United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 19-0526**
	)	**Issued: July 24, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Pasadena, MD, Employer	)	

Appearances:
Scott B. Baron, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 3, 2019 appellant, through counsel, filed a timely appeal from a September 14, 2018 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 met his burden of proof to establish greater than nine percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

[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.

FACTUAL HISTORY

OWCP accepted that on May 11, 2001 appellant, then a 36-year-old mail carrier, sustained a neck sprain, post-traumatic stress disorder, loose body and medial meniscus tear of the right knee, osteochondritis dissecans, degeneration of cervical intervertebral disc, and displacement of cervical intervertebral disc without myelopathy as a result of a motor vehicle accident that occurred while in the performance of duty.[2] It authorized a right medial meniscus repair performed on July 10, 2001, cervical discectomy and fusion performed on November 22, 2002, right medial meniscectomy performed on July 10, 2003, autologous chondrocyte implant procedure on the right knee performed on December 23, 2003, and lumbar facet rhizotomies performed on July 1, 2004 and February 2, 2005.

On July 17, 2015 appellant filed a claim for a schedule award (Form CA-7).

OWCP subsequently received an impairment evaluation dated June 8, 2015 by Dr. Michael A. Franchetti, an attending Board-certified orthopedic surgeon. Dr. Franchetti provided an impression of status post arthroscopic attempted medial meniscus repair and chondroplasty medial femoral condyle followed by medial meniscectomy, removal of loose bodies, and repeat chondroplasty medial femoral condyle followed by autologous chondrocyte implant of the medial femoral condyle (Carticel implant) with post-traumatic degenerative joint disease of the right knee and painful loss of motion/arthrofibrosis.[3] He advised that appellant had reached maximum medical improvement (MMI). Dr. Franchetti used the range of motion (ROM) method in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] to find 30 percent permanent impairment of the right lower extremity due to appellant's employment-related right knee conditions.

On August 11, 2015 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), indicated that he had reviewed the medical record and a statement of accepted facts (SOAF). Regarding impairment of the right lower extremity, he utilized Table 16-3, Knee Regional Grid-Lower Extremity Impairment, on page 511. Dr. Berman found that a diagnosis of primary knee arthritis represented a class 1 impairment, three-millimeter (mm) cartilage interval with a full-thickness articular cartilage defect or ununited osteochondral fracture, had a default value of seven percent. He assigned a grade modifier for functional history (GMFH) of 2 due to moderate deficit under Table 16-6 on page 516. Dr. Berman assigned a grade modifier for physical examination (GMPE) of 2 for moderate loss of ROM and moderate problems under Table 15-7 on page 517. He also assigned a grade modifier for clinical studies (GMCS) of

[2] Appellant stopped work on May 11, 2001. On December 1, 2014 he returned to work at the Department of Defense (DOD). By decision dated February 18, 2015, OWCP reduced appellant's wage-loss compensation to zero as his actual earnings from his position at DOD fairly and reasonably represented his wage-earning capacity.

[3] Dr. Franchetti also provided an impression of status post anterior cervical discectomy and fusion with plate fixation at C3-4, C4-5, and C5-6 followed by anterior cervical discectomy and fusion at C6-7 with anterior plate fixation followed by evacuation of postop retropharyngeal hematoma with breakage of the anterior fixation plate, chronic cervical strain, and chronic left cervical radiculopathy. Additionally, he provided an impression of chronic left shoulder sprain and strain with post-traumatic bursitis.

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

1 for less than five-mm joint space narrowing under Table 16-8 on page 519. Using the net adjustment formula, Dr. Berman moved the class 1, grade C, seven percent impairment, to a grade E or nine percent permanent impairment of the right lower extremity. He found that appellant had reached MMI on June 8, 2015.

OWCP determined that a conflict in medical opinion existed between Dr. Franchetti and Dr. Berman regarding the extent of appellant's permanent impairment of the right lower extremity. It referred appellant to Dr. Robert M. Saltzman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated December 30, 2015, Dr. Saltzman agreed with Dr. Berman's nine percent right lower extremity permanent impairment rating. On physical examination of the right knee, he found full extension to 0 degrees and flexion to greater than 120 degrees. There was no effusion present. Strength was 5/5 with resisted knee extension and flexion. There was also less than one centimeter atrophy of the quadriceps on the right as compared to the left.

Dr. Saltzman noted that Dr. Berman correctly used the sixth edition of the A.M.A., *Guides*, including the Knee Regional Grid for lower extremity impairments. He indicated that Dr. Berman utilized Table 16-3 on page 511 and identified the diagnosis of primary knee joint arthritis as a class 1 mild problem, with a three-mm cartilage interval with a full-thickness articular cartilage defect or ununited osteochondral fracture, which was reported on x-rays by Dr. Franchetti. Dr. Saltzman referred to page 543, noting that the DBI method was the method of choice for calculating impairment for the selected diagnosis. He indicated that Dr. Berman utilized Table 16-3 on page 511 and correctly assessed that a three-mm cartilage interval and represented a grade C, seven percent impairment, and that, based on a GMPE adjustment on page 517, this impairment rating was adjusted from grade C to grade E, yielding nine percent permanent impairment of the right lower extremity. Dr. Saltzman noted that Dr. Franchetti used the ROM method to determine that appellant had 10 permanent impairment of the right lower extremity impairment. He advised that the nine percent impairment rating found by Dr. Berman took into account appellant's pain, limp, ROM deficits, and restriction of activity. Dr. Saltzman concluded that appellant had reached MMI on June 8, 2015.

