United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 17-1092**
	)	**Issued: October 22, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
William Bothwell, 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 April 18, 2017 appellant, through her representative, filed a timely appeal from a February 21, 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.[3]

[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.*

[3] Following OWCP's issuance of its February 21, 2017 decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence which was before OWCP at the time it issued its decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met her burden of proof to establish that she has more than 32 percent permanent impairment of her right lower extremity and more than 31 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On December 20, 2006 appellant, then a 48-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right knee injury earlier that same day while descending the front steps of a house while in the performance of duty. OWCP initially accepted her claim for right knee sprain. It later expanded the acceptance of the claim to include right knee lateral meniscus tear, right thigh/pelvic region localized primary osteoarthritis, and aggravation of left pelvis/thigh osteoarthritis. OWCP authorized two right knee arthroscopic procedures performed on January 8, 2008 and January 20, 2009, a July 14, 2009 right total hip arthroplasty, and a March 14, 2011 left total hip arthroplasty. Appellant received wage-loss compensation for periods of temporary total disability. Effective May 9, 2013 she retired from federal service due to disability.

By letter dated February 6, 2015, appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted an October 20, 2013 report from Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, who noted that she injured her right knee when descending stairs on December 20, 2016 while delivering mail. Dr. Wert estimated that appellant had reached maximum medical improvement (MMI) as of July 18, 2012. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] he found 12 percent permanent impairment of the right lower extremity based on a diagnosis of right knee partial medial and lateral meniscectomies (class 1, grade E).[5] Regarding her bilateral hip condition, Dr. Wert opined that appellant had 67 percent permanent impairment of the right and left lower extremities based on the poor results of her bilateral total hip arthroplasties (class 4, grade C).[6] As such, he found 67 percent left lower extremity permanent impairment, and the combined value of the right lower extremity permanent impairment (67 percent + 12 percent) was 71 percent.

OWCP referred the case to its district medical adviser (DMA). In a February 7, 2016 report, the DMA recommended that appellant be referred for a second opinion evaluation.

In a May 9, 2016 report, Dr. Arnold Goldman, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's medical history, a February 2, 2016 statement of accepted facts (SOAF), and conducted a physical examination. He found that all of her

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

[5] Table 16-3, Knee Regional Grid, A.M.A., *Guides* 509 (6th ed. 2009).

[6] Table 16-4, Hip Regional Grid, A.M.A., *Guides* 515 (6th ed. 2009).

arthroscopic portals were clean and dry regarding the right knee. Appellant had well-healed incisions in terms of both hips and was not using any assistive device. She had a bilateral antalgic gait on both lower extremities and had difficulty standing on her toes and backwards on her heels. Appellant's right knee range of motion (ROM) was limited from 5 to 110 degrees and the left knee was 5 to 115 degrees. She had a bilateral positive straight leg raise at approximately 50 to 60 degrees in a seated position. Both legs demonstrated a decreased external rotation to 45 degrees. Appellant had difficulty putting each leg into a figure-four position, could not do a full squat, and had a positive Faber sign regarding both hips. Applying the sixth edition of the A.M.A., *Guides*, Dr. Goldman rated appellant based on the "good result" of her left and right total hip arthroplasties (class 2 diagnosis -- class of diagnosis (CDX)), which represented a default (grade C) lower extremity impairment of 25 percent under Table 16-4, A.M.A., *Guides* at 515. He assigned a grade modifier of 1 for functional history (GMFH) due to antalgic limp with orthotics, a grade modifier of 1 for physical examination (GMPE) due to a "mild problem," and found that a grade modifier for clinical studies (GMCS) was not applicable because radiographic studies were performed prior to the hip replacement surgeries. Using the net adjustment formula (GMFH 1- CDX 2) + (GMPE 1 - CDX 2), Dr. Goldman calculated a net adjustment of -2, which he equated to a grade A lower extremity permanent impairment of 21 percent, bilaterally.

