United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 17-0981**
	)	**Issued: July 27, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Jamaica, NY, Employer	)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 4, 2017 appellant, through counsel, filed a timely appeal from a February 1, 2017 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.

ISSUE

The issue is whether appellant met her burden of proof to establish greater than one percent permanent impairment of each upper extremity, one percent permanent impairment of the left

[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.*

lower extremity, and two percent permanent impairment of the right lower extremity, for which she previously received schedule awards.

FACTUAL HISTORY

On November 28, 2001 appellant, then a 53-year-old sales and services distribution associate, was injured while working at the service window when her foot caught on a key chain at the bottom of a drawer, causing her to fall on her hands and knees. OWCP accepted her claim for contusion of the bilateral hands and knees and aggravation of unspecified internal derangement of the bilateral knees. Appellant stopped work on the date of injury. She returned to full-time limited-duty work on May 14, 2012, but retired on January 31, 2013.

On September 25, 2013 appellant filed a claim for a schedule award (Form CA-7). In support of her claim she submitted a June 6, 2014 medical report from Dr. Karen Garvey, Board-certified in internal medicine and occupational medicine. Dr. Garvey concluded, using the diagnosis-based impairment method of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)[3] that appellant sustained one percent right upper extremity permanent impairment, one percent left upper extremity permanent impairment, two percent right lower extremity permanent impairment, and one percent left lower extremity permanent impairment due to the November 28, 2011 employment injury.

By decision dated July 30, 2014, OWCP granted appellant schedule award compensation for one percent permanent impairment of each upper extremity, one percent permanent impairment of the left lower extremity, and two percent permanent impairment of the right lower extremity.

On August 1, 2014 appellant filed a claim for increased schedule award compensation (Form CA-7). By letter dated August 6, 2014, OWCP advised appellant of the type of evidence necessary to establish her claim, noting that no new medical evidence had been submitted. By decision dated October 8, 2014, OWCP denied additional schedule award compensation as appellant failed to submit evidence of permanent impairment greater than that which was previously awarded.

On March 20, 2015 appellant filed a claim for increased schedule award compensation (Form CA-7).

In a report dated July 8, 2015, Dr. Sean Lager, Board-certified in orthopedic sports medicine and orthopedic surgery, noted appellant's history of injury and treatment and provided impairment ratings for her bilateral upper and lower extremities. He examined appellant's wrists and hands and found that she had flexion of 50 degrees and extension of 55 degrees on the right. Dr. Lager determined that appellant had flexion of 50 degrees and extension of 65 degrees on the left. He found grip strength of 4 +/5 on the right and 4/5 on the left. Dr. Lager noted that flexion and extension was 5/5 bilaterally.

Regarding the knees, Dr. Lager found patellar tenderness on the right and medial and lateral joint line tenderness on the right. He found no effusion in either knee. Dr. Lager determined

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

that appellant had medial and lateral joint line tenderness on the left and patellar tenderness on the left. He found that she was guarding during the knee examination. Dr. Lager noted that he was unable to elicit much of an examination as he could not test for ligament instability or specifically anterior cruciate instability. Regarding flexion, he found that appellant had flexion of three out of five bilaterally and extension of 3+/5 bilaterally. Additionally, Dr. Lager noted that she could barely perform a straight leg raise versus gravity on the left. He provided range of motion findings, which included: 0 degrees of extension to 90 degrees of flexion on the left. With regard to the right leg, Dr. Lager found 0 degrees of extension to 105 degrees of flexion. He determined that appellant reached maximum medical improvement on August 29, 2013. Dr. Lager noted that she walked with a cane. However, regarding his examination of the knees, appellant's complaints were a bit out of proportion to the intensity of the injury. Dr. Lager reiterated that she was guarding during the knee examination and that he was unable to elicit much of an examination as he could not test for ligament instability or specifically anterior cruciate ligament (ACL) instability. He noted that appellant complained of some tenderness around the knee joints bilaterally, and he believed that she gave a poor effort on physical examination and he questioned her motivation.

With respect to her bilateral wrist conditions, Dr. Lager explained that appellant's condition was classified as a class 0, with no significant symptoms or signs at maximum medical improvement. He advised that this was met based on the history of symptoms reported and the objective findings. Dr. Lager referred to Table 15-3 of the A.M.A., *Guides*.[4] He referred to Table 15-7[5] for functional history and determined that appellant had a grade modifier of 0. For physical examination, Dr. Lager referred to Table 15-8[6] and determined that appellant had a physical examination grade modifier of 1-mild problem. He found that wrist grip strength was 4+/5 on the right and 4/5 on the left. For clinical studies, Dr. Lager referenced Table 15-9[7] and found a grade modifier of 0. He noted that there were no available clinical studies of the right elbow. Dr. Lager utilized the net adjustment formula.[8] He referenced Table 15-3[9] and determined that appellant had one percent impairment of each wrist. Dr. Lager reiterated that appellant gave a poor effort on physical examination.

