United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
	)	**Docket No. 18-0227**
and	)	**Issued: May 24, 2018**
	)	
DEPARTMENT OF JUSTICE, BUREAU OF PRISIONS, Milan, MI, 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 November 13, 2017 appellant filed a timely appeal from a November 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established more than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 19, 2015 appellant, then a 39-year-old education supervisor, injured his left knee while responding to a medical emergency at the correctional facility's recreation yard.[3] OWCP accepted his traumatic injury claim (Form CA-1) for left knee lateral meniscus tear. On November 23, 2015 appellant underwent OWCP-approved left knee arthroscopic surgery.[4] He received wage-loss compensation for temporary total disability. On January 19, 2016 appellant returned to work in a full-time, limited-duty capacity. He resumed his regular duties on February 26, 2016.[5] Appellant also filed a claim for a schedule award (Form CA-7).

In a May 13, 2016 report, Dr. Telfer advised that appellant reached maximal medical improvement (MMI). He also advised appellant that it was quite possible that his left knee arthritis, as evidenced on x-ray (June 20, 2015) and during surgery, could progress to the point where appellant might require knee replacement surgery. In the short term, Dr. Telfer explained that appellant was able to manage his day-to-day symptoms with activity modification, over-the-counter medications, and similar conservative measures. In an August 17, 2016 follow-up report, he reiterated that appellant reached MMI. Dr. Telfer indicated that appellant was back at work and reported no significant difficulties. He explained that the combination of the loss of meniscal tissue through injury and surgery, and appellant's preexisting arthritis, would likely increase the chance of future symptoms of arthritis. Currently, appellant's symptoms were fairly minimal and tolerable. Dr. Telfer noted that there was no way to project a timetable for future difficulties with appellant's left knee. Because he was either unable or unwilling to prepare an impairment rating, OWCP referred appellant for a second opinion evaluation.

By decision dated December 21, 2016, OWCP granted a schedule award for two percent permanent impairment of the left lower extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[6] OWCP based the award on a November 8, 2016 impairment rating provided by Dr. Richard H. Deerhake, a Board-certified orthopedic surgeon and OWCP referral physician. Dr. Deerhake rated appellant based on his November 23, 2015 partial lateral meniscectomy.[7] He

[2] Docket No. 17-0489 (issued May 11, 2017).

[3] Appellant was running across the baseball field when he felt his knee pop and give way.

[4] Dr. James L. Telfer, a Board-certified orthopedic surgeon, performed a diagnostic arthroscopy with minimal chondral debridement and partial lateral meniscectomy.

[5] In a February 25, 2016 report, appellant's surgeon released him to return to his "usual work duties without restriction."

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

[7] Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509 (6th ed. 2009). OWCP's district medical adviser (DMA) concurred with Dr. Deerhake's two percent left lower extremity permanent impairment rating.

did not evaluate appellant for left knee arthritis noting there were "no clinical studies in terms of standing x-rays to evaluate joint space." Dr. Deerhake also indicated that "arthritis … [was] not an allowed condition … in regards to [appellant's] knee…."

Appellant subsequently appealed to the Board. By May 11, 2017 decision, the Board set aside OWCP's December 21, 2016 decision, and remanded the schedule award claim for further medical development.[8] The Board found that additional development was necessary with respect to appellant's preexisting left knee arthritis. The Board explained that, when determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[9]

OWCP subsequently received a February 10, 2017 left knee magnetic resonance imaging (MRI) scan interpreted by Dr. Eric C. Ferguson a diagnostic radiologist that revealed a tear of the lateral meniscal body which was likely a degenerative-type tear. He indicated that the left knee MRI scan also showed blunting of the posterior horn of the lateral meniscus that may be from prior debridement, degenerative blunting, or minor tearing. There was also evidence of moderate bony and chondral degenerative changes in the lateral compartment, mild medial compartment degenerative changes, and moderate degenerative changes of the patellofemoral joint.

In a May 26, 2017 addendum report, Dr. Deerhake reviewed appellant's June 20, 2015 left knee x-ray and indicated that he did not "find significant narrowing of the joint on his standing knee film which would allow for additional award for the arthritic changes in [appellant's] knee." He explained that while appellant had some mild degenerative knee symptoms, it was not the cause of his current discomfort and pain. Dr. Deerhake attributed appellant's problem to having had his lateral meniscus excised.