Regarding the right knee, Dr. Goldman found that appellant had a class 1 diagnosis of "Meniscal Injury: Partial Meniscectomy." He assigned a grade modifier of 1 for functional history and physical examination and zero for clinical studies. Using the net adjustment formula (GMFH 1 - CDX 1) + (GMPE 1 - CDX 1) + (GMCS 0 - CDX 1), Dr. Goldman calculated a net adjustment of -1, which he equated to a grade B and determined that appellant had two percent permanent impairment of the right knee under Table 16-3, A.M.A., *Guides* at 509.

On July 12, 2016 Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence and found that Dr. Goldman did not document the arc of motion of either hip. He opined that Dr. Robert I. Meyerson, a Board-certified orthopedic surgeon and appellant's attending physician, had measured motion which demonstrated 90 degrees of flexion, 10 degrees of internal rotation, and 20 degrees of external rotation, which was consistent with heterotopic ossification. Dr. Katz explained that, under Table 16-24, Hip Motion Impairments, A.M.A., *Guides* at 549, appellant's condition would be classified as a mild motion deficit, which represented a class 3 impairment (fair result) under Table 16-4, A.M.A., *Guides* at 515, with a default (grade C) lower extremity rating of 37 percent permanent impairment, bilaterally. Accepting Dr. Goldman's net adjustment calculation of -2, Dr. Katz adjusted appellant's hip-related bilateral lower extremity impairment from 37 percent (grade C) to 31 percent (grade A). Additionally, Dr. Katz concurred with Dr. Goldman's finding of two percent right lower extremity permanent impairment based on the diagnosis of "partial medial meniscectomy" under Table 16-3, A.M.A., *Guides* at 509. Thus, appellant's combined right lower extremity permanent impairment was 32 percent. Dr. Katz determined that appellant had reached MMI on May 9, 2016, the date of Dr. Goldman's second opinion examination.

In a supplemental report dated July 28, 2016, Dr. Goldman indicated that he concurred with Dr. Katz' recalculated impairment ratings.

On August 3, 2016 Dr. Katz explained that he and Dr. Goldman's final net adjustment calculations both equaled -2 and, therefore, their final impairment ratings were in agreement.

In an August 22, 2016 report, Dr. Katz found no substantive error in the recalculation of his impairment rating.

By decision dated September 14, 2016, OWCP granted appellant a schedule award for 32 percent permanent impairment of her right lower extremity and 31 percent permanent impairment of her left lower extremity. The award ran for 181.44 weeks for the period May 9, 2016 to October 31, 2018.

On October 5, 2016 appellant requested an oral hearing before a representative of the Branch of Hearings and Review. A hearing was held on December 22, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

In a January 22, 2017 letter, appellant's representative argued that appellant was entitled to 28 percent increase in her permanent impairment rating for her right and left hips, and 8 percent increase in her permanent impairment rating for her right knee.

By decision dated February 21, 2017, OWCP's hearing representative affirmed the prior schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

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).[10] Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE

[7] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[8] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also* 5 U.S.C. § 8107.

[9] *See D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): *A Contemporary Model of Disablement*.

and GMCS.[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

ANALYSIS

Appellant's accepted conditions include right knee sprain, right knee lateral meniscus tear, right thigh/pelvic region localized primary osteoarthritis, and aggravation of left pelvis/thigh osteoarthritis. She has undergone two right knee arthroscopic procedures and bilateral total hip arthroplasty, all of which OWCP approved. By decision dated September 14, 2016, OWCP granted appellant a schedule award for 32 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. A representative of the Branch of Hearings and Review subsequently affirmed that decision on February 21, 2017. Appellant's representative argues that the bilateral hip range of motion measurements demonstrate a moderate-to-severe motion deficit, thereby representing a class 4 diagnosis (poor result) under Table 16-4, A.M.A., *Guides* at 515. He also challenges the right knee impairment rating, arguing that appellant had tears to both the medial and lateral meniscus, rather than just the lateral meniscus. It is appellant's burden to submit sufficient medical evidence to establish the extent of permanent impairment.[13]

