United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 11-1053**
	)	**Issued: April 12, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Mount Clemens, MI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 22, 2011 appellant filed a timely appeal from a September 24, 2010 schedule award 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 the schedule award decision.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has greater than an eight percent impairment of the left lower extremity.

On appeal, appellant asserts that she is entitled to an increased award because neither an OWCP referral physician nor OWCP's medical adviser properly applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 6, 1989 appellant, then a 38-year-old part-time flexible letter carrier, filed a traumatic injury claim alleging that she injured her left knee when she fell on an icy sidewalk. She was terminated by the employing establishment on March 24, 1989. OWCP accepted a left knee sprain and subluxation of the left patella as employment related. Appellant earned an associate degree in social work in 1995 and thereafter worked in the private sector. By decision dated May 15, 1996, OWCP reduced her wage-loss compensation based on her capacity to earn wages as a case manager.

On August 1, 2005 appellant was granted a schedule award for a five percent impairment of the left leg.[2] In an August 25, 2006 decision, OWCP's hearing representative remanded the case to OWCP for OWCP's medical adviser, Dr. Jason David Eubanks to explain how he arrived at the five percent rating. By decision dated December 22, 2006, OWCP found that the weight of the medical evidence rested with the opinion of the medical adviser who advised that appellant was not entitled to an increased schedule award.[3] In a July 17, 2007 decision, the hearing representative noted that appellant had submitted a November 15, 2006 report from her attending physician, Dr. Plomaritis, who was not reviewed by an OWCP medical adviser and remanded the case to OWCP to obtain a supplementary report.[4] In an August 1, 2007 report, Dr. Nabil F. Angley, OWCP's medical adviser who is Board-certified in orthopedic surgery, noted his review of Dr. Plomaritis' report. He advised that Dr. Plomaritis did not provide sufficient rationale for his impairment evaluation and asked that OWCP request a supplementary report from Dr. Plomaritis. On September 10, 2007 OWCP again found that appellant was not entitled to an increased schedule award, noting that Dr. Plomaritis did not respond to its request for clarification. By decision dated April 11, 2008, the hearing representative found that the case should be remanded to OWCP to explain why appellant was not entitled to an increased award. In an April 16, 2008 decision, OWCP denied appellant's claim for an increased schedule award. In a June 16, 2008 decision, the hearing representative remanded the case to OWCP to obtain a second-opinion evaluation.[5]

In June 2009, OWCP referred appellant to Dr. Norman L. Pollak, a Board-certified orthopedic surgeon, for a second-opinion evaluation. It asked that Dr. Pollak provide a rationalized opinion regarding diagnoses and residuals regarding appellant's left knee and whether she continued to be disabled. Dr. Pollak was not asked to perform an impairment rating.

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[2] The rating was based on a December 1, 2003 report from appellant's attending physician, Dr. Steven Plomaritis, an osteopath, whose report was reviewed by an OWCP medical adviser, Dr. Hennessey.

[3] OWCP's medical adviser, Dr. Eubanks, reviewed a November 15, 2006 report from Dr. Plomaritis.

[4] OWCP's hearing representative initially issued a June 25, 2007 decision, instructing OWCP to obtain a second-opinion evaluation regarding appellant's left leg impairment. In the November 15, 2006 report, Dr. Plomaritis noted findings including left leg range of motion. He diagnosed left knee dysfunction secondary to patella chondromalacia, possible quadriceps tendinitis and long-standing left anterior knee pain, all secondary to the 1989 work injury. Dr. Plomaritis advised that appellant had a 12 percent impairment of the left leg.

[5] Appellant did not attend a second-opinion evaluation scheduled for July 8, 2008 because she was having gall bladder surgery.

In a July 7, 2009 report, he noted his review of the medical record. Dr. Pollak provided physical examination findings and stated that knee x-rays demonstrated no abnormality. He advised that there did not appear to be any residuals of a left knee sprain and that, on examination, there was no indication of subluxation of the left patella. Dr. Pollak concluded that appellant could return to her date-of-injury position without restriction.

In reports dated July 22 and August 4, 2009, Dr. Mark F. Rottenberg, an attending Board-certified physiatrist, noted appellant's complaints of chronic left knee pain and problems involving subluxation of her patella. Left knee examination demonstrated crepitus on extension of the left knee with mild swelling, mild atrophy and some quadriceps weakness. A left knee x-ray demonstrated a decrease in the medial joint space with patellofemoral narrowing and mild displacement of the patella. Dr. Rottenberg reported that a July 23, 2009 magnetic resonance imaging scan study of the left knee showed some chondromalacia patellae consistent with appellant's physical examination findings and her continued complaints of crepitus on extension of the left knee.