In a June 15, 2017 report, the DMA reviewed the record, including appellant's February 10, 2017 left knee MRI scan, and concurred with Dr. Deerhake's May 26, 2017 impairment rating. The DMA explained that although appellant had preexisting left knee arthritis, Dr. Deerhake's review of appellant's x-rays did not demonstrate joint space narrowing that would warrant impairment for arthritis under the A.M.A., *Guides* (6th ed. 2009).

By decision dated June 26, 2017, OWCP denied appellant's request for an increased schedule award. It found that the evidence established that he had no more than the two percent left lower extremity permanent impairment previously awarded.

On August 15, 2017 appellant requested reconsideration and submitted additional evidence.

On July 27, 2017 Dr. Chad A. Krueger, a Board-certified internist, evaluated appellant for musculoskeletal pain and back pain. He noted that appellant experienced bilateral knee pain with

[8] *See supra* note 2.

[9] *Id.*

locking, loss of strength, and difficulty climbing stairs, bending, and squatting. Dr. Krueger diagnosed chronic left knee pain.

On August 3, 2017 Dr. Krueger related that appellant experienced "constant and severe arthritic pain involving both knees and the lower back." He discussed his complaints of reduced left knee motion, loss of strength, locking, pain, and limitations with activity. Dr. Krueger opined that appellant reached MMI in November 2016.

By decision dated November 8, 2017, OWCP denied modification of its June 26, 2017 decision. It found that appellant had not submitted evidence establishing more than two percent permanent impairment of the left lower extremity.

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]

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.[13] 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.[14] If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.[15] There are no provisions for apportionment under FECA,[16] but when the prior impairment is due to a previous work-related

[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 (March 2017).

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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d.

[15] *Id.*

[16] *Id.*

injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.[17]

ANALYSIS

OWCP accepted that appellant sustained a left knee lateral meniscus tear. On November 23, 2015 appellant underwent a left partial lateral meniscectomy. He later filed a schedule award claim. Because his attending physician was unable to provide an impairment rating, OWCP referred appellant to Dr. Deerhake, who initially found two percent left lower extremity permanent impairment based on appellant's left partial lateral meniscectomy. On remand Dr. Deerhake considered whether there was any additional lower extremity impairment attributable to appellant's preexisting left knee arthritis.

In his May 26, 2017 addendum report, Dr. Deerhake reviewed appellant's left knee x-ray(s) and found that he did not have joint space narrowing on standing x-rays sufficient to show entitlement to a schedule award for arthritis. He attributed appellant's symptoms to the left meniscus surgery, which Dr. Deerhake initially rated in his November 8, 2016 report.

The Board finds that appellant has no more than two percent permanent impairment of the left lower extremity. In his November 8, 2016 impairment evaluation, Dr. Deerhake identified the diagnosis as Class of Diagnosis (CDX) one partial lateral meniscectomy using Table 16-3 on page 509 of the A.M.A., *Guides*, which yielded a default (C) value of two percent. He assigned grade modifiers for Functional History (GMFH 1) and Physical Examination (GMPE 1), and the net adjustment (0) resulted in no change from the default value of two percent (grade C).[18] An OWCP medical adviser reviewed the evidence on December 14, 2016 and June 15, 2017 and concurred with Dr. Deerhake's findings. There is no probative medical evidence showing more than two percent permanent impairment of the left lower extremity.[19]

OWCP received a February 10, 2017 left knee MRI scan, as well as additional reports from Dr. Krueger. However, Dr. Krueger did not provide an evaluation and/or rating with respect to the extent of any left lower extremity permanent impairment under the A.M.A., *Guides* (6th ed. 2009).[20]

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.

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

[18] Net Adjustment (0) = (GMFH 1-CDX 1) + (GMPE 1-CDX 1). *See* Section 16.3d, A.M.A., *Guides* 518-21 (6th ed. 2009).

[19] *See D.I.*, Docket No. 16-1891 (issued December 7, 2017).

[20] *See R.M.*, Docket No. 17-1410 (issued November 9, 2017).

CONCLUSION

The Board finds that appellant has not established more than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 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