

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

---

**K.C., Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS, PALO  
ALTO VETERANS ADMINISTRATION HEALTH  
CARE CENTER, Palo Alto, CA, Employer**

---

)  
)  
)  
) **Docket No. 19-0785**  
) **Issued: October 1, 2019**  
)  
)  
)  
)

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 February 27, 2019 appellant, through counsel, filed a timely appeal from a January 28, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of her left lower extremity, warranting a schedule award.

## FACTUAL HISTORY

On February 26, 2013 appellant, then a 50-year-old physical therapist, filed an occupational disease claim (Form CA-2) alleging that her left knee osteophytosis and osteoarthritis had been aggravated by factors of her federal employment including standing at work. She noted that she first became aware of the condition on June 12, 2010 and realized its relation to her federal employment on July 10, 2011. OWCP accepted the claim for temporary aggravation left lower leg osteoarthritis.

Appellant underwent a left knee total arthroplasty, which was performed on August 27, 2013 by Dr. Nicholas J. Giori, a Board-certified orthopedic surgeon. This procedure was not authorized by OWCP as causally related to the accepted employment injury.

In a January 9, 2014 report, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and OWCP second opinion physician, reviewed appellant's history of injury, medical records and a statement of accepted facts (SOAF). He noted physical examination findings and disagreed with OWCP's acceptance of temporary aggravation of left leg osteoarthritis, noted on the SOAF, as he believed this was an incorrect diagnosis. Dr. Hanley opined that there had been no aggravation of appellant's underlying osteoarthritis, but rather her condition was a natural progression of a preexisting condition. He also concluded that if there had been a temporary aggravation of her osteoarthritis it had resolved by July 2011.

On February 6, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as it found the January 9, 2014 report of Dr. Hanley constituted the weight of the medical opinion evidence and established that her accepted condition had resolved.

By decision dated April 8, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day. Determinative weight was accorded to the January 9, 2014 report of Dr. Hanley, who opined that appellant's accepted temporary aggravation of left lower leg osteoarthritis had resolved with no residuals or disability. OWCP also found that the evidence of record did not support a finding that appellant's total knee arthroplasty performed on August 27, 2013 was causally related to the accepted condition of temporary aggravation of left knee osteoarthritis, but rather was due to a preexisting condition.

In a letter dated March 16, 2015, Dr. John C. Zauner, a Board-certified orthopedic surgeon, reported that appellant had reached maximum medical improvement (MMI).

Appellant filed a claim for a schedule award (Form CA-7) on June 23, 2015.

In a letter dated July 7, 2015, OWCP informed appellant that no action would be taken on her claim for a schedule award as there was no medical evidence that she sustained a permanent impairment causally related to the accepted medical condition. It noted that an April 8, 2014

decision terminated her compensation benefits as it found the weight of the medical opinion evidence established that she had no residuals of the accepted left knee condition.

In a development letter dated October 11, 2017, OWCP advised appellant that the medical evidence of record was insufficient to establish her schedule award claim because no medical evidence had been received to support a finding of permanent impairment due to the accepted condition. It advised her that she should submit a medical report from her treating physician which evaluated her permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

By decision dated November 17 2017, OWCP denied appellant's claim for a schedule award finding that she had not submitted sufficient evidence to establish permanent impairment of a scheduled member or function of the body causally related to her accepted employment injury.

On November 28, 2017 counsel requested a telephonic hearing before an OWCP hearing representative. The hearing was held on May 22, 2018.

By decision dated July 23, 2018, an OWCP hearing representative affirmed the November 17, 2017 decision denying appellant's claim for a schedule award finding that she had not established permanent impairment due to her accepted temporary aggravation of her left lower leg osteoarthritis, warranting a schedule award.

In a November 8, 2018 report, Dr. Fulton S. Chen, a Board certified physiatrist and pain medicine specialist, reviewed appellant's medical history, including diagnostic testing, and provided findings on physical examination. He opined that appellant had reached MMI on March 16, 2015. Utilizing the A.M.A., *Guides*, he opined that appellant had 21 percent permanent impairment of the left lower extremity under the diagnosis-based impairment (DBI) methodology for rating a total left knee arthroplasty. Dr. Chen provided his permanent impairment calculations.

On November 13, 2018 counsel requested reconsideration of the July 23, 2018 hearing representative's decision affirming the denial of her schedule award claim.

