

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

D.L., Appellant	)	
	)	
and	)	Docket No. 20-0059
	)	Issued: July 8, 2020
U.S. POSTAL SERVICE, POST OFFICE,	)	
Monponsett, MA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 7, 2019 appellant filed a timely appeal from a September 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the September 3, 2019 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 23 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

On December 5, 2001 appellant, then a 53-year-old postmaster, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2001 she sustained a left knee injury when she walked across the floor and felt a pull and pain in the back of her leg and knee while in the performance of duty. She stopped work on the date of injury.

OWCP accepted the claim for: chondromalacia of the left patellae; osteoarthritis of the left lower leg; right hamstring sprain; degenerative disc disease, lumbar spine; herniated lumbar disc, L5-S1; and lumbar radiculitis.

On May 2, 2002 appellant underwent an arthroscopy, debridement, and chondroplasty of her left knee. She returned to work in July 2002, and stopped work again on August 20, 2002. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of August 21, 2002, and reduced compensation on the periodic rolls as of March 20, 2005 in accordance with a loss of wage-earning capacity determination. Appellant underwent a partial left knee replacement on January 31, 2007, and a total left knee replacement on February 6, 2008, both performed by Dr. Wolfgang Fitz, a Board-certified orthopedic surgeon. She retired on October 28, 2016.

On September 11, 2017 appellant filed a Form CA-7 claim for a schedule award.

In an October 2, 2017 report, Dr. Marc Friedberg, a Board-certified neurosurgeon, related that pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> appellant had 30 percent permanent impairment based upon her lumbar injury, with radiculopathy into the lower extremity.

On July 27, 2018 OWCP prepared a statement of accepted facts and referred appellant for a second opinion examination with Dr. Stanley Hom, a Board-certified orthopedic surgeon.

In an August 17, 2018 report, Dr. Hom recounted appellant's history of injury and extensive history of medical treatment. Regarding the left knee, he found no joint effusion, mild diffuse joint line tenderness, stable cruciate and collateral ligaments, and no popliteal masses. Dr. Hom found range of motion (ROM) for the left knee of 95 degrees for flexion and no evidence of a flexion contracture. He referred to the A.M.A., *Guides*, Knee Regional Grid at Table 16-3, page 511 and noted that, for the left knee, the diagnostic key factor was a total knee replacement with a good result (stable, functional, good position) which would result in a class of diagnosis (CDX) of class 2 placement, with a default value of 25 percent. Dr. Hom noted a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 1, and

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

a grade modifier for clinical studies (GMCS) of 2. He utilized the net adjustment formula and determined that the net adjustment was -1, which corresponded with 23 percent left lower extremity permanent impairment.

Dr. Hom also evaluated appellant's lumbar spine condition and referred to Table 17-4.<sup>4</sup> He noted that her clinical criteria included a herniated nucleus pulposus, which corresponded to a CDX of class 1 impairment. Dr. Hom noted that appellant had a GMFH of 2, a GMPE of 0, and a GMCS of 2, with a net adjustment of +1, which corresponded to eight percent whole person impairment, as a spinal impairment was rated as whole person impairment. He indicated that she had reached maximum medical improvement (MMI) by the end of 2008.

On August 28, 2018 OWCP advised that under the provisions of FECA, awards for permanent impairment may not be paid for the spine. However, awards may be paid for impairment lower extremities caused by an injury to the spinal nerve. OWCP requested that Dr. Hom provide an opinion as to whether there was any injury to appellant's spine that caused permanent impairment to the lower extremities, pursuant to *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).

In an August 29, 2018 report, Dr. Hom advised that, utilizing *The Guides Newsletter* and the peripheral nerve evaluation process, based on his assessment dated August 17, 2018, appellant had no verifiable lower extremity sensory and/or motor deficit. Therefore, appellant had no additional lower extremity permanent impairment attributed to her lumbar conditions.

In a September 14, 2018 report, Dr. Michael Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted appellant's history of injury and medical treatment. He referred to the Knee Regional Grid at Table 16-3<sup>5</sup> and noted that, for the left knee, the diagnostic key factor was a total knee replacement with a good result (stable, functional, good position, class 2, default value of 25 percent). Dr. Katz utilized the net adjustment formula and found that appellant had 23 percent left lower extremity impairment. The DMA explained that there was a net adjustment of -1, resulting in class 2, with an adjustment of -1 from the default value of C, which equaled a class 2, grade B equivalent to 23 percent. Dr. Katz noted that the determination was supported by the records reviewed and consistent with the methodology set forth in the A.M.A., *Guides*, Table 16-6, Table 16-7 and Table 16-8. The DMA explained that, for spinal nerve impairment at L3, L4, L5, and S1, there was no motor deficit and no sensory deficit, resulting in zero permanent impairment of the lower extremity.