OWCP determined that a conflict in medical opinion existed as to whether work-related residuals remained and on September 4, 2009 referred appellant to Dr. Robert S. Levine, a Board-certified orthopedic surgeon, for an impartial evaluation on this issue. In an October 7, 2009 report, Dr. Levine noted the history of injury, appellant's complaints of continued left knee pain, stiffness and swelling and his review of the medical record. Physical examination demonstrated full range of motion of appellant's left knee, left thigh atrophy, intact left knee ligaments and a negative McMurray's test. Crepitation was not present on flexion and extension of the left knee but Dr. Levine reported that she complained of patellofemoral tenderness. X-rays of both knees demonstrated bilateral patellar subluxation with lateral facet narrowing. Dr. Levine diagnosed chondromalacia patella and bilateral patellar subluxation. He advised that appellant had no residuals of the accepted sprain and indicated that her knee complaints were out of proportion to the physical findings. Dr. Levine stated that she had reached maximum medical improvement but could not return to full letter carrier duties due to muscle atrophy and weakness. He indicated that, under the fifth edition of the A.M.A., *Guides*,[6] appellant had seven percent impairment due to patellar subluxation.

By letter dated October 19, 2009, appellant informed OWCP that Dr. Rottenberg told her he had worked with Dr. Levine for many years at a pain management clinic and asserted that, thus, Dr. Levine was not properly selected as a referee physician. On October 29, 2009 OWCP contacted both physicians regarding her allegation and also asked that Dr. Levine provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*.[7]

In a November 18, 2009 letter, Dr. Rottenberg advised that he had never been Dr. Levine's partner and had not seen him in over 10 years. He stated that in the past he referred patients to a pain clinic where Dr. Levine was employed but that he had not made any referrals there in more than 15 years. In a December 1, 2009 letter, Dr. Levine advised that he knew who Dr. Rottenberg was and had met him but that they had never been partners and that he did not

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

[7] *Id*., (6th ed. 2008).

refer patients to him. He advised that appellant had reached maximum medical improvement within one to two years of the 1989 injury and that there were two diagnoses applicable under the sixth edition of the A.M.A., *Guides*, patellofemoral arthritis and patellar subluxation. Dr. Levine provided a worksheet and indicated that, under Table 16-3, Knee Regional Grid, the patellofemoral arthritis yielded three percent left lower extremity impairment and the patellar subluxation yielded seven percent impairment.[8] He further explained that the A.M.A., *Guides* advise that when an impairment involves the same joint, impairments should not be added but the greater one used and further explained that patellofemoral arthrosis could be a consequence of subluxation. Dr. Levine concluded that appellant had a seven percent impairment of the left lower extremity due to patellar subluxation.

On March 4, 2010 Dr. Angley noted his review of the record including Dr. Levine's December 1, 2009 report. He advised that maximum medical improvement was reached prior to October 14, 1993 and found that, in accordance with Table 16-3, appellant had class 1 impairment due to patellofemoral arthritis with a default value of three percent. Dr. Angley indicated that she had net adjustment scores of one percent each for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). OWCP's medical adviser applied the net adjustment formula and found that the impairment rating remained at three percent for left leg impairment due to patellofemoral arthritis. He then stated that, under Table 16-3, for a diagnosis of patellar subluxation, appellant had a class 1 impairment for a default value of seven percent. Dr. Angley advised that she had adjustment scores of one for GMFH and zero for GMGH and GMCS. He again applied the net adjustment formula and found that appellant's impairment rating shifted two places to the left, for a five percent impairment left lower extremity impairment due to patellar subluxation. The medical adviser added the three percent impairment for patellofemoral arthritis with the five percent impairment for patellar subluxation and concluded that she had eight percent impairment of the left leg.

