United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 15-1585**
	)	**Issued: January 7, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 16, 2015 appellant, through counsel, filed a timely appeal from a March 11, 2015 merit 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 this case.

ISSUE

The issue is whether appellant met his burden of proof to establish more than 50 percent permanent impairment of his right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

OWCP accepted that on August 29, 1987 appellant, then a 35-year-old mail handler, sustained aggravation of a preexisting right knee sprain when he slammed on the brakes of his

[1] 5 U.S.C. § 8101 *et seq.*

forklift to avoid hitting another forklift. It later accepted a consequential left knee sprain. Appellant received disability compensation on the daily rolls beginning February 14, 1998.

By decision dated August 20, 2002, OWCP granted appellant a schedule award for 50 percent permanent impairment of his right lower extremity. The award was based on the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2000).

Appellant requested an increased schedule award. On September 28, 2009 Dr. David Weiss, an attending osteopath, determined that appellant had 63 percent permanent impairment of his right lower extremity under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

In a November 19, 2009 report, Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon and OWCP referral physician, determined that appellant had 21 percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides*.

OWCP determined that there was a conflict in the medical opinion evidence regarding the extent of permanent impairment of appellant's right lower extremity between Dr. Hutter and Dr. Weiss and therefore referred appellant and the case record to Dr. Andrew Carollo, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a February 7, 2011 report, Dr. Carollo provided a discussion of appellant's factual and medical history and reported the findings of his examination on that date. He recorded some limitation on range of right knee motion and indicated that appellant had 4/5 strength in his right quadriceps. Dr. Carollo noted, "With regard to the question of whether or not maximum medical improvement has been achieved, it is my opinion that it has not been achieved on either the right or the left knee." He provided a description of the calculation through which he concluded that appellant had 40 percent permanent impairment of his right lower extremity under the sixth edition of the A.M.A., *Guides*. Dr. Carollo indicated:

> "Right knee using Table 16.3, a determination for [Class of Diagnosis (CDX)] was made. Class III classification was given for CDX indicating a fair result of his total knee arthroplasty with motion deficit which is determined to be moderate.
>
> "With regard to the [grade modifier for Functional History (GMFH)], using Table 16.6, he was given a grade modifier of 3 indicative of the presence of a limp as well as an ongoing pain with regard to the right knee.
>
> "With regard to [grade modifier for Physical Examination (GMPE)], he was given a grade modifier of 3 due to the presence of moderate palpatory findings both medially, laterally, and anterior about the knee in association with the presence of crepitus.
>
> "With regard to [grade modifier for Clinical Studies (GMCS)], he was given a modifier of 4 using Table 16.8. This patient's studies demonstrated severe

degenerative and traumatic arthritis of his right knee with no interval space left of cartilage.

"Using the net adjustment formula … the patient findings are that of a class III with a net adjustment value of +1. This, therefore, makes this grade D with 40 percent lower extremity impairment."

In October 21, 2011, September 24, 2013, and July 25, 2014 decisions, OWCP determined that appellant did not meet his burden of proof to establish that he has more than 50 percent permanent impairment of his right lower extremity, for which he received a schedule award. It indicated that the opinion of Dr. Carollo established no more than 50 percent permanent impairment of his right lower extremity. It was noted that the fact that Dr. Carollo found that appellant had not reached maximum medical improvement with respect to his right knee meant that his right knee condition had not reached a fixed and permanent state, a requirement for payment of a schedule award.

Appellant requested a video hearing with an OWCP hearing representative. During the hearing held on December 22, 2014, appellant's counsel at the time argued that the February 7, 2011 report of Dr. Carollo required additional clarification regarding the matter of maximum medical improvement.

By decision dated March 11, 2015, OWCP's hearing representative affirmed OWCP's July 25, 2014 decision finding that appellant had not shown that he has more than 50 percent permanent impairment of his right lower extremity.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing regulations[3] 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 to all claimants, good administrative practice necessitates 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.[4]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[5] After the CDX is

[2] *Supra* note 1.

[3] 20 C.F.R. § 10.404 (1999).

[4] *W.B.*, Docket No. 14-1982 (issued August 26, 2015). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[5] *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[6]

Section 8123(a) of FECA provides in pertinent part: "If there is 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 an examination."[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

OWCP accepted that on August 29, 1987 appellant, then a 35-year-old mail handler, sustained aggravation of a preexisting right knee sprain when he slammed on the brakes of his forklift to avoid hitting another forklift. It later accepted that appellant sustained a consequential left knee sprain. By decision dated August 20, 2002, OWCP granted appellant a schedule award for 50 percent permanent impairment of his right lower extremity.

OWCP had determined that there was a conflict in the medical opinion between Dr. Weiss, appellant's attending osteopath, and the government physician, Dr. Hutter, a Board-certified orthopedic surgeon acting as an OWCP referral physician, regarding the extent of the permanent impairment of appellant's right leg.[10] In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Carollo, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a report dated February 7, 2011, Dr. Carollo determined that appellant had 40 percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides*. The Board finds that Dr. Carollo's opinion is based on a complete and accurate factual and medical history and contains medical rationale in support of its conclusions. Therefore, it

[6] *Id.* at 515-22.

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[9] *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

[10] In a September 28, 2009 report, Dr. Weiss, an attending osteopath, determined that appellant had 63 permanent impairment of his right lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. In contrast, Dr. Hutter, a Board-certified orthopedic surgeon and OWCP referral physician, determined on November 19, 2009 that appellant had 21 permanent impairment of his right lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.

constitutes the weight of the medical evidence with respect to appellant's right lower extremity impairment.[11]

On appeal, counsel argues that the fact that Dr. Carollo found that appellant had not reached maximum medical improvement with respect to his right knee meant that the case should be remanded for Dr. Carollo to provide a clarifying opinion. However, the Board finds that such a remand is not necessary because Dr. Carollo's opinion in this regard shows that appellant's right knee condition had not reached a fixed and permanent state, a requirement for payment of a schedule award. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[12] The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.[13]

Although Dr. Carollo provided a rationalized calculation of the permanent impairment of appellant's right lower extremity, the fact that he found that appellant's right knee had not reached maximum medical improvement (and that he only provided 40 percent impairment rating) means that his opinion cannot show that appellant has more than 50 percent permanent impairment of his right leg. Appellant did not submit any probative medical evidence showing that he has more than 50 percent permanent impairment of his right lower extremity.

Appellant did not meet his burden of proof to establish that he has more than 50 percent permanent impairment of his right lower extremity. He 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 his burden of proof to establish that he has more than 50 percent permanent impairment of his right lower extremity, for which he received a schedule award.

[11] *See supra* note 9.

[12] *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[13] *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board