

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

_____)	
K.G., Appellant)	
)	
and)	Docket No. 17-0821
)	Issued: May 9, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Richmond, VA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 28, 2017 appellant filed a timely appeal from a February 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.³

ISSUE

The issue is whether appellant has established permanent impairment of her right lower extremity, warranting a schedule award.

¹ By decision dated October 21, 2016, OWCP authorized 2.79 hours of wage-loss compensation for July 25, 2016, but denied remaining hours of compensation for the dates and hours of disability claimed for July 25 and 26, 2016. As appellant has not appealed this decision, the Board will not address the wage-loss compensation issue.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its February 1, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On November 17, 2001 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she twisted her right knee and right ankle while descending stairs while in the performance of duty that day. She stopped work on November 17, 2001. Appellant accepted a limited-duty job offer on June 10, 2002. OWCP accepted the claim for right knee and leg strain. It paid appellant wage-loss compensation benefits on the supplemental rolls commencing January 8, 2003 and authorized medical treatment including a right knee chondroplasty and arthroscopy, which were performed on January 8, 2003.

On March 1, 2004 appellant filed a claim for a schedule award (Form CA-7). By decision dated January 18, 2006, OWCP denied appellant's claim for a schedule award, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

Appellant was placed on the periodic compensation rolls commencing April 10, 2011. She returned to limited-duty work on December 5, 2012.

OWCP had received a series of progress notes from Dr. William Fleming, a Board-certified orthopedic surgeon. In a January 15, 2015 report, Dr. Fleming noted appellant's continued right knee pain, and degenerative joint disease based on x-ray examination. He related appellant's right knee physical examination findings as full extension of the right knee, flexion of 95 to 100 degrees, and tenderness in the medial joint. Dr. Fleming noted that he would obtain a magnetic resonance imaging (MRI) scan to determine whether appellant required further arthroscopy of the right knee.

A March 9, 2015 MRI scan of appellant's right knee interpreted by Dr. Austin E. Peat, a Board-certified diagnostic radiologist, related an impression of moderate patellofemoral osteoarthritis.

On September 7, 2016 OWCP referred appellant to Dr. James Schwartz, an orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted conditions. In a report dated October 22, 2016, Dr. Schwartz related appellant's history of injury and noted appellant's complaint that her right knee arthroscopic procedure had not resolved her knee condition. He reviewed the medical evidence of record, including a number of progress reports from Dr. Fleming. Dr. Schwartz related appellant's physical examination findings regarding her right lower extremity included antalgic gait, range of motion of the right knee, 0 to 120 degrees, pain on patellar compression on the right, no joint effusion, good dorsal and pedal pulses, and medial and lateral joint line tenderness on the right. He diagnosed patellofemoral chondromalacia/patellofemoral syndrome, causally related to appellant's November 17, 2001 employment injury. Dr. Schwartz related that appellant had a permanent aggravation of preexisting patellofemoral arthritis. He opined that appellant had permanent impairment and that she was at maximum medical improvement (MMI).

On November 29, 2016 appellant filed a claim for a schedule award (Form CA-7). No medical evidence was received in support of the claim.

By letter dated December 9, 2016, OWCP requested that appellant submit a report from her attending physician addressing her work-related condition, the date of MMI, objective

findings, subjective complaints, and an impairment rating rendered according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ Appellant was advised that, if her physician was unable or unwilling to provide the required report, she should advise OWCP in writing. She was afforded 30 days to provide the requested information.

In a November 7, 2016 report, Dr. Fleming, an orthopedic surgeon, provided an assessment of right knee arthritis. He also noted that appellant continued to receive right knee injections.

In a January 4, 2017 telephone call, appellant advised OWCP that her doctor did not perform permanent impairment ratings. She was advised to put that information in writing if she wanted OWCP to schedule her for an impairment examination.

By decision dated February 1, 2017, OWCP denied appellant's claim for a schedule award, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.⁵ 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 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.⁶

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷ The Board has approved OWCP's use 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.⁸

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, the evaluator identifies the impairment class for the diagnosed condition should be Class of Diagnosis (CDX), which is then adjusted by grade modifiers based

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁶ *K.H.*, Docket No. 09-0341 (issued December 30, 2011).

⁷ 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 (March 2017).

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹¹

OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹²

ANALYSIS

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

OWCP accepted appellant's claim for right knee and leg strain and paid wage-loss compensation benefits. It also authorized medical treatment including a right knee chondroplasty and arthroscopy performed on January 8, 2003.

On November 29, 2016 appellant filed a claim for a schedule award. By decision dated February 1, 2017, OWCP denied her schedule award claim, finding that she had failed to submit an impairment evaluation establishing permanent impairment due to her employment injury. Appellant had submitted medical reports to the record which documented her continued right knee examination findings, however appellant also informed OWCP that her treating physician did not perform permanent impairment evaluations. OWCP referred appellant to Dr. Schwartz for a second opinion evaluation to determine the status of appellant's accepted condition. Dr. Schwartz was not specifically requested to perform a permanent impairment evaluation.

In his October 22, 2016 report, Dr. Schwartz related that appellant had developed a permanent aggravation of patellofemoral chondromalacia/patellofemoral syndrome from her accepted 2001 right knee injury. He also explained that this condition had caused permanent impairment and that appellant was at MMI.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Once OWCP undertakes development of the record it must procure medical

⁹ *Supra* note 4 at 493-531.

¹⁰ *Id.* at 521.

¹¹ *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹² *Supra* note 7 at Chapter 2.808.5 (March 2017).

¹³ *See Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *See Richard E. Simpson*, 55 ECAB 490 (2004).

evidence that will resolve the relevant issues in the case.¹⁵ It began to develop the evidence when it referred appellant to Dr. Schwartz for a second opinion on the status of her accepted right knee condition. Dr. Schwartz explained that appellant had permanent impairment of her right knee and had reached MMI, but did not include an impairment evaluation.¹⁶

The Board, therefore, finds that the case must be remanded to OWCP. On remand OWCP should prepare an updated statement of accepted facts which includes all accepted conditions. The case shall then be forwarded to Dr. Schwartz for a supplemental opinion addressing whether appellant has permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 1, 2017 is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: May 9, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁵ *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁶ *See P.E.*, Docket No. 17-0961 (issued March 14, 2018).