United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 20-1146**
	)	**Issued: December 18, 2020**
U.S. POSTAL SERIVCE, VERNON HILLS POST OFFICE, Vernon Hills, IL, Employer	)	

Appearances:
Stephanie N. Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 13, 2020 appellant, through counsel, filed a timely appeal from a March 23, 2020 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 two percent permanent impairment of the left lower extremity, for which he received schedule award compensation.

FACTUAL HISTORY

On January 17, 2017 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sprained his left thigh and upper leg when he slipped on mud and ice while in the performance of duty. He stopped work on January 18, 2017. OWCP accepted the claim for a strain of the left thigh muscle. On June 30, 2017 appellant underwent a left L3-4 foraminotomy and microdiscectomy. OWCP paid him wage-loss compensation for total disability from March 4 to May 26, 2017.[3]

OWCP expanded acceptance of the claim to include a disc protrusion at L3-4 and lumbar radiculopathy due to the left L3-4 disc protrusion.

On July 24, 2018 Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), noted that the accepted conditions included a sprain of the fascia and tendons at the left hip.

In an impairment evaluation dated April 25, 2019, Dr. Neil Allen, a Board-certified internist and neurologist, obtained a history of appellant slipping and falling on ice while at work on January 17, 2017. He discussed appellant's continued complaints of back pain radiating into the left thigh. Dr. Allen opined that appellant had reached maximum medical improvement (MMI). On examination he found some thigh and calf atrophy, intact sensation, and full strength of the lumbar spine and left hip. Dr. Allen measured range of motion (ROM) for the left hip three times, with the highest measurement yielding 70 degrees flexion, plus 6 degrees extension, 45 degrees external rotation, 55 degrees internal rotation, 61 degrees abduction, and 24 degrees adduction. He further measured ROM of the right hip. Referencing *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter)*, which is a supplemental publication of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairmen*t (A.M.A., *Guides*),[4] Dr. Allen found no sensory or motor impairment of either lower extremity due to a spinal condition. He determined that using the diagnosis-based impairment (DBI) method for the diagnosis of hip strain yielded a lower extremity impairment rating between five and seven percent. Dr. Allen found 10 percent permanent impairment of the left lower extremity due to loss of ROM. He applied a grade modifier for functional history (GMFH) of one to find no change from the 10 percent permanent

[3] A magnetic resonance imaging (MRI) scan of the lumbar spine, obtained on March 30, 2017, revealed an annular disc bulge and facet arthropathy causing moderate central canal stenosis and mild foraminal stenosis bilaterally and an annular disc bulge at L3-4 causing mild central canal stenosis and a lateral disc protrusion causing severe left neural foraminal stenosis. An MRI of the lumbar spine obtained on March 30, 2018 revealed stable multilevel degenerative disc disease with an unchanged left lateral disc protrusion at L3-4 causing moderate-to-severe left foraminal narrowing.

[4] (6th ed. 2009).

impairment rating. Dr. Allen reported that he had used the ROM method as it resulted in a greater impairment rating.

On May 22, 2019 appellant filed a claim for a schedule award (Form CA-7).

On October 8, 2019 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, concurred with Dr. Allen's finding that appellant had no impairment of either lower extremity due to a spinal nerve impairment under *The Guides Newsletter*. He found that ROM was not permitted as an alternative impairment rating for the applicable class of diagnosis (CDX) of left hip strain. Dr. Katz found that a class 1 CDX of hip strain with mild motion deficits yielded a default value of two percent of the left lower extremity according to Table 16-4 on page 512 of the A.M.A., *Guides*. He applied a GMFH and a grade modifier for physical examination (GMPE) of one each and indicated that a grade modifier for clinical studies (GMCS) was inapplicable. Dr. Katz utilized the net adjustment formula and found no change from the default value of two percent. He concluded that appellant had two percent permanent impairment of the left lower extremity and no impairment of the right lower extremity.

By decision dated October 22, 2019, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from April 25 to June 4, 2019.

In an addendum report dated November 14, 2019, Dr. Allen reviewed the October 8, 2019 report from Dr. Katz, noting that he had rated appellant's impairment using the DBI method rather than the ROM method. He indicated that the A.M.A., *Guides* at Table 2-1 on page 12 provided that, if there was more than one method to rate an impairment, the method yielding the greater percentage should be used. Dr. Allen advised that rating appellant's hip strain/sprain using the DBI method yielded five to seven percent impairment for the CDX of hip strain. He advised that the ROM method yielded 10 percent permanent impairment due to loss of hip flexion and, thus, was preferable to the DBI method as it resulted in a higher impairment rating.

On November 19, 2019 counsel requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. She contended that the DMA had failed to properly rate appellant's impairment rating, using the A.M.A., *Guides*, and noted that he had not physically examined appellant. Counsel maintained that Dr. Allen had properly applied the provisions of the A.M.A., *Guides*.

By decision dated March 22, 2020, OWCP's hearing representative affirmed the October 22, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulation,[6] set forth the number of weeks of compensation payable to employees sustaining permanent

[5] *Supra* note 2.

[6] 20 C.F.R. § 10.404.

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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[7] 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.[8]

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).[9] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

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

In an April 25, 2019 impairment evaluation, Dr. Allen found that appellant had full strength of the left hip and lumbar spine and some thigh and calf atrophy. He determined that he had no impairment of either lower extremity due to a spinal condition under the provisions of *The Guides Newsletter*. Dr. Allen found that appellant had 10 percent permanent impairment of the left lower extremity due to loss of ROM of the hip. He noted that using the DBI method yielded a five to seven percent left lower extremity impairment for the CDX of hip strain. Dr. Allen asserted that

[7] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[8] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] 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.

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

[11] *Id*. at 411.

[12] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[13] *See supra* note 6 at Chapter 2.808.6(f) (March 2017).

using the ROM method resulted in a greater impairment. In an addendum dated November 14, 2019, he reiterated his finding of 10 percent permanent impairment due to loss of ROM of the hip, noting that the A.M.A., *Guides* advised that the method providing the greater percentage should be used to rate an impairment.

On October 8, 2019 Dr. Katz reviewed Dr. Allen's impairment rating and concurred that appellant had no impairment of the lower extremities due to a spinal nerve impairment pursuant to *The Guides Newsletter*. He correctly determined that the A.M.A., *Guides* did not allow the ROM method to be used as an alternative impairment method to rate his hip strain as there was no asterisk next to the diagnosis in the DBI hip regional grid.[14] Dr. Katz identified the CDX as a left hip strain with mild motion loss, which yielded a default value of two percent. Dr. Allen, however, measured left hip flexion of 70 degrees, which yielded 10 percent impairment due to loss of ROM, or a moderate impairment according to Table 16-24 on page 549 of the A.M.A., *Guides*. The CDX of hip strain with a moderate motion deficit yields a default value of five percent rather than two percent under Table 16-4. The DMA did not explain his determination that appellant had only a mild motion deficit given Dr. Allen's finding of moderately reduced ROM of the hip. The Board thus finds that the DMA's report requires clarification. Consequently, the Board will remand the case for the DMA to clarify his use of Table 16-4 in rating appellant's permanent impairment of the left lower extremity impairment.[15] On remand OWCP should also clarify whether the accepted condition includes a left hip strain. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] A.M.A., *Guides* at 512. Table 16-4. *See T.F.*, Docket No. 19-0157 (issued April 21, 2020); *L.L.*, Docket No. 19-0097 (issued March 20, 2020).

[15] *See G.M.*, Docket No. 19-1931 (issued May 28, 2020).

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 18, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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