United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 18-0679**
	)	**Issued: November 7, 2019**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Athens, GA, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 9, 2018 appellant, through counsel, filed a timely appeal from a January 8, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[3]

[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.*

[3] The Board notes that following the January 8, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her left lower extremity, warranting a schedule award.

FACTUAL HISTORY

On May 16, 2011 appellant, then a 61-year-old laboratory support worker, sustained a left knee injury on May 13, 2011 when walking down the second floor stairway to the first floor while in the performance of duty. OWCP accepted her claim for tear of the lateral meniscus of the left knee. Appellant stopped work on May 17, 2011.

Appellant was treated by Dr. Charles Ogburn, a Board-certified internist, from May 26, 2011 to February 13, 2012, for a cervical spine and left knee injury sustained after her May 13, 2011 fall. Dr. Ogburn noted that x-rays of appellant's left knee revealed age-related degenerative changes. He diagnosed left knee pain, suspected meniscus tear, and cervical radiculopathy. Dr. Ogburn performed a series of left knee injections. He recommended physical therapy and discharged appellant to return to work full duty on September 23, 2011.

A magnetic resonance imaging (MRI) scan of the left knee dated June 10, 2011 revealed mucoid intrasubstance degeneration of the anterior cruciate ligament, possibly grade 1 sprain, small closed horizontal tear of the body of the lateral meniscus, increased T2 signal involving the free edge of the body of the lateral meniscus possibly representing small remote radial tear versus free edge fraying, lateral patella tilt, lateral overriding patella, and extensive irregular thinning of the articular cartilage of the patella.

Appellant treated with Dr. William C. Tally, a Board-certified orthopedist, from June 21 to August 19, 2011, for left shoulder and neck pain.

On July 20, 2016 appellant filed a claim for a schedule award (Form CA-7).

In an August 17, 2016 letter, OWCP requested that Dr. Tally submit a detailed report which provided a rating of impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] Dr. Tally did not respond.

By decision dated September 28, 2016, 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 due to her accepted May 13, 2011 employment injury.

On October 6, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The hearing was held on May 1, 2017.

In support of her schedule award claim, appellant submitted an October 3, 2016 report from Dr. Brad Register, a Board-certified orthopedist, who treated her in 2012 for

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

left knee and left shoulder pain. Dr. Register diagnosed left knee pain with a history of questionable lateral meniscus tear. He indicated that appellant had intermittent pain in the left knee, but that she had reached maximum medical improvement (MMI) and had not required further treatment for the left knee. Dr. Register referred her for an impairment rating.

In an October 6, 2016 report, a physical therapist opined that, pursuant to the A.M.A., *Guides,* Table 16-3, Knee Regional Grid, appellant sustained two percent permanent impairment of her left lower extremity.

By decision dated June 9, 2017, the hearing representative affirmed the September 28, 2016 decision.

On August 14, 2017 appellant, through counsel, requested reconsideration submitting an October 28, 2016 impairment rating report from Dr. Register which was based on the findings of a physical therapist. The primary diagnosis was left knee pain. Dr. Register opined that, pursuant to the A.M.A., *Guides*, appellant had two percent permanent impairment of the whole person.

In an August 16, 2017 letter, OWCP requested that appellant provide an impairment rating conducted pursuant to the protocols of the A.M.A., *Guides*. It specifically requested that she arrange for the submission of a detailed narrative medical report from her treating physician based upon a recent examination in accordance with the A.M.A., *Guides.* OWCP indicated that although appellant had submitted an impairment rating by Dr. Register, a whole person rating of impairment was inappropriate under FECA.

Appellant submitted an updated impairment rating from Dr. Register dated August 30, 2017. The primary diagnosis was left knee pain and he noted that, pursuant to the A.M.A., *Guides,* Knee Regional Grid, for soft tissue injury/pain of the left knee, appellant's diagnosis was a class 1, mild problem, with consistent motion deficits. Grade modifier for functional history (GMFH) was 2 for moderate deficit pursuant to the lower limb instrument (LEFS 20/80), the grade modifier for physical examination (GMPE) was 1 for mild range of motion deficits (98 flexion, -6 extension), and the grade modifier for clinical studies (GMCS) was zero due to no available clinical studies or relevant findings. Using the net adjustment formula, Dr. Register concluded that appellant was a grade C or two percent whole person impairment, which he converted to six percent permanent impairment of the left lower extremity.

OWCP thereafter routed Dr. Register's permanent impairment rating to a district medical adviser (DMA). In a report dated September 27, 2017, the DMA noted review of Dr. Register's August 30, 2017 report, which demonstrated limited motion of 6 to 98 degrees for 6 percent left lower extremity impairment based on the diagnosis-based impairment (DBI) method. He indicated that Dr. Register had not provided the necessary documentation of appellant's residual subjective complaints, diagnostic studies, treatment, or diagnosis. The DMA also noted that there was insufficient information contained in the case record to make a determination of permanent impairment based on the A.M.A., *Guides.* He recommended that appellant be referred for a second opinion examination to establish a permanent impairment rating.