Turning to the bilateral knee conditions, Dr. Lager explained that it was classified as a class 0 with no significant symptoms or signs at maximum medical improvement. He explained that this was based on the history of symptoms reported and the objective findings. Dr. Lager referenced Table 16-3.[10] He indicated that, for functional history, appellant had a grade modifier

[4] A.M.A., *Guides* 395.

[5] *Id*. at 406.

[6] *Id*. at 408.

[7] *Id*. at 410.

[8] *Id*. at 411.

[9] *Id*. at 395.

[10] *Id*. at 509.

of 1 and referenced Table 16-6.[11] Dr. Lager referenced Table 16-7[12] regarding a physical examination adjustment and determined that appellant had a grade modifier 1 for a mild problem. He determined that flexion and extension was 3/5 bilaterally. Dr. Lager noted that appellant could barely perform a straight leg raise versus gravity, as he could not test for ligament instability or specifically ACL instability. He referenced Table 16-8[13] for clinical studies and indicated that appellant had a grade modifier of 0. Dr. Lager noted that the magnetic resonance imaging (MRI) scans of her knees did not indicate that there were any tears, only osteoarthritis. He utilized the net adjustment formula and determined that appellant had two percent impairment of each knee in accordance with the A.M.A., *Guides*.[14]

On November 2, 2015 OWCP referred the medical evidence and the record to OWCP's medical adviser, Dr. Henry Magliato, a Board-certified orthopedic surgeon.

In a November 12, 2015 report, OWCP's medical adviser, Dr. Magliato, noted the history of injury and treatment and reviewed Dr. Lager's report. Regarding the impairment rating for the wrists and the knees, he explained that Dr. Lager's report incorrectly adjusted the class 0 impairment. Dr. Magliato explained that any extremity that fit into a class 0 was automatically zero percent permanent impairment for that extremity. He noted that appellant had already received schedule awards of one percent for both upper extremities and two percent for the right lower extremity and one percent for the left lower extremity. Dr. Magliato opined that the class 0 result did not matter. Regarding the date of maximum medical improvement, he explained that the date used by Dr. Lager, August 29, 2013, was based upon a prior treating physician report. Rather, October 18, 2013, the date of Dr. Lager's report, should be used.

By letter of December 11, 2015, OWCP provided Dr. Lager with a copy of Dr. Magliato's report and requested an addendum report with specified information. Specifically, it noted that Dr. Magliato reviewed his report and found that he had mistakenly adjusted a class 0 for all the claimed impairment. OWCP advised Dr. Lager that, according to the A.M.A., *Guides*, any extremity that fits into class 0 was automatically 0 percent permanent impairment.

By letter dated February 11, 2016, counsel provided OWCP with a supplemental report from Dr. Lager.

In the January 11, 2016 supplemental report, Dr. Lager explained that he had inadvertently adjusted a class 0 for the claimed impairment. He noted that, pursuant to the A.M.A., *Guides*, any extremity that fit into a class 0 was automatically zero percent impairment. Dr. Lager noted that appellant did not appear to have any studies made of her wrists and she had therapy for over a year. He also indicated that she had injections in her knees and was discharged from treatment for quite

[11] *Id*. at 516.

[12] *Id*. at 517.

[13] *Id*. at 519.

[14] *Id*. at 521.

a while. Dr. Lager advised that appellant was at maximum medical improvement, which occurred on August 29, 2013.

By decision dated March 31, 2016, OWCP denied appellant's claim for increased schedule award compensation. It found that the medical evidence of record was insufficient to establish greater permanent impairment than that which was previously awarded.

By letter dated April 15, 2016, appellant, through counsel, requested a telephonic hearing, which was held on December 7, 2016. During the hearing, appellant described her continuing injury-related problems and limitations. She also indicated that she continued to receive treatment.

OWCP also received reports, dated May 6, June 3, August 12, and November 18, 2016 from Dr. Mitchell Kaphan, Board-certified in orthopedic surgery and orthopedic sports medicine. However, these reports did not provide an impairment rating pursuant to the A.M.A., *Guides*.

