

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

M.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 14-1077
Issued: July 2, 2015**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 9, 2014 appellant, through counsel, filed a timely appeal from an April 1, 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 has more than a 31 percent permanent impairment to his right leg.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated May 4, 2007, the Board affirmed an October 3, 2006 schedule award decision for a nine percent right leg

¹ 5 U.S.C. § 8101 *et seq.*

impairment.² The Board noted that the claim had been accepted for a right knee sprain and a right medial meniscus tear in the performance of duty on June 4, 2002. The medical evidence indicated that appellant had a nine percent right leg impairment based on reduced cartilage interval in the right knee and partial medial meniscectomy. The history of the case as provided by the Board is incorporated herein by reference.

On April 16, 2012 appellant underwent arthroscopic surgery on the right knee, performed by Dr. Jon Tucker. On July 30, 2012 he underwent patellofemoral joint replacement surgery. Appellant underwent additional right knee surgery on August 22, 2012.

In a report dated June 4, 2013, Dr. Tucker provided results on examination, indicating that range of motion in the knee was 0 to 100 degrees. In a report dated July 9, 2013, he again provided results on examination. Dr. Tucker noted 0 to 90 degrees active range of motion in the right knee, with palpable crepitus at about 30 degrees of flexion in the patellofemoral joint.

By report dated October 11, 2013, Dr. Michael Platto, a Board-certified physiatrist, provided a history and results on examination. For the right knee, he reported that range of motion for the right knee was 102, 105, and 106 on successive trials, with extension on -18, -16, and -15. With respect to permanent impairment, Dr. Platto identified Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (sixth edition). He noted that there was no provision for a partial knee replacement, and therefore he would use the diagnostic criteria of total knee replacement. Dr. Platto indicated that appellant was a class 4 impairment, as he had a poor result with moderate motion deficit of 15 degrees.³ As to the adjustment from the default value (67 percent leg impairment), he found that, based on a functional history grade modifier 2, appellant had a -2 grade adjustment or a 59 percent leg impairment.

OWCP referred the case to an OWCP medical adviser for review. In a report dated March 14, 2014, the medical adviser indicated that he would like to review postoperative notes from treating physicians from August 22, 2012 to October 11, 2013 to determine if Dr. Platto's findings were consistent with other providers.⁴ The medical adviser indicated that otherwise the impairment would be 59 percent.

In a report dated March 22, 2014, OWCP medical adviser indicated that he had reviewed additional evidence, noting the June 4 and July 9, 2013 reports from Dr. Tucker. The medical adviser indicated that, under Table 16-3, he would find a class 3 "fair result," stating that medical evidence showed mild range of motion deficit, rather than the moderate found by Dr. Platto. The default (grade C) impairment therefore was 37 percent, and with a net grade adjustment of minus 2, the leg impairment was 31 percent. The medical adviser opined that the date of maximum medical improvement was June 4, 2013, as appellant's right knee condition had stabilized at that time.

² Docket No. 07-82 (issued May 4, 2007).

³ Dr. Platto referred to Table 16-23 for knee motion impairments.

⁴ These reports were of record, but apparently had not been forwarded to the medical adviser.

By decision dated April 1, 2014, OWCP issued a schedule award for an additional 22 percent right leg impairment. The period of the award was 63.36 weeks commencing August 25, 2013.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

With respect to a knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The class of impairment Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 16-6), Physical Examination (GMPE, Table 16-7) and Clinical Studies (GMCS, Table 16-8). The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).⁸

Under FECA, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.⁹ The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰

ANALYSIS

In the present case, an attending physician, Dr. Platto, determined that appellant had a 59 percent right leg impairment under Table 16-3. He used the diagnostic criteria of total knee replacement and found a class 4 impairment with a default (grade C) leg impairment of 67

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404.

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁹ 5 U.S.C. § 8123.

¹⁰ 20 C.F.R. § 10.321 (1999).

percent. The class 4 impairment is for a “poor result (poor position, moderate-to-severe instability, and/or moderate-to-severe motion deficit).”¹¹ Dr. Platto found that, based on his examination, including range of motion, this was the appropriate class designation. Using the net adjustment formula, he found a grade A, class 4 impairment of 59 percent.

OWCP medical adviser disagreed with Dr. Platto. He also applied the diagnostic criteria of total knee replacement, but found a class 3 “fair result (fair position, mild instability and/or mild motion deficit)” was appropriate.¹² The medical adviser opined that this was more consistent with the range of motion results of record. A class 3 impairment, after a net adjustment to grade A, results in a 31 percent impairment.

The Board finds that a conflict under 5 U.S.C. § 8123(a) was created. In *M.L.*, for example, the attending physician had found a class 3 impairment under total knee replacement, but OWCP’s medical adviser opined a class 2 was appropriate.¹³ The Board held that OWCP had properly referred the case to a referee physician to resolve the conflict. In the present case, there is a disagreement over the proper class designation under Table 16-3, and both have supported their opinion with medical rationale. The Board will remand the case to OWCP to properly resolve the conflict as to the right leg impairment under the A.M.A., *Guides*. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for proper resolution of a conflict under 5 U.S.C. § 8123(a).

¹¹ A.M.A. *Guides* 511, Table 16-3.

¹² *Id.*

¹³ Docket No. 13-1602 (issued December 9, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 1, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 2, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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