

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

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R.R., Appellant)	
)	
and)	Docket No. 19-1314
)	Issued: January 3, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Imperial, CA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 28, 2019 appellant filed a timely appeal from an April 10, 2019 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish more than one percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 13, 2017 appellant, then a 43-year-old fleet supervisor, filed a traumatic injury claim (Form CA-1) alleging that on September 11, 2017 he injured his right knee while in the performance of duty.² On November 27, 2017 OWCP accepted his claim for right knee strain and right knee lateral meniscus tear with a cyst.

On January 10, 2018 appellant underwent OWCP-approved arthroscopic surgery, which included right knee partial lateral meniscectomy, synovectomy, and chondroplasty. Dr. James E. McSweeney, a Board-certified orthopedic surgeon, performed the January 10, 2018 arthroscopic procedure.

Appellant returned to work on January 16, 2018.

On July 24, 2018 appellant filed a claim for a schedule award (Form CA-7). He submitted an April 3, 2018 impairment rating from Dr. McSweeney. Dr. McSweeney reviewed appellant's history of injury, diagnostic studies, the January 10, 2018 operative report, and provided current physical examination findings. He noted that appellant reached maximum medical improvement and was tolerating full-duty work at that time. Applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. McSweeney found that, under Table 16-3, Knee Regional Grid, appellant's partial lateral meniscectomy was a class 1 diagnosis (CDX) with a default impairment (grade C) of two percent of the lower extremity. He assigned a grade modifier of one for clinical studies (GMCS), a grade modifier of zero for functional history (GMFH), and a grade modifier of zero for physical examination (GMPE). Dr. McSweeney explained that, pursuant to the net adjustment formula, appellant would receive a net adjustment of -1, which would move the rating one position to the left to result in grade B.³ According to Table 16-3, a grade B rating would result in two percent permanent impairment of the right lower extremity.

In a development letter dated July 24, 2018, OWCP acknowledged receipt of appellant's claim for a schedule award, as well as Dr. McSweeney's April 3, 2018 report. It informed appellant that he was required to submit a rating based on a recent physical examination and in conformance with the A.M.A., *Guides*. OWCP afforded him 30 days to submit additional medical evidence in support of his claim for a schedule award.

OWCP subsequently prepared an August 9, 2018 statement of accepted facts (SOAF) and referred the case record, including Dr. McSweeney's April 3, 2018 impairment rating, to a district medical adviser (DMA) for review.

In an August 20, 2018 report, Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as a DMA, reviewed the SOAF, medical records, and Dr. McSweeney's April 3, 2018 permanent impairment evaluation. He diagnosed right lateral meniscus tear. Applying Table 16-

² At the time of injury, appellant was engaged in work-related physical fitness training. He reported that he lost his footing on his right leg and slid over a few inches.

³ Net Adjustment = (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). A.M.A., *Guides* 521 (6th ed. 2009).

3, the DMA found that the diagnosis represented a CDX of 1, with a default lower extremity rating of two percent. Applying the net adjustment formula, he found -2 net adjustment, which represented grade A impairment of one percent.⁴

OWCP subsequently referred appellant to Dr. Blake R. Thompson, a Board-certified physiatrist, for a second opinion evaluation for the purpose of ascertaining the extent of his permanent impairment. On October 17, 2018 Dr. Thompson performed a physical examination for evaluation of appellant's permanent impairment of the right lower extremity pursuant to the A.M.A., *Guides*. He indicated that appellant had 130 degrees of flexion on the right, compared to 140 degrees on the left. Dr. Thompson noted lateral joint line tenderness to palpation of the right knee on examination. He diagnosed a sprain of the right knee and a cystic meniscus of the posterior horn of the lateral meniscus of the right knee. Referring to Table 16-3, Dr. Thompson rated appellant for a meniscal injury, which represented a CDX of 1, with a default lower extremity permanent impairment of two percent. He assigned a GMFH of zero noting there was no gait derangement, a GMPE of one for minimal palpatory findings consistently documented without observed abnormalities, and a GMCS of one based on diagnostic studies that confirmed a meniscal tear. Dr. Thompson explained that, pursuant to the net adjustment formula, appellant would receive a net adjustment of minus one, which would then result in grade B, with a two percent permanent impairment of the right lower extremity. He further noted that appellant had good range of motion (ROM) and did not qualify for impairment based on ROM deficit.