By decision dated February 1, 2017, OWCP affirmed the March 31, 2016 decision as there was no evidence of a greater permanent impairment than that which was previously awarded. OWCP's hearing representative also noted that, as appellant was previously awarded compensation for one percent permanent impairment of each upper extremity, one percent permanent impairment of the left lower extremity, and two percent permanent impairment of the right lower extremity in accordance with the A.M.A., *Guides*, and was now found to have zero percent impairment of each upper and lower extremity, OWCP should compute the overpayment of compensation and issue an appropriate preliminary finding in that regard.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[15] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[16] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[17]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled, "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing

[15] *See* 20 C.F.R. §§ 1.1-1.4.

[16] 5 U.S.C. § 8107(c)(1).

[17] 20 C.F.R. § 10.404; *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[18] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[19]

Specifically for addressing lower extremity impairment, the sixth edition requires identification of 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). The net adjustment formula is (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX).[20] 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.[21] Section 16.2a of the A.M.A., *Guides*, provides that if the class selected is defined by physical examination findings or clinical studies results, these same findings may not be used as grade modifiers to adjust the rating.[22]

ANALYSIS

The Board finds that this case is not in posture for decision with regard to whether appellant has established greater permanent impairment of her upper extremities than that which was previously awarded. The Board further finds that appellant has not met her burden of proof to establish greater permanent impairment of her for her bilateral lower extremities for which she previously received schedule award compensation.

In granting schedule awards for permanent impairment of the upper extremities, the Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides*. No consistent interpretation has been followed regarding the proper use of the diagnosis-based impairment (DBI) methodology or the range of motion (ROM) methodology when assessing the extent of permanent impairment for schedule award purposes.[23] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[24] In *T.H.*, the Board concluded that OWCP's physicians are at odds over the proper

[18] 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 (February 2013).

[19] *Isidoro Rivera*, 12 ECAB 348 (1961).

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

[21] A.M.A., *Guides* 4, section 1.3. The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement; *W.S.*, Docket No. 16-1111 (issued March 14, 2017).

[22] A.M.A., *Guides*, 500.

[23] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[24] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board has found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[25]

Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly,[26] and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased schedule award compensation with regard to her bilateral upper extremities.

With regard to appellant's lower extremity impairment, appellant provided a July 8, 2015 report from Dr. Lager, who noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. Dr. Lager later submitted a supplemental report dated January 11, 2016. In his July 8, 2015 report, regarding the lower extremities, Dr. Lager examined appellant and found patellar tenderness on the right and medial and lateral joint line tenderness on the right. He determined that there was no effusion in either knee and that appellant had medial and lateral joint line tenderness on the left and patellar tenderness on the left. Dr. Lager referred to the A.M.A., *Guides* and explained that, for the bilateral knee condition, it was classified as a class 0 with no significant symptoms or signs at maximum medical improvement. Following the use of appropriate grade modifiers and the net adjustment formula he determined that appellant had two percent permanent impairment of each knee in accordance with the A.M.A., *Guides.*

In a November 12, 2015 report, OWCP's medical adviser, Dr. Magliato, noted the history of injury and treatment and reviewed Dr. Lager's report. He explained that Dr. Lager's report incorrectly adjusted the class 0 and explained that any extremity that fit into a class 0 was automatically zero percent impairment for that extremity. Dr. Magliato concluded that appellant had no permanent impairment of any upper or lower extremity.

In his January 11, 2016 supplemental report, Dr. Lager explained that he had inadvertently adjusted a class 0 for the claimed impairment. He noted that, pursuant to the A.M.A., *Guides*, any extremity that fit into a class 0 was automatically zero percent impairment. Therefore, Dr. Lager amended his findings such that he opined that appellant had zero percent permanent impairment of her bilateral lower extremities.

OWCP also received reports, dated May 6, June 3, August 12, and November 18, 2016, from Dr. Kaphan. However, these reports did not provide an impairment rating pursuant to the A.M.A., *Guides* and therefore do not provide any support for an increased schedule award of any extremity.

[25] *Supra* note 23.

[26] *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

Having duly considered the medical evidence of record, the Board finds that there is no evidence that suggests that appellant has greater permanent impairment of her bilateral lower extremities greater than that which was previously awarded.

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 the case is not in posture with regard to appellant's bilateral upper extremity permanent impairment. The Board further finds that appellant has not established greater permanent impairment than the one percent of the left lower extremity and two percent of the right lower extremity previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: July 27, 2018
Washington, DC

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

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

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