On February 16, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, found that appellant had nine percent permanent impairment of the right lower extremity. He advised that appellant had reached MMI on June 8, 2015.

On February 24, 2016 OWCP requested that the DMA provide clarification of his February 16, 2016 report as he did not address Dr. Saltzman's findings. It advised him to review the findings of Dr. Saltzman, as well as the findings of Dr. Franchetti and Dr. Berman, and the SOAF. OWCP also requested that the DMA explain whether Dr. Saltzman had properly calculated appellant's permanent impairment of the right lower extremity and determined his date of MMI.

On March 30, 2016 the DMA indicated that he had reviewed the SOAF and medical record. He agreed with Dr. Saltzman's nine percent right lower extremity impairment rating.

By decision dated June 30, 2017, OWCP granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. The award ran for the period June 8

to December 6, 2015, for a total of 25.92 week, and was based on the December 30, 2015 report of Dr. Saltzman and March 30, 2016 report of the DMA.

On June 18, 2017 appellant, through counsel, requested reconsideration. In support of his request he submitted a letter dated May 18, 2018 from Dr. Franchetti. Dr. Franchetti indicated a review of appellant's medical records and noted that neither Dr. Berman nor Dr. Harris had performed an interview or physical examination. He maintained that both physicians had simply reviewed medical records to arrive at their opinions. Dr. Franchetti further maintained that the impairment reflected in his June 8, 2015 report remained a fair and an accurate assessment of appellant's May 11, 2001 employment-related impairments based on his review of the voluminous medical records and his detailed report.

By decision dated September 14, 2018, OWCP denied modification of its June 30, 2017 decision, finding that Dr. Franchetti's May 18, 2018 report was insufficient to establish that appellant had more than nine percent permanent impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulation,[6] 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[9] After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10] Under Chapter 2.3, the

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] *See* A.M.A., *Guides* 509-11 (6th ed. 2009).

[10] *Id.* at 515-22.

evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[13] Where a case is referred to an impartial medical examiner (IME) for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[14]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than nine percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

OWCP accepted that appellant sustained neck sprain, post-traumatic stress disorder, loose body and medial meniscus tear of the right knee, osteochondritis dissecans, degeneration of cervical intervertebral disc, and displacement of cervical intervertebral disc without myelopathy with resulting cervical and lumbar spine and right knee surgeries performed on various dates from November 22, 2002 through February 2, 2005.

OWCP properly determined that a conflict in the medical opinion evidence existed between Dr. Franchetti, a treating physician, and Dr. Berman, an OWCP DMA, regarding the extent of appellant's permanent impairment of the right lower extremity due to his accepted work-related conditions.

Dr. Saltzman was selected as the IME, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). In his December 30, 2015 report, he reviewed the SOAF and medical record, and provided extensive physical examination findings. Dr. Saltzman concurred with Dr. Berman's assessment that appellant had nine percent permanent impairment of the right lower extremity for the diagnosis of primary knee joint arthritis in accordance with the A.M.A., *Guides*. He maintained that Dr. Berman properly assigned a class 1 impairment for mild arthritis knee problems with a three-mm cartilage interval with a full-thickness articular cartilage defect or ununited osteochondral fracture, which represented a default grade C, seven percent impairment, under Table 16-3, Knee Regional Grid, page 511. Dr. Saltzman further maintained that, Dr. Berman properly applied the net adjustment formula, which required movement of the grade

[11] *Id*. at 23-28.

[12] 5 U.S.C. § 8123(a).

[13] *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[14] *Id.*

C impairment to grade E, for a nine percent impairment of the right lower extremity. He explained that the impairment rating took into account appellant's pain, limp, ROM deficits, and restriction of activity. Based on his examination and review of the record, Dr. Saltzman properly concluded that appellant had nine percent right lower extremity permanent impairment. The Board finds his impartial medical opinion is sufficiently well rationalized and based upon a proper factual and medical background such that it is entitled to special weight.[15]

Dr. Franchetti, in a report dated May 18, 2018, reviewed the medical record and contended that neither Dr. Berman nor Dr. Harris, also an OWCP DMA, had interviewed or examined appellant. He contended that the physicians simply reviewed medical records to arrive at their opinions. Contrary to Dr. Franchetti's contention, OWCP's procedures specifically provide: "The [c]laims [e]xaminer (CE) will ask the DMA to evaluate a case when it appears to be in posture for schedule award determination. The DMA is responsible for reviewing the file, particularly the medical report on which the award is to be based, and then calculating the award."[16] Further, Dr. Franchetti contended that his 30 percent right lower extremity impairment rating remained a fair and an accurate assessment of appellant's impairment due to the May 11, 2001 employment injury. He, however, was on one side of the conflict resolved by Dr. Saltzman. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME, or to create a new conflict.[17] Dr. Franchetti's report is thus insufficient to overcome the special weight accorded to Dr. Saltzman's opinion or to create a new conflict in medical opinion.[18]

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 greater than nine percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

[15] *See N.L.*, Docket No. 18-0743 (issued April 10, 2019*); A.H.*, Docket No. 18-0050 (issued March 26, 2018); *J.J.*, Docket No. 10-1758 (issued May 16, 2011).

[16] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700.3 (January 2010); *see also D.P.*, Docket No. 16-1908 (issued May 22, 2017).

[17] *See S.S.*, Docket No. 17-1361 (issued January 8, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

[18] *See S.S., id.*; *K.R.*, Docket No. 16-0542 (issued December 21, 2016).

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board