United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 17-0229**
	)	**Issued: June 22, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2016 appellant, through counsel, filed a timely appeal from a June 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On September 14, 2009 appellant, then a 50-year-old letter carrier filed a traumatic injury claim (Form CA-1) alleging that, on September 9, 2008, he twisted his knee when he ascended steps while delivering mail in the performance of duty. Following the injury, he began working with restrictions. Appellant returned to full-duty work on October 2, 2009, but due to increased pain, returned to working with restrictions on October 5, 2009.

OWCP accepted appellant's claim for a tear of the posterior horn of the medial meniscus, right knee and partial rupture of a Baker's cyst, right knee. On December 9, 2009 appellant underwent medial meniscus repair, performed by his treating physician, Dr. Thomas Corcoran, a Board-certified orthopedic surgeon. He then returned to light-duty work on January 23, 2010. Appellant received wage-loss compensation benefits.

On June 16, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letters dated July 17 and 20, 2015, counsel noted that he had enclosed medical evidence from Dr. David Weiss, an osteopath Board-certified in sports medicine and nonsurgical orthopedics, dated May 15, 2014. He also indicated that Dr. Weiss had provided an updated report dated July 3, 2015, in which he provided a permanent impairment rating of 24 percent to the right lower extremity utilizing x-rays performed on the right knee on April 27, 2015.

The April 27, 2015 x-ray reports, read by Dr. Sheldon Karasick, a Board-certified radiologist, revealed minimal narrowing of the joint space on the weight-bearing side and additional degenerative changes were present involving the patellofemoral articulation. Dr. Karasick diagnosed minimal-to-moderate degenerative joint disease involving the right knee.

In a May 15, 2014 report, Dr. Weiss noted that appellant's history included that, on October 15, 2009, he was diagnosed with a right knee effusion and right knee medial meniscus tear, from which synovial fluid was aspirated from the right knee. He advised that a magnetic resonance imaging (MRI) scan of the right knee performed on October 20, 2009, revealed tricompartmental osteoarthritic changes in the medial compartment and patellofemoral horn joint, extruded medial meniscus with a tear of the posterior horn, and small joint effusion and Baker's cyst. Dr. Weiss also noted that the December 9, 2009 arthroscopy of the right knee, partial medial meniscectomy, chondroplasty of the patella, medial femoral condyle, and lateral tibial plateau on December 9, 2009 as performed by Dr. Corcoran. He examined appellant and noted that he ambulated with a slight right lower extremity limp and explained that calcaneal and equinus gait are carried through within normal limits. Dr. Weiss found that the right knee examination revealed well-healed portal arthroscopy scars with no effusion. He determined that range of motion revealed flexion extension of 1-130/140 degrees. Dr. Weiss found patellofemoral compression that produced crepitus, but no retro patellar pain and nontenderness over the medial joint line and

medial femoral condyle. He also indicated that the knee was stable to both valgus and varus stress testing. Dr. Weiss also found a Lachman and drawer sign that was negative along with the Apley grind test. He advised that the quadriceps circumference as at 10 millimeters above the patella measure and 47 centimeters on the right and 49.5 centimeters on the left. Dr. Weiss diagnosed post-traumatic internal derangement to the right knee with a medial meniscus tear, post-traumatic chondromalacia of the patellofemoral joint, aggravation of preexisting age-related degenerative joint disease of the right knee, status post arthroscopic surgery with partial medial meniscectomy, and status post chondroplasty of the patellofemoral joint of the right knee. He indicated that appellant had subjective complaints of right knee pain and stiffness, which was daily and constant. Dr. Weiss also noted that changes in the weather would exacerbate the pain. He further related that appellant's activities of daily living were restricted.

Dr. Weiss referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)[3] and referred to Table 16-3, page 511 of the A.M.A., *Guides* to find that appellant fell into a class 1 for right primary knee joint arthritis, or seven percent. He referred to Table 16-6, page 516, for functional history and explained that appellant fell into category 2. Dr. Weiss referred to Table 16-7, page 517 for grade modifier physical examination and found that appellant fell into category 2. He utilized the net adjustment formula and found a net adjustment of 2. Dr. Weiss determined that appellant had nine percent right lower extremity permanent impairment. He advised that appellant had reached maximum medical improvement (MMI) on May 15, 2014.

