United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
	)	
and	)	**Docket No. 11-2127**
	)	**Issued: June 8, 2012**
DEPARTMENT OF AGRICULTURE, PLANT PROTECTION & QUARANTINE, Riverdale, MD, 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 September 21, 2011 appellant filed a timely appeal from a June 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding her schedule award claim. 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 claim.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] Appellant submitted a timely request for oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). The Board has duly considered the matter and finds that appellant's request for oral argument should be denied. Pursuant to 20 C.F.R. § 501.5(a), oral argument may be held in the discretion of the Board. The Board in exercising its discretion has determined that there is not a sufficient need for the oral argument in this case. The Board finds that oral argument would further delay issuance of a decision and would not serve a useful purpose. Furthermore, the appeal can adequately be addressed in a decision based on the case record submitted. For these reasons, oral argument is denied.

ISSUE

The issue is whether appellant has established more than 37 percent right lower extremity impairment, for which she received a schedule award.

FACTUAL HISTORY

On September 9, 2004 appellant, then a 53-year-old employee relations specialist, was cleaning up a work area when she twisted her right knee. She stopped work and returned to work on October 4, 2004. OWCP accepted the condition of right knee medial meniscus tear and arthroscopy of the knee and paid compensation benefits. Appellant underwent approved arthroscopic debridement of the torn medial and lateral meniscus on February 3, 2005 and an approved total knee replacement surgery due to post-traumatic arthritis on February 9, 2009. She retired on July 31, 2007.

On September 12, 2005 appellant filed a claim for a schedule award. By decision dated March 10, 2006, OWCP denied a schedule award on the grounds the medical evidence did not reflect her condition had reached maximum medical improvement. The record indicates that, on September 4, 2007, it issued appellant a schedule award payment for 10 percent right lower extremity impairment.

On July 30, 2009 appellant filed a claim for an increased schedule award. In a July 17, 2009 report, Dr. Uchenna Nwaneri, an orthopedic surgeon, opined that appellant had 73 percent impairment to the right leg based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On August 13, 2009 an OWCP medical adviser stated that appellant had not yet reached maximum medical improvement from her knee replacement of February 9, 2009.

On March 4, 2010 appellant requested an increased schedule award. In a February 25, 2010 report, Dr. Nwaneri advised that appellant reached maximum medical improvement and that she had been discharged from care. He opined that she had 73 percent right leg impairment rating under the sixth edition of the A.M.A., *Guides.* Under Table 16-3, page 511, Dr. Nwaneri stated that appellant had class 3 impairment for osteoarthritis and total knee replacement with a fair result for an impairment rating of 43 percent. With regard to peripheral nerve impairment, he utilized Table 16-2, page 533 and graded appellant's weakness as 3+/5 to 4/5 of motor testing of the lower extremity and classified her as a class 1 for sensory deficits, for a final lower extremity impairment of 20 percent. With regard to range of motion, Dr. Nwaneri stated that, under Table 16-23, page 549, appellant had terminal extension lag of 3 degrees and flexion limited to 100 degrees, which gave a total lower extremity impairment of 10 percent. He concluded that appellant had a diagnosis-based impairment of 43 percent, a peripheral nerve impairment of 20 percent, and range of motion impairment of 10 percent, for a final combined impairment of 73 percent of the leg.

In a March 23, 2010 report, an OWCP medical adviser reviewed appellant's medical record. He noted her work-related injury and that she underwent two surgeries. The medical adviser also noted that appellant had previously been awarded 10 percent impairment. He

opined that appellant reached maximum medical improvement on February 9, 2010. The medical adviser reviewed Dr. Nwaneri's report and stated that it was not in keeping with the sixth edition of the A.M.A., *Guides* as the physician rated both diagnosis-related estimates as well as physical findings. He indicated that the diagnosis-related estimate is the most appropriate method to rate patients who undergo total joint replacements. The medical adviser agreed with Dr. Nwaneri's findings that under Table 16-3, page 511 appellant is a class 3 with a fair result which equates to 37 percent impairment. He noted that Dr. Nwaneri indicated that appellant had 73 percent impairment to the lower extremity, which amounted to a class 4 impairment under Table 16-3 which is a very serve problem. The medical adviser stated that appellant did not fit into a class 4 under Table 16-3 as Dr. Nwaneri indicated that she had a fair result with her total knee replacement. He stated that, while appellant was entitled to a total 37 percent impairment to the right lower extremity, she should only receive an additional 27 percent impairment as she was previously awarded 10 percent impairment.