On October 31, 2017 OWCP referred appellant for a second opinion to Dr. Howard B. Krone, a Board-certified orthopedist, for a determination of whether appellant had permanent

impairment attributable to her accepted condition. In a report dated December 5, 2017, Dr. Krone noted a history of appellant's work-related condition and subsequent treatment. He noted examination findings and noted that she was ambulating without a cane. Dr. Krone found that examination of appellant's left knee was normal and that she had reached MMI in 2011. He further noted that the diagnosis was initially a lateral meniscal tear of the left knee, but that there were no MRI scan findings included for review and his examination did not demonstrate evidence of a lateral meniscal tear. Dr. Krone noted the diagnosis of left knee pain was secondary to the initial contusion of the anterior aspect of her left knee and had generally resolved within six to eight weeks post injury. He indicated that based upon the A.M.A., *Guides* appellant had zero percent permanent impairment of the left lower extremity due to lack of physical findings.

On December 18, 2017 OWCP requested clarification from Dr. Krone regarding his opinion. It noted that Dr. Krone had not assigned an impairment rating based on the DBI method because he had not observed evidence of a lateral meniscus tear. OWCP requested that he review additional medical evidence it had provided, including a left knee MRI scan dated June 10, 2011 and a medical report from Dr. Ogburn dated June 14, 2011, and provide a supplemental impairment rating of permanent impairment, if any. It further requested that Dr. Krone address whether appellant had permanent impairment based on the range of motion methodology of the A.M.A., *Guides*, and provide the date of MMI.

In a supplemental report dated December 18, 2017, Dr. Krone noted that Dr. Ogburn's June 14, 2011 office note described MRI scan findings, but made no mention of a complete tear of the lateral meniscus. He further indicated that OWCP had not sent him a left knee MRI scan report as dictated by a radiologist. Dr. Krone found that appellant's physical examination had not demonstrated lateral joint line pain and opined that, if there was a lateral meniscus tear, he would have observed lateral joint line pain and a positive McMurray test, which he had not. He therefore again opined that appellant had zero percent permanent impairment of the left lower extremity. Dr. Krone advised that during his examination on December 5, 2017 appellant's range of motion was normal and thus there would be no permanent impairment based on loss of range of motion. He noted that appellant reached MMI on July 12, 2011.

By decision dated January 8, 2018, OWCP denied modification of the June 9, 2017 decision.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations,[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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.[8]

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).[9] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class of diagnosis condition (CDX), which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] The grade modifiers are used on the net adjustment formula described above to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C, by the calculated net adjustment.[12]

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

ANALYSIS

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

OWCP referred appellant to Dr. Krone for a second opinion examination to determine her permanent impairment for schedule award purposes. In a report dated December 5, 2017, Dr. Krone provided findings on physical examination and noted that the diagnosis was initially a lateral meniscal tear of the left knee, but that no MRI scan findings were included for review and that the examination was normal and had not demonstrated evidence of a lateral meniscal tear. He noted the diagnosis of left knee pain secondary to the initial contusion to the anterior aspect of her left knee, which would have resolved within six to eight weeks post injury. Dr. Krone concluded that appellant had reached MMI in 2011 and, in accordance with the A.M.A., *Guides,* she had zero percent permanent impairment of the left lower extremity.

On December 18, 2017 OWCP requested that Dr. Krone provide clarification of his opinion. In his supplemental report dated December 18, 2017, Dr. Krone noted receiving a

[7] *Id.* at § 10.404(a).

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

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

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

[11] *Id.* at 521.

[12] A.M.A., *Guides* 497.

[13] *See Federal* (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

fax from OWCP on December 19, 2017, which included an office note from Dr. Ogburn dated June 14, 2011. He noted that he had not been provided a left lower extremity MRI scan report and that Dr. Ogburn's June 14, 2011 office note described MRI scan findings, but made no mention of a complete tear of the lateral meniscus. Dr. Krone also noted that his physical examination had not demonstrated lateral joint line pain, findings of lateral joint line pain, nor a positive McMurray test. He therefore continued to opine that appellant had zero percent impairment of the left lower extremity pursuant to the A.M.A., *Guides*.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[14] 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.[15] Once OWCP undertakes development of the record it must procure medical evidence that will resolve the relevant issues in the case.[16] It began to develop the evidence when it referred appellant to Dr. Krone for a second opinion examination to determine whether appellant sustained permanent impairment. Dr. Krone questioned whether appellant had evidence of a left lateral meniscus tear as her physical examination was negative. He clearly indicated that he had not received a copy of the June 10, 2011 MRI scan report of the left knee upon which the accepted conditions of the claim had been based. The Board finds that the MRI scan report was necessary for full consideration of whether appellant sustained permanent impairment of her left lower extremity.[17]

Therefore, the Board finds that the case must be remanded to OWCP. On remand OWCP should prepare an updated statement of accepted facts and obtain a copy of the MRI scan of the left knee dated June 10, 2011. The case shall then be forwarded to Dr. Krone for a supplemental opinion, or to a new second opinion physician, to address whether appellant has permanent impairment of her left lower extremity 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.

[14] *See X.V.*, Docket No. 18-1360 (issued April 12, 2019); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Vanessa Young*, 55 ECAB 575 (2004).

[15] *See B.C.*, Docket No. 19-0920 (issued September 25, 2019); *Richard E. Simpson*, 55 ECAB 490 (2004).

[16] *Supra* note 14; *Phillip L. Barnes*, 55 ECAB 426 (2004).

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

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 7, 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