United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 20-0258**
	)	**Issued: November 2, 2020**
U.S. POSTAL SERVICE, NORTHSIDE POST OFFICE, St. Petersburg, FL, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 14, 2019 appellant filed a timely appeal from an October 30, 2019[1] 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.[3]

[1] Although appellant indicated October 28, 2019 as the decision date, the record reflects that the date of decision is October 30, 2019.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the October 30, 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 greater than 26 percent permanent impairment of the left lower extremity (LLE), for which she previously received a schedule award.

FACTUAL HISTORY

On October 12, 2010 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed knee pain, swelling, and stiffness, due to factors of her federal employment, including standing on a hard surface, bending and twisting, and continuously walking on uneven surfaces carrying a 35-pound satchel. She reported that she first became aware of the condition on June 4, 2001 and realized that it resulted from her federal employment on July 7, 2001. On the reverse side of the claim form the employing establishment noted that appellant had not worked since June 2, 2010 and that she was currently on the periodic rolls under OWCP File No. xxxxxx833.[4]

By decision dated July 12, 2012, OWCP accepted appellant's claim for aggravation of degenerative arthritis of both knees. On March 14, 2013 it granted her a schedule award for 59 percent permanent right lower extremity impairment due to her accepted right knee injury.[5] The award ran for 169.92 weeks from October 24, 2012 to January 26, 2016.

Appellant continued to receive medical treatment for both knees. On February 20, 2019 she underwent diagnostic testing. A left knee magnetic resonance imaging (MRI) scan report revealed tricompartmental osteoarthritis, worse in the medial and patellofemoral compartments, small joint effusion, and free-edge tear of the body of the medial meniscus. A left knee x-ray examination report of even date revealed tricompartmental osteoarthrosis, near bone-on-bone joint space narrowing in the medial compartment with a cartilage interval of 0.1 millimeter (mm), near bone-on-bone joint space narrowing in the patellofemoral compartment with the cartilage interval measuring .5 mm, and small joint effusion and loose intraarticular bodies.

In a May 28, 2019 impairment rating report, Dr. Mark A. Seldes, a Board-certified family physician, reviewed all of appellant's medical records and noted that a recent left knee x-ray examination revealed almost essentially 0 mm cartilage in the medial compartment. He related her complaints of bilateral knee pain, left side greater than right, intermittent buckling and swelling, and difficulty with any prolonged standing, sitting, or reclining. Upon examination of appellant's left knee, Dr. Seldes observed effusion in the medial aspect of the left knee joint, varus

[4] The record reflects that appellant had previously filed a traumatic injury claim (Form CA-1) on March 3, 2010 alleging that on March 2, 2010 she sustained injuries to both knees and right shoulder. She did not stop work. OWCP accepted appellant's claim for right shoulder contusion, right shoulder rotator cuff tear, and right shoulder adhesive capsulitis. On June 3, 2010 appellant underwent authorized right shoulder surgery and stopped work. OWCP paid wage-loss compensation on the periodic rolls, effective August 1, 2010.

[5] The award was based on the December 29, 2012 report of Dr. William Dinenberg, a Board-certified orthopedic surgeon serving as OWCP's second-opinion examiner, and the March 4, 2013 report of OWCP's district medical adviser (DMA), who determined that appellant had 59 percent right lower extremity impairment due to her accepted right knee condition. Neither report provided an impairment rating for appellant's accepted left knee condition.

deformity in the left knee joint, and tenderness overlying the joint line medially and laterally. Range of motion (ROM) of her left knee revealed 95 degrees flexion. Dr. Seldes diagnosed status post total right knee joint replacement and revision with suboptimal outcome, severe degenerative osteoarthritis of the left knee joint, and severe degenerative arthritis of the right knee joint. He opined that appellant had reached maximum medical improvement (MMI) with regard to her left knee as of May 28, 2019. Dr. Seldes indicated that he would provide an impairment rating using the diagnosis-based impairment (DBI) method for her left knee osteoarthritis. Utilizing Table 16-3 at page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[6] he determined that appellant was a class 4 impairment, severity of C, and noted that the left knee x-ray examination showed a .1 mm cartilage gap in the medial compartment. Dr. Seldes noted a grade modifier for functional history (GMFH) of 3 because she continued to walk with daily pain and instability and a grade modifier for physical examination (GMPE) of 3 due to severe palpatory findings. After applying the net adjustment formula ((3-4) + (3-4) = -2), he determined that appellant had a net adjustment score of -2, which resulted in a grade C impairment of 50 percent for her LLE impairment.

