United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 10-1938**
	)	**Issued: June 21, 2011**
U.S. POSTAL SERVICE, NJ PROCESSING & DISTRIBUTION CENTER, Trenton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2010 appellant filed a timely appeal from a March 30, 2010 merit decision of the Office of Workers' Compensation Programs concerning her schedule award to the left leg and a June 8, 2010 merit decision denying benefits for the right leg. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than a 25 percent impairment of her left lower extremity, for which she received a schedule award; and (2) whether appellant's October 3, 1999 employment injury caused a right knee condition.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 3, 1999 appellant, then a 54-year-old clerk, fell over a tow bar and hurt her left knee at work. The Office accepted the claim for left knee contusion and torn left posterior horn of the medial meniscus. It authorized benefits, including a left knee arthroscopy, which she underwent on October 15, 2001 and a left knee replacement, which appellant underwent on September 26, 2005.[2] On April 21, 2008 appellant elected to retire under the Office of Personnel Management effective May 1, 2008.

In reports of March 2 and April 14, 2006, Dr. Ronald M. Krasnick, a Board-certified orthopedic surgeon, noted that appellant had progressive right knee arthritis and would likely need a total right knee replacement. On October 24, 2006 he found that she was totally disabled due to her right knee arthritis. Dr. Krasnick noted that appellant's right total knee arthroplasty was on hold due to an intraarticular fracture to her left wrist.

In an August 10, 2006 report, Dr. Zohar Stark, a Board-certified orthopedic surgeon and Office referral physician, noted the history of injury, reviewed the medical record and the statement of accepted facts and set forth his examination findings. He opined that the accepted left knee condition, which was treated by arthroscopic surgery, had resolved. Dr. Stark opined that appellant could return to work with no limitations. He further opined that there were no other employment-related injuries.

On December 18, 2006 the Office found a conflict in medical opinion arose between Dr. Krasnick and Dr. Stark as to the nature and extent of appellant's injury-related disability. Appellant was referred to Dr. Glenn, a Board-certified orthopedic surgeon, for an impartial medical examination.[3] In an April 24, 2007 report, Dr. Glenn noted that he previously examined her on November 17, 2004. He noted his review of the amended statement of accepted facts and the medical record and set forth his examination findings. Dr. Glenn stated that the diagnosis with respect to the left knee was preexisting degenerative osteoarthritis with a superimposed traumatically induced torn medial meniscus. He stated that the bilateral preexisting degenerative osteoarthritic changes were probably accelerated to some degree by the presence of the unattended tear of the medial meniscus over the two-year period; however, Dr. Glenn opined that the aggravating factor resolved once the torn meniscus was attended to surgically and that the advancement of the degenerative changes were solely on the basis of the natural advancement of

[2] In a November 17, 2004 report, Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, selected as an impartial medical examiner, opined that the accepted left knee meniscus tear was an aggravating factor contributing to degenerative left knee changes. He further opined that the arthritic changes to the right knee were preexisting and not medically related to the accepted 1999 injury. Dr. Glenn explained that while one could argue that the unattended medial meniscus tear over the two-year interval did cause some acceleration of the arthritic process, it was not unusual to see differences in degree of degenerative arthritic involvement when one compared one knee with the other strictly on a developmental basis in the absence of trauma. He further opined that the right knee was not in any way accelerated or exacerbated by protective weight bearing on the left.

[3] Dr. Glenn previously served as an impartial medical examiner to resolve the following issues: appellant's diagnosis; the necessity of surgery for treatment of the accepted, work-related condition; whether a causal relationship existed between appellant's condition and the accepted work injury; and whether there was continuing disability due to the accepted work injury. *See id*.

the preexisting degenerative process. He opined that the right knee condition was due to preexisting degenerative osteoarthritis and was not associated in any way with the October 3, 1999 injury. Dr. Glenn provided permanent work tolerances and limitations.

On December 27, 2008 appellant requested a schedule award claiming impairment to her left and right lower extremities as a result of the October 3, 1999 work injury. In a July 31, 2008 report, Dr. Arthur F. Becan, an orthopedic surgeon, noted the history of injury, his review of the available medical records and presented his examination findings. He opined that appellant reached maximum medical improvement the date of his examination and had 50 percent left lower extremity impairment and 13 percent right lower extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] Dr. Becan further noted that she developed right knee pain in 2005 without specific injury. He opined that appellant sustained a "derivative injury to the right knee causing aggravation of preexisting osteoarthritis to the right knee."

In a July 22, 2009 letter, the Office requested that Dr. Becan provide an impairment rating under the sixth edition of the A.M.A., *Guides*, which had been in effect since May 1, 2009.

