United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
	)	
and	)	**Docket No. 18-1467**
	)	**Issued: March 5, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Warren, 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 July 23, 2018 appellant filed a timely appeal from a February 27, 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 more than two percent permanent impairment of his right 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 March 27, 2014 appellant, then a 58-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he suffered from right knee pain as a result of walking, standing, and mounting and dismounting vehicles while at work. He noted that he first became aware of his claimed condition and realized its relation to his federal employment on February 10, 2014. Appellant stopped work on March 4, 2014 and returned to modified duty on March 5, 2014.

OWCP accepted his claim for right knee strain.

On January 28, 2015 appellant filed a claim for a schedule award (Form CA-7). After development of the medical evidence, OWCP granted him a schedule award for two percent permanent impairment of his right lower extremity.

On January 26, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

In a January 11, 2016 report, Dr. Peter E. Metropoulos, Board-certified in occupational medicine, opined that appellant had 22 percent permanent impairment of the right lower extremity[3] according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).[4] He noted that appellant's claim had been accepted for right knee sprain and provided examination findings. Dr. Metropoulos diagnosed right knee progressive pain with loss of function and decreased range of motion with diagnostic evidence of tricompartmental osteoarthritis. He reported that appellant had reached maximum medical improvement (MMI) as of January 21, 2015.

In a February 11, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), noted his disagreement with Dr. Metropoulos' January 11, 2016 impairment rating report. He explained that Dr. Metropoulos applied Table 16-3, *Knee Regional Grid*, for separate diagnoses, which was duplicative and inconsistent with the methodology outlined in the A.M.A., *Guides.* Dr. Katz recommended that OWCP refer appellant's schedule award claim for a second opinion evaluation.

[2] Docket No. 17-1056 (issued November 3, 2017).

[3] Dr. Metropoulos indicated that his evaluation of impairment was based on Table 16-3, *Knee Regional Grid*, and supplemental Table 16-5, Table 16-6, Table 16-7, Table 16-8, and Table 16-23. He determined that appellant had seven percent permanent impairment for his right ankle sprain condition, two percent permanent impairment for appellant's medial meniscus tear, seven percent for appellant's tear of the gastrocnemius muscle tendon, and seven percent for his tricompartmental osteoarthritis.

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

In a May 18, 2016 supplemental report, Dr. Metropoulos noted that the A.M.A., *Guides* allowed for a medical examiner to combine diagnoses if the most impairing diagnosis did not adequately reflect a claimant's functional loss. He explained that based on appellant's complaints of continuing and increased right knee pain and objective examination findings, a combination of diagnoses more accurately reflected appellant's total functional loss to his right lower extremity.

In a June 2, 2016 report, Dr. Katz reiterated that the A.M.A., *Guides* clearly provides that the examiner should use the diagnosis which offers the highest impairment rating. In a June 28, 2016 report, he indicated that he was unable to provide a current impairment rating or MMI date based on the current evidence of record and again recommended a second opinion evaluation.

OWCP found a conflict in medical opinion between Dr. Metropoulos, appellant's treating physician, and Dr. Katz, DMA, regarding the degree of permanent impairment to appellant's right lower extremity as a result of his accepted right knee condition. It referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the medical record, to Dr. Paul J. Drouillard, an osteopath Board-certified in orthopedic surgery, for an impartial medical examination and opinion to resolve the conflict pursuant to 5 U.S.C. § 8123(a).

In a September 27, 2016 report, Dr. Drouillard discussed appellant's history of injury and reviewed the medical record of evidence, including the SOAF. He related that a December 2, 2015 right knee magnetic resonance imaging (MRI) scan showed tricompartmental osteoarthritis degenerative tear in the posterior horn of the medial meniscus, and a small Baker's cyst. Upon physical examination of appellant's right knee, Dr. Drouillard observed some palpable crepitus under the patellofemoral joint of both knees, consistent with chondromalacia. Drawer, Lachman, pivot shift, and McMurray's tests were negative. Dr. Drouillard diagnosed right knee degenerative joint disease. He reported that, according to the SOAF, appellant's claim had been accepted for right knee strain and he had been granted a schedule award for two percent permanent impairment of the right lower extremity. Dr. Drouillard noted his agreement with that assessment.