On June 18, 2019 appellant filed a schedule award claim (Form CA-7).

On July 9, 2019 OWCP forwarded Dr. Seldes' report to Dr. Jovito Estaris, Board-certified in occupational and preventive medicine, to serve as a DMA. In a July 16, 2019 report, Dr. Estaris recommended that appellant undergo an orthopedic consultation regarding her left knee condition.

OWCP subsequently referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Patrick Horan, a Board-certified orthopedic surgeon, for a second-opinion examination in order to determine whether she had sustained a ratable permanent impairment due to her accepted left knee condition.

In an August 26, 2019 report, Dr. Horan indicated that he had reviewed the SOAF and noted that appellant's claim was accepted for aggravation of degenerative arthritis of her bilateral knees. He related that appellant continued to complain of intermittent pain in her left knee, crepitus in her kneecap, difficulty fully extending the knee, and occasional use of a cane in order to walk. Upon physical examination, Dr. Horan observed an antalgic gait without use an assistive device. He also indicated that a left knee x-ray examination report revealed that the left knee medial compartment had, at its tightest area, a gap of 1 mm of cartilage. ROM of appellant's left knee was 95 degrees. Dr. Horan diagnosed left knee osteoarthritis. He placed appellant in category 3 for knee joint osteoarthritis because she had a 1 mm cartilage interval. Dr. Horan also reported GMPE of 1 due to mild deformity of ROM and a GMFH of 1 due to antalgic gait and walking without an assistive device. He related that appellant had two grade 1 modifiers, which would move her two spaces to the left, which resulted in 26 percent LLE impairment.

On October 1, 2019 OWCP referred the record to Dr. Estaris, the DMA, and requested that he review Dr. Horan's August 26, 2019 permanent impairment rating report. In an October 15, 2019 report, Dr. Estaris referenced Table 16-3, *Knee Regional Grid*, of the A.M.A., *Guides*, and noted a rating of class 3 under the DBI method for osteoarthritis due to 1 mm cartilage interval. He reported a GMFH of 1 due to antalgic gait with no use of gait aid and a GMPE of 1 for mild

[6] A.M.A., *Guides* (6th ed. 2009).

limitation of ROM. Dr. Estaris applied the net adjustment formula ((1-3) + (1-3) =-4), which resulted in -4 adjustment, for a total of 26 percent permanent impairment. He reported that impairment rating utilizing the ROM method was also applicable. Dr. Estaris referenced Table 16-23, *Knee Motion Impairments*, on page 549, and reported that 95 degrees flexion resulted in 10 percent LLE impairment and 1 degree extension resulted in 0 percent impairment for a total of 10 percent LLE impairment. He explained that, as the DBI method was the higher rating, appellant had a LLE impairment rating of 26 percent LLE impairment. Dr. Estaris reported an MMI date of August 26, 2019.

By decision dated October 30, 2019, OWCP granted appellant a schedule award for 26 percent permanent impairment of the LLE. The award ran for 74.88 weeks from August 26, 2019 to January 31, 2021. OWCP noted that the schedule award was based on the October 15, 2019 DMA report of Dr. Estaris.

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] 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 under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[10]

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, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[11] After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history, grade modifier for physical examination, and grade modifier for clinical studies. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) +

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

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

(GMCS - CDX).[12] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[13]

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment causally related to an employment injury.[14] The medical evidence must include a detailed description of the permanent impairment.[15]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[16] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[17]

ANALYSIS

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

OWCP accepted appellant's claim for aggravation of degenerative arthritis of both knees as causally related to her federal employment duties. It subsequently granted her a schedule award for 59 percent permanent right lower extremity impairment due to her accepted right knee condition. On June 18, 2019 appellant filed a Form CA-7 for a schedule award claim for her accepted left knee condition.

