

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

F.K., Appellant)	
)	
and)	Docket No. 18-1700
)	Issued: May 9, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Charlotte, NC, Employer)	
)	

Appearances:
Appellant, pro se
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 September 10, 2018 appellant filed a timely appeal from an August 7, 2018 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the August 7, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 11, 2011 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she slid, fell on her back, and twisted her left knee as she exited her vehicle while in the performance of duty. OWCP accepted her claim for back contusion and left knee medial meniscus tear. It paid compensation for intermittent wage loss on the supplemental rolls, effective March 11, 2011. On May 18, 2011 appellant underwent arthroscopic left knee partial meniscectomy with chondral debridement, which OWCP authorized.

On February 27, 2012 appellant filed a claim for a schedule award (Form CA-7).

By decision dated April 27, 2012, OWCP issued appellant a schedule award for two percent permanent impairment of her left leg based on the March 6, 2012 opinion of an OWCP district medical adviser (DMA). The rating was based on appellant's partial medial meniscectomy. The period of the award ran from March 10 to April 19, 2012.

Appellant subsequently requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated August 29, 2012, a hearing representative affirmed the April 27, 2012 schedule award decision.

Appellant underwent a second left knee arthroscopic procedure on May 19, 2014, which was authorized by OWCP.

On April 30, 2015 OWCP referred appellant to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion to determine the nature of appellant's condition, extent of her disability, and eligibility for a schedule award. In a May 21, 2015 report, Dr. Hayes opined that she had 10 percent permanent impairment of her left knee due to postoperative changes and 0 percent permanent impairment of her lumbar spine. He noted that appellant had reached maximum medical improvement (MMI) on approximately August 19, 2014.⁴

³ Docket No. 17-1596 (issued May 2, 2018).

⁴ Dr. Hayes further opined that appellant was no longer disabled from work due to her accepted conditions. On January 14, 2016 OWCP terminated her wage-loss compensation, effective January 15, 2016, based on Dr. Hayes' second opinion report. It noted that it did not terminate appellant's medical benefits.

On December 14, 2016 appellant filed a claim for an increased schedule award (Form CA-7).

In a March 9, 2017 report, a DMA determined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁵ appellant had three percent impairment of the left lower extremity for arthroscopic partial medial meniscectomy and/or arthroscopic medial meniscal repair.

By decision dated April 5, 2017, OWCP issued appellant a schedule award for an additional one percent permanent impairment of the left leg. The period of the award ran from January 15 to February 4, 2016.

On July 17, 2017 appellant appealed to the Board.

On February 22, 2018 appellant underwent a third left knee arthroscopic procedure, which OWCP approved.

By decision dated May 2, 2018, the Board set aside OWCP's April 5, 2017 schedule award decision and remanded the case for further medical development of the evidence.⁶ The Board found that the second opinion physician, Dr. Hayes, failed to sufficiently describe appellant's impairment and schedule award ratings and OWCP should, therefore, have obtained a supplemental report before it referred appellant to a DMA. The Board instructed OWCP to refer appellant for another second opinion evaluation, to be followed by a *de novo* decision.

On remand OWCP referred appellant to Dr. Joseph Estwanik, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 25, 2018 report, Dr. Estwanik discussed appellant's employment injury of January 11, 2011 and discussed the history of her medical treatment. He diagnosed a tear of the medial meniscus of the left knee, primary osteoarthritis of the left lower leg, contusion of the back resolved, iatrogenic opioid addiction, multiple auto accidents, and significant documented and ongoing symptom magnification. Dr. Estwanik noted preexisting and unrelated osteoarthritis in three compartments of the knee. He noted findings on examination of intact sensory examination of the lower extremities, negative straight leg raises, no effusion of the bilateral knees, stable medial, lateral, anterior and posterior ligaments, and symptom magnification of a nonphysiologic basis. Range of motion testing was performed on both knees after warm-up resulting in 135 degrees, 135 degrees, and 125 degrees for an average of 131 degrees for the right knee. With regard to the left knee Dr. Estwanik measured 125 degrees, 128 degrees, and 132 degrees for an average of 128 degrees. He opined that with regard to range of motion examination findings there was zero percent permanent impairment of the left lower extremity. Pursuant to Table 16-3, of the A.M.A., *Guides*, the Knee Regional Grid, for a diagnosis of meniscal injury, Dr. Estwanik rated appellant as a class 1 with a default impairment rating of two percent. He noted a functional history grade modifier (GMFH) of 3, physical examination grade modifier (GMPE) of 1, and clinical studies grade

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ *Id.*

modifier (GMCS) of 2. Dr. Estwanik concluded that the impairment class was not altered by grade modification and appellant, therefore, sustained two percent left lower extremity permanent impairment.