On March 16, 2010 appellant was granted a schedule award for an additional three percent left lower extremity impairment, for a total eight percent impairment. OWCP noted that she had been referred to Dr. Levine for an impartial evaluation and that both Dr. Rottenberg and Dr. Levine clearly dispelled any implications of a prior relationship or potential bias. It concluded that an OWCP medical adviser, Dr. Angley, properly calculated appellant's schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

In letters dated March 22, 2010, appellant stated that as Dr. Angley had been previously involved in her case, another OWCP medical adviser should have been assigned. She also asserted that Dr. Plomaritis' opinion should have been credited and that the medical adviser did not correctly apply the A.M.A., *Guides* and improperly deducted points from her rating. On March 31, 2010 appellant requested a hearing, that was held telephonically on July 8, 2010. She testified regarding the medical evidence. Appellant asserted that Dr. Angley should not be involved in her case and that both he and Dr. Levine incorrectly calculated her schedule award. She thereafter submitted a statement in which she discussed the history of her case and again

[8] Dr. Levine identified the table used as Table 16-2, which is the Foot and Ankle Regional Grid. This is considered a typographical error as his analysis is clearly in reference to the knee as found in Table 16-3.

asserted that the medical adviser was improperly selected and did not correctly apply the A.M.A., *Guides*.

By decision dated September 24, 2010, OWCP's hearing representative affirmed the March 16, 2010 decision. The hearing representative found that Dr. Levine did not serve as a referee physician on the issue of appellant's impairment evaluation, noting that OWCP found that a conflict existed regarding whether appellant had continuing residuals of the work injury only. It was therefore proper for OWCP to refer Dr. Levine's impairment evaluation to Dr. Angley for an opinion on appellant's impairment.

LEGAL PRECEDENT

The schedule award provision of FECA[9] and its implementing federal regulations[10] 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.[11] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[12] For decisions issued after May 1, 2009, the sixth edition will be used.[13]

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).[14] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[15] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] 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.[17]

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id*. at § 10.404(a).

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

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

[14] A.M.A., *Guides*, *supra* note 6 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

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

[16] *Id*. at 521.

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

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[18] In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[19]

ANALYSIS

The Board finds that appellant did not establish that she has greater than an eight percent left lower extremity impairment.

In his December 1, 2009 report, Dr. Levine provided a worksheet and indicated that under Table 16-3, Knee Regional Grid, the patellofemoral arthritis yielded a three percent left lower extremity impairment and the patellar subluxation yielded a seven percent impairment. He further explained that the A.M.A., *Guides* advise that when an impairment involves the same joint, impairments should not be added but the greater one used, indicating that patellofemoral arthrosis could be a consequence of subluxation. Dr. Levine concluded that appellant had seven percent impairment of the left leg due to patellar subluxation. Appellant's accepted diagnosed conditions are left knee sprain and subluxation of the left patella. Table 16-3 of the sixth edition of the A.M.A., *Guides*, Knee Regional Grid, provides classes to be used in rating knee impairments.[20] As noted, the sixth edition also indicates that when analyzing a lower extremity impairment, after identifying the impairment class for the CDX, the rating is then adjusted by grade modifiers based on GMFH, GMPE and GMCS by using the net adjustment formula.[21] A review of Dr. Levine's December 1, 2009 report, however, indicates that, while he provided an explanation for his conclusion that the diagnosis of patellar subluxation should be used, he did not apply the net adjustment formula in calculating his impairment rating. His report is therefore of diminished probative value in assessing appellant's left leg impairment.

As noted by OWCP's hearing representative, as there was no conflict in medical evidence regarding the degree of impairment of appellant's left lower extremity, OWCP properly referred Dr. Levine's impairment evaluation to Dr. Angley for review. In his March 4, 2010 report, Dr. Angley provided impairment evaluations for both patellofemoral arthritis and patella subluxation. He properly applied the modifiers and net adjustment formula to each knee diagnosis. The medical adviser then added the two, concluding that appellant was entitled to an eight percent left lower extremity impairment.

The Board finds that OWCP properly investigated appellant's allegation of bias on the part of Dr. Levine and properly determined that he was sufficient to serve as the impartial medical specialist.

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

[19] *Peter C. Belkind*, 56 ECAB 580 (2005).

[20] A.M.A., *Guides*, *supra* note 6 at 509-11.

[21] *Id.* at 495.

There is no other medical evidence of record addressing the extent of appellant's permanent impairment under the appropriate edition of the A.M.A., *Guides*, which supports a left lower extremity impairment greater than eight percent.

Appellant may request a schedule award or increased schedule award 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 did not meet her burden of proof to establish that she had a left lower extremity impairment greater than the eight percent previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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