In support of her schedule award claim, appellant submitted a May 28, 2019 report of her attending physician, Dr. Seldes. Dr. Seldes indicated that she had reached MMI as of May 28, 2019. Utilizing Table 16-3 of the A.M.A., *Guides*, he opined that appellant was a class 4 diagnosis, severity of C, for her left knee osteoarthritis based on the left knee x-ray examination, which showed a .1 mm cartilage gap in the medial compartment. Dr. Seldes reported a GMFH of 3 because she continued to walk with daily pain and instability and a GMPE of 3 due to severe palpatory findings. He applied the net adjustment formula ((3-4) + (3-4) = -2) and determined that appellant had a net adjustment score of -2, which resulted in 50 percent permanent impairment of her LLE.

[12] *Id.* at 515-22.

[13] *Id*; at 23-28; *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[14] *See Rose V. Ford*, 55 ECAB 449 (2004).

[15] *See Vanessa Young*, 55 ECAB 575 (2004).

[16] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[17] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

In a July 16, 2019 report, the DMA, Dr. Estaris, recommended that appellant undergo an orthopedic consultation regarding her left knee condition.

OWCP subsequently referred appellant to Dr. Horan for a second opinion. In an August 26, 2019 report, Dr. Horan indicated that he had reviewed the SOAF and noted that her claim was accepted for aggravation of degenerative arthritis of her bilateral knees. He provided examination findings and indicated that a left knee x-ray examination report revealed a gap of 1 mm cartilage in appellant's left knee medial compartment. Dr. Horan referenced page 511 of the A.M.A., *Guides* and assigned a class 3 placement for appellant's left knee joint osteoarthritis. He reported a GMPE of 1 due to mild deformity of ROM and a GMFH of 1 due to antalgic gait and walking without an assistive device. Dr. Horan indicated that two grade 1 modifiers would move the category two spaces to the left, which resulted in 26 percent LLE permanent impairment. In an October 15, 2019 report, Dr. Estaris, the DMA, indicated that he had reviewed Dr. Horan's August 26, 2019 permanent impairment rating report and concurred with his finding that appellant had 26 percent permanent impairment of the LLE.[18] By decision dated October 30, 2019, OWCP granted appellant a schedule award for 26 percent permanent impairment of the LLE based on the DMA's October 15, 2019 report.

The Board finds, however, that a conflict in medical opinion exists between the opinions of Dr. Seldes, on behalf of appellant, and Dr. Horan, OWCP's physician, regarding the degree of permanent impairment that appellant sustained for her accepted left knee condition. While the physicians properly utilized Table 16-3, *Knee Regional Grid*, of the A.M.A., *Guides* for the accepted diagnosis of left knee osteoarthritis, they differed on the class of diagnosis and the proper grade modifiers for functional history and physical examination. As noted above, if there is a disagreement between an employee's physician and OWCP's physician, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, who shall make an examination.[19] Because the reports of Dr. Seldes and Dr. Horan are virtually of equal weight, she must be referred to an impartial medical examiner to resolve the existing conflict in the medical opinion evidence regarding the extent of the permanent impairment of her LLE.[20]

On remand OWCP shall refer appellant, along with the case record and SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation and report which includes a rationalized opinion as to the extent of her LLE permanent impairment. The impartial medical specialist should be instructed to obtain updated diagnostic testing, including a left knee x-ray examination, as both Dr. Seldes and Dr. Horan based their class of diagnosis on her cartilage interval in her left knee medial compartment. Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

[18] The Board notes that, while Dr. Estaris also calculated appellant's impairment rating using the ROM method on page 549 of the A.MA., *Guides*, the DBI ratings under Table 16-3 were not marked by an asterisk and were, therefore, ineligible for an alternate ROM rating.

[19] *Supra* note 16.

[20] *See M.M.*, Docket No. 18-0235 (issued September 10, 2019); *L.W.*, Docket No. 19-1208 (issued July 19, 2019).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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