In an updated DMA review dated November 7, 2018, Dr. Kuhn reproduced his August 20, 2018 analysis and responded to Dr. Thompson's October 17, 2018 second opinion report. He noted that Dr. McSweeney had found no palpable tenderness or palpatory findings on examination on April 3, 2018 while Dr. Thompson had found lateral joint line tenderness to palpation, resulting in Dr. Thompson's assigning a GMPE modifier of 1 in calculating appellant's permanent impairment. Dr. Kuhn explained that, by the fact that these examination findings were different, it indicated that the palpatory findings were inconsistent. Therefore, a GMPE of zero was most accurate.

On January 9, 2019 OWCP requested that Dr. Kuhn address Dr. Thompson's ROM measurements in his October 17, 2018 report and whether these measurements changed his opinion regarding appellant's percentage of permanent impairment.

In an updated DMA review dated January 18, 2019, Dr. Kuhn observed that Dr. Thompson had measured knee flexion of 130 degrees, which was normal according to Table 16-22 on page 549, and knee extension of zero, which was in the normal range according to the same table. Using the ROM method and referring to Table 16-25 on page 550, these measurements would result in zero percent right lower extremity impairment. Dr. Kuhn explained that as the ROM method resulted in a lower rating than the diagnosis-based impairment (DBI) method, the DBI calculation should be used.

⁴ The DMA found the same for GMFH (0), GMPE (0), and GMCS (1) as Dr. McSweeney.

By decision dated April 10, 2019, OWCP granted appellant a schedule award for one percent permanent impairment of the right lower extremity. The period of the award ran for 2.88 weeks from April 3 through 23, 2018.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, 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 509.⁹ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹¹

In some instances, a DMA's opinion can constitute the weight of the medical evidence.¹² This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*.¹³ In this instance, a detailed opinion by a DMA may constitute the weight of the medical evidence as long as he or she explains his or

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *See* A.M.A., *Guides* 509-11 (6th ed. 2009).

¹⁰ *Id.* at 515-22.

¹¹ *Id.* at 23-8.

¹² *J.H.*, Docket No. 18-1207 (issued June 20, 2019); *M.P.*, Docket No. 14-1602 (issued January 13, 2015); *supra* note 8 at Chapter 2.810.8(j) (September 2010).

¹³ *Id.*

her opinion, shows values and computation of impairment based on the A.M.A., *Guides*, and considers each of the reported findings of impairment.¹⁴ If the attending physician misapplied the A.M.A., *Guides*, no conflict would exist because the attending physician's report would have diminished probative value and the opinion of the DMA would constitute the weight of medical opinion.¹⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than one percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

In support of his schedule award claim, appellant submitted an impairment evaluation report from Dr. McSweeney dated April 3, 2018. Based on physical examination and the Knee Regional Grid of the A.M.A., *Guides*, Table 16-3, Dr. McSweeney calculated a permanent impairment rating of two percent of appellant's right lower extremity.

OWCP referred appellant to Dr. Thompson, for a second opinion evaluation on October 17, 2018 as to the extent of his permanent impairment. Based on physical examination and reference to the Knee Regional Grid, Dr. Thompson calculated a permanent impairment rating of two percent of appellant's right lower extremity.

The DMA, Dr. Kuhn, who reviewed the reports of both Dr. McSweeney and Dr. Thompson, found that appellant had one percent permanent impairment of the right lower extremity based on his right lateral meniscus tear. The Board has held that, when an attending physician's report gives an estimate of permanent impairment, but it is not based on proper application of the A.M.A., *Guides*, OWCP may follow the advice of the DMA if he or she has properly applied the A.M.A., *Guides*.¹⁶ In his August 20 and November 7, 2018 reports, as well as his January 18, 2019 report, the DMA properly applied the A.M.A., *Guides* to the physical examination findings of Drs. McSweeney and Thompson. He noted that the physical examinations of record were inconsistent with regard to palpatory findings and tenderness, and, as such, a GMPE of zero was most accurate, as opposed to the GMPE of one as assigned by Dr. Thompson. Dr. McSweeney and Dr. Kuhn both recommended the same grade modifiers, but only Dr. Kuhn provided a calculation of the net adjustment formula.¹⁷ The Board finds that the DMA accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings, and with the appropriate provisions of the A.M.A., *Guides*.¹⁸ The DMA's report therefore carries the weight

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *J.D.*, Docket No. 19-0414 (issued August 19, 2019); *P.L.*, Docket No. 17-0355 (issued June 27, 2018); see also *Ronald J. Pavlik*, 33 ECAB 1596 (1982).

¹⁷ The Board notes that Dr. McSweeney made an arithmetical error in his calculation of the net adjustment formula.

¹⁸ See *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

of the medical evidence and establishes that appellant has one percent permanent impairment of the right lower extremity.¹⁹

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 his burden of proof to establish more than one percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2020
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁹ See *F.T.*, Docket No. 16-1236 (issued March 12, 2018).