On October 13, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Drouillard's September 27, 2016 report. He noted that a SOAF was not contained within the case file. Dr. Harris reported that according to Table 16-3, page 509, of the sixth edition of the A.M.A., *Guides*, appellant had two percent lower extremity permanent impairment "for residual problems status post straining injury right knee." He noted a date of MMI of September 27, 2016. Dr. Harris reported that, as appellant was previously awarded two percent right lower extremity permanent impairment, appellant was not entitled to an increased schedule award.

By decision dated November 4, 2016, OWCP denied appellant's claim for an increased schedule award.

On April 20, 2017 appellant appealed to the Board. By decision dated November 3, 2017, the Board determined that there had been no conflict, pursuant to 5 U.S.C. § 8123(a), between Dr. Metropoulos and Dr. Katz with respect to the extent of appellant's right lower extremity impairment and, therefore, Dr. Drouillard was a second opinion examiner. The Board also found that Dr. Drouillard's September 27, 2016 impairment rating report was of diminished probative value as he had not provided an impairment rating in accordance with the sixth edition of the

A.M.A., *Guides*. The case was remanded for Dr. Drouillard, acting as a second opinion physician, to provide a supplemental report which properly conformed to the sixth edition of the A.M.A., *Guides.* The Board also noted that Dr. Harris, a DMA, had not been provided with a copy of the SOAF.

On December 11, 2017 OWCP requested an addendum medical report from Dr. Drouillard. It requested that he provide medical rationale for how he arrived at the two percent right lower extremity permanent impairment rating. OWCP advised Dr. Drouillard to clearly reference specific tables, measurements, calculations, and protocols in the sixth edition of the A.M.A., *Guides*.

In a February 7, 2018 supplemental report, Dr. Drouillard related appellant's complaints of pain at the front of the right knee, particularly the infrapatellar and suprapatellar areas. He reviewed appellant's history and the SOAF, and noted that appellant's claim had been accepted for right knee sprain. Dr. Drouillard discussed appellant's medical records and indicated that a July 14, 2014 right knee MRI scan report demonstrated moderate degenerative changes in the patella. Upon physical examination of appellant's right knee, he observed repetitive flexion and extension with no palpable crepitus. Range of motion was 0 to 120 degrees bilaterally. Drawer, Lachman, pivot shift, and McMurray's testing were negative. Dr. Drouillard diagnosed resolved right knee sprain, mild-to-moderate degenerative joint disease in both knees, most pronounced at the patellofemoral joint, and possible degenerative changes of the right hip.

Dr. Drouillard referenced Table 16-3, *Knee Regional Grid*, of the A.M.A., *Guides* and assigned a class 1 diagnosis based on the accepted diagnosis of right knee sprain with normal range of motion. He found a grade modifier of 1 for functional history (GMFH) due to the fact that appellant was still symptomatic and zero for physical examination (GMPE) due to normal range of motion and no evidence of any functional impairment. Dr. Drouillard related that a grade modifier for clinical studies (GMCS) was inapplicable. Utilizing the net adjustment formula, he indicated that a GMFH of 1 minus class diagnosis of 1 equaled a grade modifier of 0, and a GMPE of 1 minus diagnosis of 1 equaled a grade modifier of 0. Dr. Drouillard calculated that, with zero net adjustment, appellant had a final right lower extremity permanent impairment rating of two percent.

By decision dated February 27, 2018, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence of record failed to establish that he was entitled to more than the two percent permanent impairment of his right lower extremity previously awarded. OWCP determined that the "special weight" of the medical opinion evidence rested with the February 7, 2018 report of Dr. Drouillard as an "impartial medical examiner."

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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides,* published in 2009.[6]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[7] In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides,* an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. 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.[8] 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 the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[10]

A claim for an increased schedule award may be based on new exposure.[11] Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with an OWCP medical adviser providing rationale for the percentage of impairment specified.[13]

[5] 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.806.6.6a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement (6th ed. 2009).