By letter dated July 17, 2015, counsel for appellant provided an updated report from Dr. Weiss dated July 3, 2015. He explained that Dr. Weiss utilized updated x-rays performed on appellant's right knee on April 27, 2015.

In the July 3, 2015 update, Dr. Weiss utilized the A.M.A., *Guides.* He advised that x-rays of the right knee performed on April 27, 2014 revealed medial joint space of two millimeters and lateral joint space of four millimeters. Dr. Weiss referred to Table 16-3, page 511 of the A.M.A., *Guides* and found that appellant fell into a class 2 for right primary knee joint arthritis, or 20 percent. He referred to Table 16-6, page 516, for functional history and explained that appellant fell into category 2. Dr. Weiss referred to Table 16-7, page 517 for grade modifier physical examination and found that appellant fell into category 2. He utilized the net adjustment formula and found a net adjustment of 2. Dr. Weiss determined that appellant had 24 percent right lower extremity permanent impairment. He again confirmed that appellant reached MMI on May 15, 2014.

In an August 18, 2015 report, Dr. Corcoran examined appellant and found synovitis along with medial joint line tenderness and range of motion from 0 to 95 degrees. He diagnosed right knee degenerative joint disease and right knee synovitis.

On October 8, 2015 OWCP requested that a district medical adviser (DMA) provide an impairment rating.

[3] A.M.A., *Guides* (6th ed. 2009).

In an October 14, 2015 report, OWCP's DMA noted appellant's history of injury and treatment. He reviewed the reports from Dr. Weiss. The DMA explained that appellant underwent a partial medial meniscectomy and had moderately advanced osteoarthritis, which meant that the calculation would be made on the basis of the meniscus alone. However, because there was preexisting osteoarthritis, under the A.M.A., *Guides* it was required that the calculation be made utilizing the arthritis formula, "basically stating that calculation is made on the entire extremity 'as you find it.'" The DMA referred to Table 16-3, page 511 of the A.M.A., *Guides*, Knee Regional Grid --Lower Extremity Impairment, class 1 -- right knee joint arthritis, default value, class 1, grade C = seven percent impairment as a three-millimeter cartilage interval, full-thickness articular cartilage defect or ununited osteochondral fracture. He referenced the adjustment grid and grade modifiers, Table 16-3: Knee Regional Grid -- Lower Extremity Impairment, class 1 -- right knee joint arthritis, default value class 1, grade C = seven percent impairment for a three-centimeter cartilage interval, full-thickness articular cartilage defect or ununited osteochondral fracture. The DMA indicated that based upon the adjustment grid and grade modifiers, Table 16-3, primary knee osteoarthritis, functional history, grade modifier 2, physical examination adjustment, Table 16-7, grade modifier 2; clinical studies adjustment; not applicable. He advised that utilizing the net adjustment formula, the net adjustment was plus 2; which increased the schedule award from grade C to E for nine percent right lower extremity permanent impairment. The DMA indicated that date of MMI was May 15, 2014.

By decision dated December 15, 2015, OWCP granted appellant a schedule award for nine percent permanent impairment of the right lower extremity. The decision noted that the July 3, 2015 report of Dr. Weiss was considered, but it did not provide sufficient rationale to support a higher permanent impairment rating. The period of the award ran from May 15 to November 12, 2014, for a total of 25.92 weeks of compensation.

By letter dated December 21, 2015, counsel for appellant requested a hearing, which was held before an OWCP hearing representative on April 11, 2016.

In a February 1, 2016 report, Dr. Weiss explained that he had reviewed the DMA's October 14, 2015 report and the radiology report of x-rays of the right knee dated April 27, 2015. He noted that the x-ray report of April 27, 2015 revealed minimal-to-moderate degenerative joint disease involving the right knee. Dr. Weiss explained that there were no joint space measurements applied. He advised that according to the joint space measurements performed on the x-ray of the right knee dated April 27, 2015, he would agree with the radiologist that this was a class 2, which was a moderate impairment for primary knee joint arthritis. Dr. Weiss reiterated that his calculations remained as noted.

By decision dated June 30, 2016, OWCP's hearing representative affirmed the December 15, 2015 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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.[6] For decisions issued after May 1, 2009, the sixth edition will be used.[7]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[9]

OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[10]

ANALYSIS

OWCP accepted appellant's traumatic injury claim for a tear of the posterior horn of the medial meniscus, right knee and partial rupture of a Baker's cyst, right knee. It also authorized a medial meniscus repair on December 9, 2009. Appellant filed a claim for a schedule award on June 16, 2015. On December 15, 2015 OWCP granted a schedule award for nine percent permanent impairment of the right lower extremity.