In an April 6, 2010 report, the medical adviser again reviewed appellant's medical records. He stated that she initially underwent a partial medial and lateral meniscectomy on February 3, 2005 and was awarded 10 percent right lower extremity impairment consistent with the fourth, fifth and sixth editions of the A.M.A., *Guides*.[3] The medical adviser stated that appellant was now more than one year postoperation from her total knee replacement of February 9, 2009 and thus the date of maximum medical improvement is February 9, 2010. He indicated that, under Table 16-3, page 511, appellant rates a class 3 impairment for total knee replacement or 37 percent impairment to the lower extremity. The medical adviser noted that while Dr. Nwaneri indicated that appellant had 73 percent impairment, that rating would only be appropriate if she had a poor result with severe instability and significant motion deficit or with a chronic infection. He stated that appellant does not fit into this category (class 4) as she had a fair result from her total knee replacement (class 3).

By decision dated June 10, 2011, OWCP found appellant was entitled to 37 percent total right lower extremity impairment. As she previously received 10 percent award, she was paid 27 percent impairment. The award ran for 77.76 weeks of compensation for the period February 9, 2001 to August 7, 2011.

By appeal form postmarked August 9, 2011, appellant requested a review of the written record by an OWCP hearing representative. New evidence was submitted. By decision dated September 8, 2011, OWCP denied appellant's request for a review of the written record as it was untimely. It also denied his request on the basis that the issue in the case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.[4]

LEGAL PRECEDENT

[3] A.M.A., *Guides* 509, Table 16-3.

[4] Appellant did not appeal this decision to the Board.

The schedule award provision of FECA[5] 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, 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 implementing regulations as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] 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.[8]

The sixth edition requires identifying 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).[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.[10] Benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[11]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.[12]

ANALYSIS

[5] *Supra* note 1.

[6] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[9] A.M.A., *Guides* 494-531.

[10] 5 U.S.C. § 8101; 20 C.F.R. § 10.404(c).

[11] 20 C.F.R. § 10.404(c)(1), (2).

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

Appellant has previously received a schedule award for 10 percent right lower extremity following her February 3, 2005 arthroscopic surgery. On February 9, 2009 she underwent a total knee replacement due to post-traumatic arthritis and subsequently requested an increased schedule award. OWCP awarded 37 percent total right lower extremity impairment based on the reports of its medical adviser. The Board finds that this issue is not in posture for decision.

In a February 25, 2010 report, Dr. Nwaneri opined that appellant reached maximum medical improvement and had a total right lower extremity impairment of 73 percent. He based this finding on the diagnosed-based impairment of osteoarthritis and total knee replacement as well as physical findings pertaining to a peripheral nerve impairment and range of motion impairment. However, diagnosis-based impairment is the primary method of evaluation for the lower limb.[13] Thus, an impairment rating cannot be based on both diagnosis-related estimates and physical findings. Accordingly, OWCP properly referred the medical record to a medical adviser for review.[14]

In his March 23 and April 6, 2010 reports, the medical adviser opined that under Table 16-3, page 511 appellant rated a class 3 for a total knee replacement or 37 percent right lower extremity impairment. He explained that appellant fit into a class 3 impairment as opposed to a class 4 impairment as Dr. Nwaneri indicated that she had a fair result from her total knee replacement. However, the medical adviser failed to address any of the grade modifiers described in section 16.3 after determining the class 3 impairment. Grade modifiers include functional history, physical examination and clinical studies. Section 16.2, page 497 of the A.M.A., *Guides* state that the grade modifiers are used in the net adjustment formula described in section 16.3d to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down from the default value C, by calculated net adjustment. Dr. Nwaneri indicated that appellant had range of motion as well as sensory and motor deficits. OWCP's medical adviser did not select any grade modifiers or apply the net adjustment formula to determine whether these findings raised or lowered the impairment rating. Consequently, the Board will remand the case for OWCP to obtain an additional report from its medical adviser or such other specialist as it finds necessary.[15] Following such further development as deemed necessary, it shall issue an appropriate decision.

CONCLUSION

[13] Section 16.2, page 497 A.M.A, *Guides.* However, peripheral nerve impairment can be combined with diagnosed-based impairments when the diagnosis-based impairment does not already include nerve impairment. *See* A.M.A., *Guides* 531. Dr. Nwaneri did not address whether nerve impairment was included in the diagnosis-based impairment nor did he explain how he applied Table 16-12 and grade modifiers in rating peripheral nerve impairment. Likewise, it was improper for Dr. Nwaneri to combine range of motion impairment with a diagnosis-based impairment as the A.M.A., *Guides* point out that range of motion impairment is only to be used as a stand-alone rating and only when other grids refer to the range of motion section. A.M.A., *Guides* 543.

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

[15] *See J.B.*, Docket No. 08-1735 (issued January 27, 2009) (proceedings under FECA are not adversarial in nature; OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done).

The Board finds that the case is not in posture for decision with regard to the schedule award as an additional report from OWCP's medical adviser is needed.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: June 8, 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