On October 13, 2009 the Office received an updated report from Dr. Becan wherein he applied the sixth edition of the A.M.A., *Guides* to his July 31, 2008 examination findings. Dr. Becan opined that appellant had 25 percent left leg impairment based on a class 2 left total knee replacement and 9 percent right lower extremity impairment based on class 1 right knee strain with mild motion defects. For the left leg, he assigned under Table 16-3, page 511, 25 percent impairment for a class 2 left total knee replacement. Based on a lower extremity activity scale (LEAS) score of 67 percent, Dr. Becan assigned a grade 3 modifier for Functional History (GMFH) adjustment under Table 16-6, page 516. Based on his observation and palpatory findings, he assigned a grade 2 modifier for Physical Examination (GMPE) adjustment under Table 16-7, page 517. Based on magnetic imaging resonance (MRI) scan studies, Dr. Becan assigned a grade 2 modifier for Clinical Studies (GMCS) adjustment under Table 16-8, page 519. He utilized the net adjustment formula of (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX) or (3-2) + (2-2) + (2-2) to find a net adjustment of 1. Dr. Becan opined the final left leg impairment after net adjustment was 25 percent. For the right leg, he assigned under Table 16-3, page 509, seven percent impairment for class 1 right knee strain with mild motion defects. Based on LEAS score of 67 percent, Dr. Becan assigned a grade 3 modifier for functional history adjustment under Table 16-3, page 509. Based on his observation and palpatory findings, he assigned a grade 2 modifier for physical examination adjustment under Table 16-7, page 517. Dr. Becan noted that there was no grade adjustment for clinical studies. He utilized the net adjustment formula of (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX) or (3-1) + (2-1) + (0-2) to find a net adjustment of 2. Dr. Becan opined the final right leg impairment after net adjustment was nine percent.

In an October 31, 2009 report, an Office medical adviser reviewed Dr. Becan's report utilizing the sixth edition of the A.M.A., *Guides* and concurred with the impairment rating with

[4] A.M.A., *Guides* (5th ed. 2001).

respect to left and right lower extremities. He further stated maximum medical improvement was reached July 31, 2008.

In a November 24, 2009 letter, the Office advised appellant that the evidence of record was insufficient to support her claim for a schedule award for the right leg as a right knee condition had not been accepted as causally related to the October 3, 1999 injury. Appellant was advised of the evidence necessary to support her claim.

By decision dated November 27, 2009, the Office awarded appellant a schedule award for 25 percent permanent impairment of the left lower extremity. The award ran for 72 weeks during the period July 31, 2008 to December 16, 2009.

In a December 2, 2009 letter, appellant's attorney requested that the Office issue a schedule award for the right knee.

In a December 7, 2009 letter, appellant's attorney requested a review of the written record with regard to the Office's November 27, 2009 decision. He argued that the Office failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides* thereby depriving appellant of her due process rights and benefits under the Act.

By decision dated December 28, 2009, the Office denied appellant's schedule award claims for the right leg on the grounds the medical evidence was insufficient to establish a causal relation between the employment injury and a right knee condition.

By decision dated March 30, 2010, an Office hearing representative affirmed the November 27, 2009 decision that appellant had not established greater than 25 percent impairment to the left lower extremity.

Appellant's attorney requested a hearing with regard to the December 28, 2009 decision, which was held by videoconference on April 20, 2010. At the hearing, appellant denied any prior or subsequent injuries to her right knee. She testified that she walked with an altered gait and used a cane. Appellant's attorney argued the medical evidence supported that appellant developed a right knee condition due to her altered gait.

In a January 18, 2010 report, Dr. Efrain Paz, Jr., an osteopath and orthopedic surgeon, noted the history of the October 3, 1999 work injury and that appellant had a long history of bilateral knee pain. He noted that she attributed the development of pain in her right knee to altered gait and favoring the left knee as well as right knee pain since the left total knee arthroplasty in 2005. Dr. Paz opined that appellant's right knee arthritic condition was likely aggravated by her left knee injury given her altered gait and her years of pain and dysfunction. He stated that, while he did not believe her entire arthritic condition was caused by her fall onto her left knee, he felt it reasonable to conclude that her right knee arthritic condition was aggravated as her right knee was not painful until after a long period of treatment and ambulatory dysfunction associated with the left knee injury. Thus, Dr. Paz opined that appellant's right knee condition was aggravated and had led to end stage arthritis requiring total knee replacement.

Appellant underwent right total knee arthroplasty February 26, 2010. X-ray reports of both knees from May 8, 2008 to March 26, 2010 were submitted along with diagnostic studies.

By decision dated June 8, 2010, an Office hearing representative affirmed the Office's December 28, 2009 decision that there was no basis for a schedule award based on a right knee condition.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[5] provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] Schedule award decisions issued between February 1, 2001 and April 30, 2009 utilize the fifth edition of the A.M.A., *Guides*.[7] Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides*,[8] published in 2008, as the appropriate edition for all awards issued after that date.[9]

For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[10] 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).[11] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMPE - DCX) + (GMCS - CDX).

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[13]

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[5] 5 U.S.C. §§ 8101-8193.

[6] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] Federal (FECA) Procedure Manual, *supra* note 7, Chapter 3.700, Exhibit 1 (January 9, 2010).

[10] *Id*.