OWCP subsequently routed the case record, including Dr. Estwanik's June 25, 2018 report, to its DMA for review. In a July 23, 2018 report, the DMA noted that appellant had undergone an arthroscopic partial medial meniscectomy and pursuant to Table 16-3, page 509 of the A.M.A., *Guides*, utilizing the diagnosis-based impairment (DBI) method, appellant had three percent impairment of the left lower extremity.⁷ He further noted that the A.M.A., *Guides* does not permit impairment ratings to be calculated on the range of motion method for this diagnosis. The DMA noted the date of MMI was June 25, 2018. He also noted that appellant was previously awarded three percent permanent impairment of the left lower extremity for her knee, and therefore, she would not be entitled to an additional award.

By decision dated August 7, 2018, OWCP denied appellant's claim for an additional schedule award for the left lower extremity as the evidence of record was insufficient to establish a greater than the three percent permanent impairment previously awarded.

LEGAL PRECEDENT

Under section 8107 of FECA⁸ and section 10.404 of the implementing federal regulations,⁹ schedule awards are payable for permanent impairment of specified body members, functions, or organs. FECA, however, does not specify the manner in which the percentage of impairment 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.¹⁰ As of May 1, 2009, the sixth edition is used to calculate schedule awards.¹¹

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).¹² Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition as class of diagnosis (CDX), which is then adjusted by grade modifiers

⁷ *Id.* at 509, Table 16-3.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.* at § 10.404(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹² A.M.A., *Guides* (6th ed. 2009), page 3, Section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

including GMFH, GMPE, and GMCS.¹³ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁴

In determining impairment for the lower extremities, 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 509.¹⁵ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁶ Under Chapter 2.3, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁷

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than three percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

On remand following the Board's May 2, 2018 decision, OWCP referred appellant to Dr. Estwanik for a second opinion evaluation. In a June 25, 2018 report, pursuant to Table 16-3, A.M.A., *Guides*, Dr. Estwanik rated appellant as a class 1 with a default impairment rating of two percent. He noted a GMFH of 3, GMPE of 1, and GMCS of 2. Dr. Estwanik found the impairment class was not altered and appellant sustained two percent left lower extremity impairment.

An OWCP DMA utilized the physical examination findings in Dr. Estwanik's June 25, 2018 report, and correlated them to specific provisions in the A.M.A., *Guides* to determine the impairment rating. In a July 23, 2018 report, the DMA noted that appellant had undergone an arthroscopic partial medial meniscectomy. Pursuant to Table 16-3, page 509 of the A.M.A.,

¹³ *Id.* at 383-419.

¹⁴ *Id.* at 411.

¹⁵ *Id.* at 509-11.

¹⁶ *Id.* at 515-22.

¹⁷ *Id.* at 23-28.

¹⁸ See Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.808.6(f) (March 2017). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 414 (2006).

Guides, appellant had three percent impairment of the left lower extremity.¹⁹ The DMA applied grade modification procedures of the A.M.A., *Guides* to the physical findings provided in Dr. Estwanik's report and reached an impairment rating of three percent for the left lower extremity. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than three percent impairment of the left leg. Because appellant was previously granted schedule award compensation for three percent permanent impairment of the left leg, she was not entitled to an additional award. For the reasons discussed, the Board finds that the weight of the medical evidence is insufficient to establish more than the three percent left lower extremity permanent impairment previously awarded.

On appeal appellant argues that she was entitled to an additional schedule award for her left lower extremity as she has undergone three surgeries, she was still having problems, and ultimately had to retire early due to disability. As noted, the A.M.A., *Guides*, Table 16-3, Knee Regional Grid, provides a maximum impairment allowed for a patient who has undergone an arthroscopic partial medial meniscectomy and/or arthroscopic medial meniscal repair would be three percent. There is no contemporaneous medical evidence which provides a higher impairment rating.

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 more than three percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

¹⁹ A.M.A., *Guides* 509, Table 16-3.

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2019
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