

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

B.G., Appellant)	
)	
and)	Docket No. 15-0556
)	Issued: August 18, 2015
DEPARTMENT OF HOMELAND SECURITY,)	
IMMIGRATION & CUSTOMS)	
ENFORCEMENT, Newark, NJ, Employer)	
)	

<i>Appearances:</i> <i>Appellant, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
 CHRISTOPHER J. GODFREY, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 12, 2015 appellant filed a timely appeal from a December 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish more than 13 percent impairment of the left leg for which he received schedule awards.

On appeal appellant maintains that the Board found that the opinion of an OWCP referral physician established that he had a 26 percent left lower extremity impairment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In an April 16, 2014 decision, the Board found the case was not in posture for decision regarding whether appellant had more than 10 percent permanent impairment of the left leg. The Board noted that the accepted conditions were left medial and lateral meniscal tears. The Board noted that in a March 11, 2013 report, Dr. Emily Hoff-Sullivan, a Board-certified orthopedic surgeon and OWCP referral physician, indicated that a February 5, 2013 left knee x-ray demonstrated severe degenerative changes and a one-millimeter joint interval of the medial and patellofemoral compartments. She advised that appellant's left knee arthritis had advanced since the 2008 injury and concluded that he had 26 percent left leg impairment based on a diagnosis of class 3 primary knee joint arthritis. The Board remanded the case to OWCP, as the record clearly established that appellant had preexisting left knee joint arthritis, which should have been considered in determining the extent of impairment. On remand OWCP was to obtain a supplemental report from its medical adviser, Dr. Arnold T. Berman, a Board-certified orthopedist, who had previously found only 10 percent left leg impairment because it was inappropriate to rate impairment for arthritis if it was not an accepted condition.²

Following remand, OWCP forwarded the Board's decision to Dr. Berman for review. In an April 25, 2014 report, Dr. Berman noted his review of the medical record, including Dr. Hoff-Sullivan's report. He conceded that she had correctly found 26 percent impairment based on a one millimeter cartilage interval found on the February 5, 2013 x-ray. He, however, stated:

“Dr. Hoff-Sullivan stated that the arthritis had advanced since 2008. This could be the case. However, it is not well documented and the degree of advancement is highly questionable. Therefore, this requires apportionment. Apportionment is described and defined by the [American Medical Association], *Guides to the Evaluation of Permanent Impairment*, sixth edition, page 609 as follows: ‘The extent to which each of two or more probable causes are found responsible for an effect (injury, disease, impairment, etc.), only probable causes (at least more probable than not) are included. Hence, the first step in apportionment is scientifically-based causation analysis. Second, one must allocate responsibility among the probable causes and select apportionment percentages consistent with the medical literature and facts of the case in question. Arbitrary, merely opinion based unscientific apportionment estimates which are nothing more than speculations, must be avoided. Apportionment impairment can also be apportioned to more than one cause.’”

The medical adviser indicated that, based on this definition and the medical facts available, appellant should receive a 50 percent apportionment which would result in 13 percent left lower extremity impairment.

In a June 4, 2014 decision, appellant was granted a schedule award for an additional three percent impairment of the left leg, for a total impairment of 13 percent. He timely requested a

² Docket No. 14-76 (issued April 16, 2014).

hearing which was held on September 19, 2014. At the hearing, appellant testified that his condition had worsened since the 2008 injury. He stated that he was also receiving Department of Veterans Affairs (VA) disability for his left knee, described a 1990 ankle injury, and maintained that the opinion of OWCP referral physician should be credited.

By decision dated December 2, 2014, an OWCP hearing representative affirmed the June 4, 2014 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing federal regulations⁴ 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 second printing of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁵ (hereinafter A.M.A., *Guides*) as the uniform standard applicable to all claimants.⁶ For decisions after May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used.⁷

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).⁸ Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the Class of Diagnosis (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).¹⁰ 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.¹¹

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ 20 C.F.R. § 10.404(a).

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); see also Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁸ A.M.A., *Guides*, *supra* note 5 at 4, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

⁹ *Id.* at 494-531.

¹⁰ *Id.* at 521.

¹¹ *Id.* at 23-28.

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 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.¹²

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included. There are no provisions for apportionment under FECA.¹³ Rated impairment should reflect the total loss as evaluated for the scheduled member at the time of the rating examination.¹⁴

ANALYSIS

The Board finds this case is not in posture for decision. In its April 16, 2014 decision, the Board remanded the case for a supplemental report from Dr. Berman, its medical adviser, after reviewing Dr. Hoff-Sullivan's March 11, 2013 report.¹⁵ She had found 26 percent impairment due to class 3 primary knee joint arthritis.

In his April 25, 2014 report, Dr. Berman apportioned the arthritis rating found by Dr. Hoff-Sullivan. He indicated that appellant should receive a 50 percent apportionment or 13 percent left lower extremity impairment due to arthritis.

As noted in the Board's April 16, 2014 decision and explained above, there are no provisions for apportionment under FECA,¹⁶ and rated impairment should reflect the total loss as evaluated for the scheduled member at the time of the rating examination.¹⁷ As Dr. Berman's April 25, 2014 report did not cure the deficiencies noted previously by the Board, the case must again be remanded for OWCP to obtain a supplemental report from OWCP medical adviser regarding the degree of appellant's left lower extremity impairment.¹⁸

The Board also notes that appellant testified at the September 19, 2014 hearing that he was receiving VA benefits for his left knee. Section 8116(a) of FECA provides that while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the VA, unless such benefits are payable for the same injury or the same death being

¹² See *supra* note 7 at Chapter 2.808.6(f) (February 2013).

¹³ *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁴ *Supra* note 7 at Chapter 2.808.5d (February 2013).

¹⁵ *Supra* note 2.

¹⁶ *Supra* note 13.

¹⁷ *Supra* note 14.

¹⁸ *Id.*; see also *C.W.*, Docket No. 09-290 (issued January 28, 2010).

compensated for under FECA.¹⁹ Thus, there is a prohibition against an employee receiving benefits under both FECA and VA for the same injury, including any increase in a service-connected disability.²⁰ The accepted conditions in this case include aggravation of preexisting tear of the medial meniscus of the left knee and derangement of left lateral meniscus. On remand OWCP should secure information from the VA regarding appellant's left knee disability to determine if his VA benefits would preclude entitlement under FECA.

After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds this case is not in posture for decision regarding the degree of appellant's left lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2014 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: August 18, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ 5 U.S.C. § 8116(a).

²⁰ *Kelvin L. Davis*, 56 ECAB 404 (2005).