[11] A.M.A., *Guides* (6th ed., 2008), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[12] *Id*. at 494-531 (6th ed. 2008).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly applied the sixth edition of the A.M.A., *Guides* to determine the extent of appellant's impairment. Effective May 1, 2009, the Office applied the sixth edition of the A.M.A., *Guides* to calculate awards.[14] On appeal, appellant asserts that she has a property right in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held that a claimant who was in receipt of benefits (in *Goldberg* public assistance and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.

In *Harry D. Butler*,[15] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[16] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.[17] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.

The sixth edition of the A.M.A., *Guides* provides that lower extremity impairments be classified by diagnosis and then adjusted by grade modifiers according to the above-noted formula. Dr. Becan determined that appellant was class 2 for the left total knee replacement pursuant to Table 16-3, page 511 of the A.M.A., *Guides*, which was 25 percent. He properly applied the grade modifiers of 3 for functional history based on LEAS score of 67 percent; a modifier of 2 for physical examination and a modifier of 2 for clinical studies. Dr. Becan applied the applicable formula to determine that appellant had a net adjustment of 1.[18] He next properly calculated her impairment to her left lower extremity by using the net adjustment of one to determine that she had an impairment of 25 percent of her left lower extremity.[19] The Office medical adviser reviewed Dr. Becan's findings under the A.M.A, *Guides* and agreed with his calculations.

[14] Federal (FECA) Procedure Manual, *supra* note 13, Chapter 2.808.6.6a (January 2010); *see also id*. *supra* note 8, Chapter 3.700.2 and Exhibit 1 (January 2010).

[15] 43 ECAB 859 (1992).

[16] *Id.* at 866.

[17] FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.808.6(a) (January 2010).

[18] GMFH - CDX (3-2=1). GMPE - CDX (2-2=0). GMCS - CDX (2-2=0). Adding one plus zero plus zero yielded a net adjustment of one.

[19] A.M.A., *Guides* 511, Table 16-3; 516, Table 16-6, 517, Table 16-7, 519, Table 16-8.

The record does not contain any medical evidence that establishes greater impairment in accordance with the sixth edition of the A.M.A., *Guides.* The Board finds that appellant has not established more than 25 percent impairment to her left leg.

LEGAL PRECEDENT -- ISSUE 2

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[20]

The basic rule respecting consequential injuries is that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause. Once the work-connected character of an injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.[21]

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[22] Physicians who may not be used as referees include those previously connected with the claim or the claimant or physicians in partnership with those already so connected.[23]

ANALYSIS -- ISSUE 2

On appeal, counsel argued that appellant's right knee condition was contributed to by her accepted left knee injury due to her altered gait and overcompensation while walking. He asserted that Dr. Paz' report provided *prima facie* evidence of a causal relationship between the consequential right knee condition and the work injury to appellant's left leg.

In a November 17, 2004 report, Dr. Glenn, selected as an impartial medical examiner, opined in part that appellant's right knee condition was not medically related or in any way accelerated or exacerbated by the accepted work-related injury. As her right knee condition continued to worsen, the Office referred her to Dr. Stark, who opined that the accepted left knee condition had resolved and there was no other employment-related injury. Dr. Krasnick, however, opined that appellant was totally disabled due to her right knee arthritis and she needed a right total knee arthroplasty. The Office found a medical conflict with regard to continuing

[20] *Veronica Williams*, 56 ECAB 367 (2005).

[21] *See Kathy A. Kelley*, 55 ECAB 206 (2004); *Carlos A. Marerro*, 50 ECAB 170 (1998).

[22] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321(b); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[23] Federal (FECA) Procedure Manual, *supra* note 7, Chapter 3.500.4.b(3)(b) (March 1994, October 1995, May 2003), *citing Raymond E. Heathcock*, 32 ECAB 2004 (1981).

employment-related injury and referred her to Dr. Glenn to resolve this conflict. However, Dr. Glenn cannot be considered an impartial specialist with regard to the cause of appellant's right knee condition as his opinion was solicited with regard to work-related disability, not whether the right knee condition was employment related. There also was no medical conflict between Drs. Stark and Krasnick regarding the cause of her right knee condition as Dr. Krasnick did not specifically address causal relationship. Moreover, Dr. Glenn previously served as an impartial specialist in the claim and Office procedures clearly prohibit the selection of an impartial specialist who has a previous connection with the claim.[24]

The Board finds that there is a conflict in medical opinion as to whether appellant's right knee condition is a consequence of her accepted left knee injury. Dr. Glenn opined that the right knee condition was not work related. Dr. Stark, another Office referral physician, also found that appellant had no work-related injuries except to the left knee. Both Drs. Paz and Becan, for appellant, supported that her right knee condition developed a consequence of her left knee injury. There is an unresolved conflict of medical opinion.

On remand, the Office should follow its procedures and refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician to resolve the issue of whether she sustained a consequential right knee injury due to her accepted left knee conditions.

CONCLUSION

The Board finds that appellant has not established that she has more than 25 percent left lower extremity impairment. The Board also finds that the issue of whether she sustained a consequential right knee injury due to her accepted left knee conditions is not in posture for decision due to unresolved conflict in medical opinion.

[24] *See id.*

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The Office's June 8, 2010 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision.

Issued: June 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board