatic for six months. Dr. Stamelos advised that the reason he had surgery in May 2013 was not because his symptoms were increasing in such intensity, but more because of multiple factors, including his work status situation. He opined that appellant did not continue to suffer residuals of the September 30, 2011 employment injury. Furthermore, Dr. Stamelos explained that appellant had a total knee replacement as a result of his preexisting arthritic condition and had residuals from that.

Effective August 14, 2013, appellant resigned from the employing establishment.

On February 18, 2014 appellant filed a claim for a schedule award (Form CA-7).

By letter dated March 7, 2014, OWCP requested that appellant obtain an opinion on impairment from his treating physician based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (A.M.A., *Guides*). It noted that the July/August 2009 *The Guides Newsletter* should be utilized to assess impairment to the extremities due to spinal nerve injury.

In a March 13, 2014 report, Dr. Neil Allen, a Board-certified internist and neurologist, noted appellant's history of injury and treatment, which included arthroscopic surgery to the left knee five years prior to the September 30, 2011 employment injury. Additionally, he noted that appellant had a left total knee arthroplasty on May 14, 2013. Dr. Allen examined appellant, provided findings, and utilized the A.M.A., *Guides*. He utilized Table 16-3, Knee Regional Grid-lower extremity impairments,[5] and determined that appellant had a diagnosis-based impairment of class 2, with a default value of 25 percent. Dr. Allen adjusted it based upon functional history and physical examination findings. Regarding functional history, he referred to Table 16-6[6] and found that appellant had a lower limb score of 49 and a stiff antalgic gait, which qualified him for a grade modifier of one for clinical studies. Dr. Allen provided a physical examination adjustment grade 2 modifier pursuant to Table 16-7[7] based upon: mild palpatory findings, consistently documented without observed abnormalities; negative findings for instability; negative Lachman's moderate deformity compared to unaffected side knee circumference; full motion in all spheres; and negative muscle atrophy. He also provided a clinical studies adjustment grade modifier of 2 pursuant to Table 16-8.[8] Dr. Allen indicated that, based upon the net adjustment formula,[9] appellant had 23 percent permanent impairment of his left lower extremity. He also indicated that appellant had reached MMI.

In a May 3, 2014 report, OWCP's medical adviser noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. In particular, he noted that appellant underwent a left knee arthroplasty on May 14, 2013. OWCP's medical adviser explained that the total knee arthroplasty was not related to the September 30, 2011 employment injury. Although Dr. Allen correctly rated appellant's total knee arthroplasty, OWCP's medical adviser noted that the surgery had not been approved by OWCP and, therefore, it could not be rated. He further found that appellant did not have any motor or sensory deficits in the bilateral lower extremities and; therefore, a lumbar sprain would equate to a class 0 diagnosis with zero percent bilateral lower extremity impairment.

[5] A.M.A., *Guides* 511.

[6] *Id*. at 516.

[7] *Id*. at 517.

[8] *Id*. at 519.

[9] *Id*. at 521.

On July 30, 2015 OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not establish a permanent impairment based upon his work-related lumbar and left knee sprains.

On August 5, 2015 counsel requested a telephonic hearing, which was held before an OWCP hearing representative on March 18, 2016.

In a letter dated March 22, 2016, counsel referenced Dr. Sack's June 15, 2012 report, and requested that appellant's claim be expanded to include exacerbation of preexisting left knee arthritis.

By decision dated May 3, 2016, an OWCP hearing representative affirmed the July 30, 2015 decision. The hearing representative further that the left knee arthroplasty was unrelated to the accepted condition(s) and had not been authorized by OWCP. Therefore, there was no basis for any impairment rating secondary to appellant's 2013 surgery.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[10] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[11] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[12]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[13] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[14] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.[15] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of

[10] For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[11] 20 C.F.R. § 10.404.

[12] *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).

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[14] *Supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3).

[15] The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.[16]

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[17] Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.[18] If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[19] There are no provisions for apportionment under FECA,[20] but when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.[21]

ANALYSIS

The Board finds that the evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

In his March 13, 2014 report, Dr. Allen rated appellant's left lower extremity based on the results of the May 14, 2013 left total knee arthroplasty. He did not specifically identify any lower extremity impairment due to either of appellant's accepted conditions -- lumbar sprain and left knee sprain. Dr. Allen also did not specifically attribute appellant's left total knee arthroplasty to the September 30, 2011 employment injury. As the May 14, 2013 left knee surgery was not authorized by OWCP to treat appellant's accepted injury-related conditions, any subsequent permanent impairment resulting from the unauthorized medical treatment is not covered under FECA, absent evidence of causal relationship. Dr. Allen did not indicate that the work-related injury had affected any residual usefulness, in whole or in part, of the left lower extremity.[22] The Board finds that this report does not establish entitlement to a schedule award.

Furthermore, OWCP's medical adviser found that appellant did not have any ratable impairment under the A.M.A., *Guides.* In a May 3, 2014 report, he noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. OWCP's medical adviser explained that appellant underwent a left knee arthroplasty on May 14, 2013, which was not related to the September 30, 2011 work injury. He opined that the "knee cannot be rated as [appellant] had a total knee arthroplasty performed unrelated to a work injury." OWCP's medical adviser

[16] *See supra* note 12 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

[17] *Carol A. Smart,* 57 ECAB 340, 343 (2006); *Michael C. Milner,* 53 ECAB 446, 450 (2002).

[18] *Supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d.

[19] *Id.*

[20] *Id.*

[21] *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

[22] *Id.*

explained that, while Dr. Allen's opinion on impairment was correct, the surgery was not OWCP approved and it could not be rated. Furthermore, he explained that appellant did not have any motor or sensory deficits in the bilateral lower extremities and opined that the lumbar sprain would equate to a class 0 diagnosis with zero percent bilateral lower extremity impairment.

The Board finds that OWCP medical adviser's opinion is entitled to the weight of the medical evidence as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his report in finding that appellant was not entitled to a schedule award. As indicated, the left knee was only accepted for a sprain and no surgeries to the knee were authorized. OWCP's medical adviser reviewed the medical records, and reported accurate medical and employment histories. He did not find that the work-related injury affected any residual usefulness in whole or in part and there is no current probative medical evidence of record establishing that appellant has any ratable permanent impairment.

Consequently, appellant has not submitted medical evidence sufficient to establish that his accepted conditions of lumbar sprain and left knee sprain caused permanent impairment to a scheduled member of the body. As such evidence has not been submitted, appellant has not established entitlement to a schedule award.

On appeal counsel argues that the employing establishment takes the injured worker as it finds him, and that appellant's underlying left knee condition must be considered when determining entitlement to a schedule award. He also urged OWCP to expand appellant's claim to include aggravation/exacerbation of left knee arthritis. Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[23] Thus far, OWCP has only accepted appellant's claim for lumbar and left knee sprains. A preexisting, underlying condition should be considered when determining entitlement to a schedule award, but only to the extent that the work-related injury has affected any residual usefulness in whole or in part of the schedule member.[24]

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 entitlement to a schedule award.

[23] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[24] *See supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2018
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