The Board notes that both Dr. Weiss and the DMA were initially in agreement with regard to appellant being entitled to a schedule award of nine percent to the right lower extremity. The Board notes that in his May 15, 2014 report, Dr. Weiss noted appellant's history, examined appellant, and provided findings. Dr. Weiss referenced the A.M.A., *Guides* and referred to

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

[8] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[9] A.M.A., *Guides* 521.

[10] *Supra* note 8 at Chapter 2.808.5 (March 2017).

Table 16-3, page 511 and found that appellant fell into a class 1 for right primary knee joint arthritis, or seven percent. He referred to Table 16-6, page 516, for functional history and explained that appellant fell into category 2. Dr. Weiss referred to Table 16-7, page 517 for the grade modifier for physical examination and found that appellant fell into category 2. He utilized the net adjustment formula and found a net adjustment of 2. Dr. Weiss determined that appellant had nine percent right lower extremity impairment. He advised that appellant reached MMI on May 15, 2014.

The DMA provided a similar report dated October 14, 2015. He explained that appellant underwent a partial medial meniscectomy and had moderately advanced osteoarthritis and explained that the calculation would be made on the basis of the meniscus alone. However, because there was preexisting osteoarthritis and under the A.M.A., *Guides* it was required that the calculation be made utilizing the arthritis formula as the calculation was "made on the entire extremity 'as you find it.'"[11] The DMA also referred to Table 16-3, page 511 of the A.M.A., *Guides,* Knee Regional Grid -- Lower Extremity Impairment, class 1 -- right knee joint arthritis, default value, class 1, grade C = seven percent impairment. He explained that appellant fell into this category as a three-millimeter cartilage interval, full-thickness articular cartilage defect or ununited osteochondral fracture. The DMA also agreed with Dr. Weiss that, based upon the adjustment grid and grade modifiers, Table 16-3, primary knee osteoarthritis, functional history, grade modifier 2, physical examination adjustment, Table 16-7, grade modifier 2; clinical studies adjustment; not applicable. He advised that utilizing the net adjustment formula, the net adjustment was plus 2; which increased the schedule award from grade C to E for nine percent right lower extremity impairment. The DMA indicated that date of MMI was May 15, 2014. The Board finds that the DMA explained that the rating was proper pursuant to the A.M.A., *Guides*.

Dr. Weiss provided a July 3, 2015 updated report advising that x-rays of the right knee performed on April 27, 2015 revealed medial joint space of two millimeters and lateral joint space of four millimeters. However, it is unclear how he arrived at this finding as there are no measurements to show that the medial joint space was smaller. The Board notes that x-rays indicated minimal narrowing of the joint space on the weight-bearing side and were reviewed by the DMA. Furthermore, Dr. Corcoran found synovitis and medial joint line tenderness with range of motion from 0 to 95 degrees. Likewise, in his February 1, 2016 report, Dr. Weiss explained that he had reviewed the DMA's October 14, 2015 report and the radiology report of x-rays of the right knee dated April 27, 2015 and advised that the x-ray report revealed minimal-to-moderate degenerative joint disease involving the right knee. Dr. Weiss explained that there were no joint space measurements applied. He then noted that according to the joint space measurements performed on the x-ray of the right knee dated April 27, 2015, he would agree with the radiologist that this was a class 2, which was a moderate impairment for primary knee joint arthritis. Dr. Weiss reiterated that his calculations remained as noted. As set forth above, the Board has found that the report of Dr. Weiss is insufficiently rationalized as it is unclear how he arrived at this finding as there are no measurements to show that the medial joint space was smaller. Thus, the evidence is insufficient to establish a greater permanent impairment rating.

[11] Preexisting impairments are included in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment. *See Mike E. Reid*, 51 ECAB 543 (2000).

On appeal counsel argues that OWCP's report was insufficient to carry the weight. He also argues alternatively, that a conflict in medical opinion was created. However, as found above, the evidence of record is insufficient to establish that appellant has more than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

Appellant may request a schedule award or increased schedule award at any time 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 has not met his burden of proof to establish greater than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board