Dr. Katz advised that appellant's diagnoses were not eligible for the ROM impairment rating methodology and noted that there were no discrepancies between his and Dr. Hom's impairment ratings. He concluded that she had reached MMI on August 17, 2018.

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<sup>4</sup> *Id.* at 570.

<sup>5</sup> *Id.* at 511.

By decision dated September 3, 2019, OWCP granted appellant a schedule award for 23 percent permanent impairment of her left lower extremity. The period of the award was 66.24 weeks, to run from August 17, 2018 to November 23, 2019.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. 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.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment (DBI) method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).<sup>10</sup> Under the sixth edition, for lower extremity impairment the evaluator identifies the impairment of the CDX, which is then adjusted by the GMFH, GMPE, and GMCS.<sup>11</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>12</sup>

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.<sup>13</sup> Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,<sup>14</sup> no claimant is entitled to such an award. However, in 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a); *see D.M.*, Docket No. 18-1792 (issued September 16, 2019); *see also Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>10</sup> *Supra* note 3 at page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>11</sup> *Id.* at 493-556.

<sup>12</sup> *Id.* at 521.

<sup>13</sup> *Henry B. Floyd, III*, 52 ECAB 220 (2001).

<sup>14</sup> FECA specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

nonscheduled member. As the schedule award provision of FECA includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>15</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.<sup>16</sup> The Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>17</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP 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.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than 23 percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

Dr. Friedberg opined that appellant had 30 percent permanent impairment. However, he did not specify the scheduled function which was impaired, nor did he explain how he arrived at his conclusion utilizing the A.M.A., *Guides* or *The Guides Newsletter*. As Dr. Friedberg's October 2, 21017 report did not comport with the A.M.A., *Guides* or *The Guides Newsletter*, his report is insufficient to establish appellant's increased schedule award claim.<sup>19</sup>

In his August 17, 2018 report, second opinion physician Dr. Hom referred to the Knee Regional Grid at Table 16-3 of the A.M.A., *Guides* and noted that, for the left knee, the diagnostic key factor was a total knee replacement with a good result (stable, functional, good position) class 2, default value of 25 percent, he applied the GMFH, GMPE, and GMCS and concluded that the adjustment formula resulted in a permanent impairment of the left lower extremity of 23 percent. In his supplemental report of August 29, 2018, he explained that regarding appellant's accepted

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<sup>15</sup> *J.F.*, Docket No. 19-0922 (issued October 4, 2019); see *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>16</sup> *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>17</sup> *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

<sup>18</sup> *A.R.*, Docket No. 19-0250 (issued May 6, 2019); *M.J.*, Docket No. 17-1776 (issued December 19, 2018); *P.R.*, Docket No. 18-0022 (issued April 9, 2018). See *supra* note 9 at Chapter 2.808.5 (March 2017).

<sup>19</sup> See *A.W.*, Docket No. 17-1350 (issued December 12, 2018); *M.M.*, Docket No. 17-0197 (issued May 1, 2018).

lumbar conditions, pursuant to *The Guides Newsletter* she had no additional permanent impairment of the lower extremities as she had no sensory or motor loss due to peripheral nerve impairment.

The DMA concurred with the opinion of Dr. Hom, finding that appellant had 23 percent permanent impairment of the left lower extremity.

The DMA referred to the Knee Regional Grid at Table 16-3<sup>20</sup> for a total knee replacement with a good result, utilized the net adjustment formula, and found that appellant had 23 percent left lower extremity impairment. He indicated that, for spinal nerve impairment at L3, L4, L5, and S1, there was no motor deficit and no sensory deficit, resulting in zero impairment. The DMA also properly explained that appellant's diagnoses were not eligible for an alternative rating utilizing the ROM methodology.

The Board finds that the DMA properly applied the A.M.A., *Guides* and *The Guides Newsletter* to find that appellant had 23 percent permanent impairment of the left lower extremity. As appellant has not submitted evidence establishing greater permanent impairment, she has not met her burden of proof.

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 23 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

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<sup>20</sup> *Supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2020  
Washington, DC

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

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

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