

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

C.T., Appellant)	
)	
and)	Docket No. 18-0544
)	Issued: May 22, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Pittsburgh, PA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 January 22, 2018 appellant, through counsel, filed a timely appeal from a December 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 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 of his right lower extremity, warranting a schedule award.

FACTUAL HISTORY

On January 27, 2014 appellant, then a 64-year-old housekeeping aid, filed an occupational disease claim (Form CA-2) alleging that he developed a right knee condition due to his performance of employment duties. He reported experiencing severe right knee pain which he attributed to putting weight on his right knee daily while working. Appellant noted that he first became aware of his claimed condition on December 2, 2013, and first realized that it resulted from his federal employment on December 9, 2013.

On April 10, 2014 OWCP accepted appellant's claim for right knee/leg sprain.

In correspondence dated February 2, 2015, counsel requested that appellant's claim be expanded to include additional conditions including advanced osteoarthritis of the right medial knee compartment, right knee tear, osteochondral defect of the anterior medial femoral condyle, small subchondral cysts in the posterior aspect of the medial femoral condyle, and high-grade chondromalacia in the patellofemoral knee compartment.

On March 11, 2015 appellant filed a claim for a schedule award (Form CA-7).

In a February 29, 2016 report, Dr. Jeffrey Kann, a Board-certified orthopedic surgeon, recounted appellant's complaints of right knee pain, which he believed was due to his work duties. In a disability status form, Dr. Kann related that appellant could work modified duty with specified restrictions.

OWCP subsequently referred appellant, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted right knee condition. In an April 6, 2016 report, Dr. Langa explained that his right knee degenerative joint disease and related total right knee replacement surgery were not work related.

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Kann, appellant's treating physician, and Dr. Langa, OWCP's second opinion physician, with respect to the status of his employment-related conditions. It referred appellant, along with a SOAF and a copy of the case record, to Dr. Michael J. Rytel, Board-certified in orthopedic surgery and sports medicine, to resolve the conflict.

In a May 25, 2017 report, Dr. Rytel reviewed appellant's medical records, including diagnostic reports and the SOAF. He opined that, in December 2013, appellant sustained a "temporary aggravation of preexisting osteoarthritis," but that his right knee osteoarthritis preexisted his accepted right knee sprain and, accordingly, was not work related. Dr. Rytel reported that appellant's right total knee arthroplasty was not medically necessary to treat a work-related condition. He also concluded that any current impairment or disability from work was not

due to a work-related condition. Dr. Rytel indicated that appellant had reached maximum medical improvement and had no work-related limitations.

On May 31, 2017 OWCP expanded the acceptance of appellant's claim to include temporary aggravation of right knee unilateral post-traumatic osteoarthritis based upon the opinion of Dr. Rytel.

In a development letter dated May 31, 2017, OWCP requested that appellant provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It afforded him 30 days to submit the requested information.

Dr. Rytel provided an addendum impartial medical report on June 14, 2017. He opined that the temporary aggravation of appellant's preexisting right knee osteoarthritis had resolved before the June 1, 2016 right total knee arthroplasty. Dr. Rytel explained that appellant had advanced osteoarthritis as early as 2007 and that it was inevitable that he would require surgery based on the natural history of osteoarthritis. He further reported that appellant's accepted right knee sprain would be expected to heal in approximately six weeks and that appellant's aggravation of osteoarthritis would have resolved by March 2014, approximately three months after he reported the injury.

By decision dated June 16, 2017, OWCP denied appellant's claim for a schedule award finding that he had not submitted sufficient evidence to establish permanent impairment of a scheduled member causally related to his accepted employment injury. It noted that the May 25 and June 14, 2017 reports of Dr. Rytel, the impartial medical examiner, did not demonstrate that he had a ratable permanent impairment due to his accepted right knee injury.

On June 22, 2017 counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. On November 7, 2017 a telephonic hearing was held.

By decision dated December 8, 2017, an OWCP hearing representative affirmed the June 16, 2017 decision denying appellant's claim for a schedule award. She found that he had not established permanent impairment due to his accepted right knee conditions, warranting a schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing federal regulations,⁵ 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. For consistent results and to ensure equal justice, the Board has authorized the use of

³ A.M.A., *Guides* (6th ed. 2009).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

a single set of tables so that there may be uniform standards applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁷ The Board has approved the use by OWCP 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

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function as a result of an employment injury.⁹ OWCP's 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*.¹⁰

When determining entitlement to a schedule award, preexisting impairment to a scheduled member should be included.¹¹ 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.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right lower extremity, warranting a schedule award.

OWCP initially accepted appellant's claim for right knee sprain. On June 1, 2016 appellant underwent a right total knee arthroplasty. OWCP subsequently declared a conflict in medical opinion between appellant's treating physician, Dr. Kann, and second opinion physician, Dr. Langa. It properly referred appellant's case to Dr. Rytel for an impartial medical examination in order to resolve the conflict in medical opinion regarding whether appellant had disability and/or impairment due to his accepted right knee sprain, and whether he sustained additional conditions due to factors of his federal employment. The referee physician determined that appellant had not established additional right knee medical conditions other than a temporary aggravation of his osteoarthritis, which was accepted on May 31, 2017. He was not asked, nor did he provide a rating.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *Supra* note 7 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

¹¹ *J.H.*, Docket No. 17-1916 (issued January 19, 2019); *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

¹² *Supra* note 7 at Part 3 -- Medical, *Determining Schedule Awards*, Chapter 3.700.3(a)(3) (January 2010).

Appellant has submitted no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that he has permanent impairment of his right lower extremity due to his accepted right knee injury. Consequently, appellant has not established entitlement to a schedule award.

On appeal counsel continues to argue that the impartial medical examiner should have considered appellant's preexisting osteoarthritis condition in determining a schedule award. The Board has explained, however, that a preexisting, underlying condition should be considered when determining entitlement to a schedule award only to the extent that the work-related injury has affected any residual usefulness in whole or in part of the scheduled member.¹³ Furthermore, when a claimant does not demonstrate any permanent impairment caused by the accepted exposure, the claim is not ripe for consideration of any preexisting impairment.¹⁴ In this case, Dr. Rytel determined that the accepted conditions of right knee sprain and temporary aggravation of osteoarthritis had ceased and did not cause a permanent impairment of appellant's right lower extremity. Accordingly, appellant is not entitled to a schedule award based solely on any preexisting conditions.

Appellant may request a schedule award or an increased schedule award at any time based on evidence of a new exposure or medical evidence showing a 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 permanent impairment of his right lower extremity, warranting a schedule award.

¹³ See *E.L.*, Docket No. 18-1492 (issued March 19, 2019); *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

¹⁴ *Thomas P. Lavin*, 57 ECAB 353 (2006).

ORDER

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

Issued: May 22, 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