With respect to appellant's right knee permanent impairment due to her accepted lateral meniscus tear, both the January 8, 2008 and January 20, 2009 arthroscopic procedures involved a partial lateral meniscectomy. In his October 20, 2013 report, Dr. Wert found 12 percent right lower extremity permanent impairment based on a diagnosis of right knee partial "medial and lateral meniscectomy." As appellant's two OWCP-approved right knee arthroscopic surgeries did not involve the medial meniscus, both Dr. Goldman and the Dr. Katz, OWCP's medical adviser, properly rated her for a "partial medial *or* lateral meniscectomy."[14] Appellant's representative failed to provide any competent medical evidence in support of his argument that she should have received a higher rating based on a diagnosis of partial "medial *and* lateral" meniscectomy.

Regarding appellant's accepted bilateral hip condition and OWCP-approved total arthroplasties, Dr. Wert found 67 percent bilateral lower extremity permanent impairment based on a "poor result" (class 4) following surgery. Upon review Dr. Katz noted that appellant's hip ROM measurements represented only a mild motion deficit or a class 3 impairment (fair result) under Table 16-4, A.M.A., *Guides* at 515. Dr. Katz also advised that Dr. Wert's net adjustment calculation was in error. Therefore, he recommended that OWCP refer appellant for a second opinion evaluation.

The Board has held that when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* or does not discuss how he arrives at the degree of

[11] *Id.* at 494-531.

[12] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[13] *See Annette M. Dent*, 44 ECAB 403 (1993).

[14] Table 16-3, A.M.A., *Guides* 509 (6th ed. 2009).

impairment based on physical findings, his opinion is of diminished probative value in establishing the degree of impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[15] Thus, Dr. Wert's report is of diminished probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.[16]

Dr. Goldman, the second opinion examiner, initially found only 21 percent bilateral lower extremity permanent impairment under Table 16-4, A.M.A., *Guides* at 515. The rating was based on appellant having achieved a "good result" following surgery. However, Dr. Katz, OWCP's medical adviser, disagreed noting again that appellant's bilateral hip ROM measurements represented a mild motion deficit, which was consistent with a class 3 diagnosis (fair result) under Table 16-4. He explained that the default (grade C) rating was 37 percent lower extremity permanent impairment, and after applying the net adjustment formula (-2), he found 31 percent (grade A) bilateral lower extremity permanent impairment. Upon further reflection, Dr. Goldman ultimately agreed that appellant's bilateral hip ROM deficit represented a class 3 diagnosis (fair result) under Table 16-4.

As noted, appellant's representative argues that the bilateral hip ROM measurements represent a moderate-to-severe motion deficit (class 4 -- poor result), rather than a mild motion deficit as determined by Dr. Goldman and Dr. Katz. However, appellant's representative has not submitted any competent medical evidence demonstrating that she has a greater hip-related permanent impairment than previously awarded.

The Board finds that Dr. Katz applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to clinical findings provided by appellant's physicians and Dr. Goldman. Dr. Katz' calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. The Dr. Katz explained that he had recalculated appellant's impairment ratings for each hip because Dr. Goldman's assessment failed to document the arc of motion of either hip. In a supplemental report dated July 28, 2016, Dr. Goldman indicated that he concurred with Dr. Katz' recalculated impairment ratings. Therefore, OWCP properly relied on its medical advisers, Dr. Katz' assessment of 32 percent permanent impairment of the right lower extremity, and 31 percent permanent impairment of the left lower extremity, in granting appellant a schedule award.

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 32 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established that she is entitled to a schedule award greater than that previously received.

[15] *See John L. McClanic*, 48 ECAB 552 (1997); *L.M.*, Docket No. 12-868 (issued September 4, 2012).

[16] *See Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

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 her burden of proof to establish that she sustained more than 32 percent permanent impairment of her right lower extremity and more than 31 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 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