On November 15, 2018 OWCP forwarded Dr. Chen's report, along with a SOAF, for review by Dr. Jovito Estaris, Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA). It noted the accepted condition was localized primary lower left leg osteoarthritis, while the SOAF provided to the DMA noted that appellant's claim had been accepted for temporary aggravation of left leg osteoarthritis, which had resolved by April 8, 2014.

In a report dated November 26, 2018, the DMA noted that he had reviewed the SOAF and medical records provided by OWCP. He reported that appellant had a diagnosis of left leg localized primary osteoarthritis, thereafter, he rated her permanent impairment based upon her total left knee replacement, pursuant to Table 16-3, page 511. The DMA agreed with Dr. Chen's lower extremity permanent impairment rating of 21 percent, using the DBI methodology. He also rated

---

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

appellant's permanent impairment using loss of range of motion (ROM) methodology and found that appellant had zero percent permanent impairment of the left lower extremity.

In a letter dated December 20, 2018, OWCP requested that appellant provide additional evidence explaining how the temporary aggravation of her preexisting left lower extremity osteoarthritis caused permanent impairment. It also noted that a termination decision had been issued on April 8, 2014 finding that the accepted condition had resolved without residuals or disability.

In a letter dated December 27, 2018, counsel contended that appellant's claim had been accepted for left lower leg primary osteoarthritis, not a temporary aggravation.

By decision dated January 28, 2019, OWCP denied modification finding that the evidence of record was insufficient to establish permanent impairment of her left lower leg, warranting a schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>4</sup> and its implementing federal regulations,<sup>5</sup> 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. 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.<sup>6</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>7</sup> 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.<sup>8</sup>

The sixth edition of the A.M.A., *Guides* provides an DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability, and Health (ICF).<sup>9</sup> In addressing lower extremity impairments, the sixth edition requires identification of the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on

---

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> *C.T.*, Docket No. 18-0544 (issued May 22, 2019); *D.S.*, Docket No. 18-1140 (issued January 29, 2019); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>9</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), page 3, Section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>10</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>11</sup>

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>12</sup> 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*.<sup>13</sup>

When determining entitlement to a schedule award, preexisting impairment to a scheduled member should be included.<sup>14</sup> Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.<sup>15</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

As noted in OWCP's acceptance letter and the SOAF provided to Dr. Estaris OWCP accepted appellant's claim for temporary aggravation of left lower leg osteoarthritis. In the referral letter to DMA Dr. Estaris, however, OWCP incorrectly noted the accepted condition as localized primary lower left leg osteoarthritis. Dr. Estaris reviewed and concurred with Dr. Chen's DBI impairment rating for total knee replacement under Table 16-3 of the A.M.A., *Guides*. However, OWCP had previously determined that appellant's total knee replacement was not required due to the accepted condition, but rather was required for appellant's preexisting left knee condition. Therefore the DMA did not provide an opinion in compliance with the accepted condition.

The Board notes that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter.<sup>16</sup> While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the

---

<sup>10</sup> *Id.* at 493-553

<sup>11</sup> *Id.* at 521.

<sup>12</sup> *C.T.*, *supra* note 8; *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>13</sup> *Supra* note 7 at Chapter 2.808.5 (March 2017).

<sup>14</sup> *C.T.*, *supra* note 8; *J.H.*, Docket No. 17-1916 (issued January 19, 2019); *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>15</sup> *Supra* note 7 at Chapter 3.700.3(a)(3) (January 2010).

<sup>16</sup> *L.G.*, Docket No. 18-0519 (issued March 8, 2019); *T.C.*, Docket No. 17-1905 (issued May 25, 2018); *Melvin James*, 55 ECAB 406 (2004).

obligation to see that justice is done.<sup>17</sup> Accordingly, once it undertook to develop the medical evidence, it had the responsibility to do so in a manner that will resolve the relevant issues in the case. OWCP should have requested that the DMA provide an opinion as to whether appellant has permanent impairment due to her accepted temporary aggravation of left knee osteoarthritis condition, and then address whether appellant was entitled to a schedule award for her total left knee arthroscopy.

On remand, OWCP shall further develop the medical evidence of record and obtain an opinion from the DMA, or second opinion physician if necessary, regarding the nature and extent, if any, of appellant's impairment due to her accepted condition. Following this and further development deemed necessary, OWCP shall issue a *de novo* merit decision regarding appellant's schedule award claim.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 28, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: October 1, 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

---

<sup>17</sup> *L.G., id.; Richard E. Simpson, 55 ECAB 490 (2004).*