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

[9] *Id.* at 494-531.

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

[11] *A.A.,* 59 ECAB 726 (2008); *Tommy R. Martin,* 56 ECAB 273 (2005); *Rose V. Ford,* 55 ECAB 449 (2004).

[12] *James R. Hentz,* 56 ECAB 573 (2005); *Linda T. Brown,* 51 ECAB 115 (1999).

[13] *Id. See C.K.,* Docket No. 09-2371 (issued August 18, 2010).

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's November 4, 2016 decision because the Board considered that evidence in its November 3, 2017 decision and found it insufficient for purposes of an increased schedule award. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[14]

The Board initially notes that OWCP improperly accorded Dr. Drouillard the special weight of an impartial medical examiner under 5 U.S.C. § 8123(a). In its November 3, 2017 decision, the Board found that there was no conflict in medical opinion evidence regarding appellant's permanent impairment and, therefore, Dr. Drouillard was a second opinion examiner. As noted, findings made in prior Board decisions are *res judicata*. Despite the Board's previous determination as to Dr. Drouillard's status as a second opinion physician, OWCP in its February 27, 2018 decision, still afforded Dr. Drouillard the special weight of medical opinion as an impartial medical examiner. Due to the Board's previous findings of no conflict in the medical opinion evidence, Dr. Drouillard should only be considered as an OWCP referral physician.[15] Although his report must not be given special weight with respect to the matter of permanent impairment, it can still be considered for its own intrinsic value.[16]

In a February 7, 2018 report, Dr. Drouillard reviewed appellant's history, including the SOAF, and provided examination findings. He diagnosed resolved right knee sprain, mild-to-moderate bilateral degenerative joint disease, and possible degenerative changes of the right hip. Dr. Drouillard referenced Table 16-3, *Knee Regional Grid*, of the A.M.A., *Guides* and determined that appellant had a right lower extremity permanent impairment rating of two percent based on his accepted diagnosis of right ankle sprain. Based on his February 7, 2018 report, OWCP determined that appellant was not entitled to an increased schedule award than the previously received award of two percent permanent impairment of his right lower extremity.

The Board finds, however, that Dr. Drouillard's February 7, 2018 supplemental report lacks medical rationale. He reported his impression was that appellant's accepted right knee sprain had resolved, but went on to provide an impairment rating based on the diagnosis of right knee sprain. Dr. Drouillard, however, failed to explain how appellant had a permanent impairment due to a condition that had resolved.[17] Furthermore, the Board notes that he also diagnosed degenerative joint disease in appellant's right knee

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares

[14] *See B.R.*, Docket No. 17-0294 (issued May 11, 2018).

[15] *See L.Y.*, Docket No. 16-0012 (issued May 17, 2016).

[16] *See R.H.*, Docket No. 17-1477 (issued March 14, 2018).

[17] *See T.W.*, Docket No. 16-0176 (issued January 10, 2018).

responsibility in the development of the evidence.[18] Once OWCP undertook development of the evidence by referring appellant to second opinion physician Dr. Drouillard, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[19] In light of these deficiencies in Dr. Drouillard's February 7, 2018 second opinion report, the Board will, therefore, set aside OWCP's February 27, 2018 decision and remand the case for a new second opinion examiner to conduct a proper analysis under the A.M.A., *Guides* in order to determine the extent of appellant's right lower extremity impairment.

On remand OWCP shall update the SOAF and refer appellant to a new second opinion physician for an evaluation concerning the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides.* After this and other such further development as may be deemed necessary, it shall render a *de novo* decision.

CONCLUSION

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

[18] *Donald R. Gervasi*, 57 ECAB 281 (2005); *William J. Cantrell*, 34 ECAB 1233 (1983).

[19] *Peter C. Belkind*, 56 ECAB 580 (2005); *Ayanle A. Hashi*, 56 ECAB 234 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2018 merit decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 5, 2019
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