United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 20-0831**
	)	**Issued: December 27, 2021**
U.S. POSTAL SERVICE, BROOKLINE POST OFFICE, Brookline, MA, Employer	)	

Appearances:
John L. DeGeneres, Jr., 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 March 4, 2020 appellant, through counsel, filed a timely appeal from a December 20, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted in order to present argument demonstrating that he had greater right lower extremity permanent impairment than had previously been found by OWCP. The Board, in exercising its discretion, denies his request for oral argument because this matter requires an evaluation of the medical evidence required. As such, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act[3] (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 greater than 31 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On March 19, 2012 appellant, then a 48-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging injury to his right femoral joint due to factors of his federal employment. He noted that he first became aware of his claimed condition on March 3, 2011 and realized its relation to his federal employment on November 23, 2011. OWCP accepted appellant's claim for permanent aggravation of degenerative arthritis of the right hip and paid wage-loss compensation. Appellant underwent OWCP-authorized total right hip joint replacement surgery on March 26, 2013.

In a May 1, 2016 report, Dr. Bryon Hartunian, an attending Board-certified orthopedic surgeon, determined that appellant had 37 percent permanent impairment of his right lower extremity based on the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4]

On May 10, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On May 24, 2016 OWCP referred the case to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA). In a May 28, 2016 report, Dr. Orenstein determined that appellant had 31 percent permanent impairment of the right lower extremity based on the standards of the sixth edition of the A.M.A., *Guides*.

In July 2017, OWCP determined that there was a conflict in the medical opinion evidence regarding permanent impairment and referred appellant, along with an updated statement of accepted facts, for an impartial medical examination with Dr. Robert R. Pennell, a Board-certified orthopedic surgeon. It requested that Dr. Pennell provide an opinion on appellant's right lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a report dated August 8, 2017, Dr. Pennell discussed appellant's factual and medical history and reported his physical examination findings. He noted that appellant denied that right hip pain caused him to limp and reported range of motion testing results, including 70 degrees of flexion for the right hip. Dr. Pennell referred to the sixth edition of the A.M.A., *Guides* and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-4 (Hip Regional

[3] 5 U.S.C. § 8101 *et seq*.

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

Grid), page 515, the class of diagnosis (CDX) for appellant's total right hip joint replacement resulted in a class 3 impairment with a default value of 37 percent. For the right lower extremity, he assigned a grade modifier for functional history (GMFH) of 1 due to a mild problem; a grade modifier for physical examination (GMPE) of 1 as a result of muscle atrophy; and a grade modifier for clinical studies (GMCS) of 0 due to no relevant findings. Dr. Pennell utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-3) + (1-3) + (0-3) = -7, but noted that, under Table 16-4, moving two spaces to the left of the default value of 37 percent was the maximum allowed. He indicated that this calculation resulted in a grade A or 31 percent permanent impairment of the right lower extremity. Dr. Pennell found that appellant reached maximum medical improvement on March 26, 2014, one year after his March 26, 2013 right hip surgery.

On July 30, 2018 OWCP referred the case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as the DMA. In an August 3, 2018 report, Dr. Katz discussed Dr. Pennell's August 8, 2017 report and explained that he agreed with Dr. Pennell that appellant had 31 percent permanent impairment of the right lower extremity based on the standards of the sixth edition of the A.M.A., *Guides*.

By decision dated December 28, 2018, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity. The award ran for 89.28 weeks from August 8, 2017 through April 24, 2019. It based the award on the August 8, 2017 opinion of the impartial medical specialist, Dr. Pennell, as supported by the August 31, 2018 opinion of Dr. Katz, the DMA.

Appellant, through counsel, requested reconsideration of the December 28, 2018 decision.

By decision dated December 20, 2019, OWCP denied modification of its December 28, 2018 decision.

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 and the Board has

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

concurred in such adoption.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor.[9] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the range of motion section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[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 right hip, the relevant portion of the right lower extremity for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.[11] After the CDX is determined from the Hip 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).[12] 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.[13]

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.[14] For a conflict to arise, the opposing physicians' opinions must be of

[7] *Id.*; *see V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] A.M.A., *Guides* (6th ed. 2009) 497, section 16.2.

[10] *Id.* at 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[11] *Id.* at 509-11.

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

[13] *Id.* at 23-28.

[14] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

virtually equal weight and rationale.[15] In situations where the case is properly 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.[16]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

OWCP properly determined that there was a conflict in the medical opinion evidence regarding appellant's lower extremity permanent impairment and referred appellant for an impartial medical examination and impairment evaluation with Dr. Pennell, pursuant to 5 U.S.C. § 8123(a).[17] The Board finds that the special weight of the medical evidence with respect to the permanent impairment of appellant's right lower extremity rests with the well-rationalized August 8, 2017 opinion of the impartial medical specialist, Dr. Pennell, as supported by the August 31, 2018 opinion of Dr. Katz, the DMA.[18]

In his August 8, 2017 report, Dr. Pennell referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-4 (Hip Regional Grid), page 515, the CDX for appellant's total right hip joint replacement resulted in a class 3 impairment with a default value of 37 percent. For the right lower extremity, he assigned a grade modifier for GMFH of 1; a GMPE of 1; and a GMCS of 0. Dr. Pennell properly utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-3) + (1-3) + (0-3) = -7, and noted that, under Table 16-4, moving two spaces to the left of the default value of 37 percent was the maximum allowed. He indicated that this calculation resulted in a grade A or 31 percent permanent impairment of the right lower extremity.

In addition, in an August 3, 2018 report, Dr. Katz discussed Dr. Pennell's August 8, 2017 report and also properly determined that appellant had 31 percent permanent impairment of the right lower extremity based on the standards of the sixth edition of the A.M.A., *Guides*.

Appellant has not submitted a medical report which establishes a greater permanent impairment rating of the right lower extremity in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

On appeal, counsel argues the opinion of appellant's attending physician, Dr. Hartunian, established a greater permanent impairment of the right lower extremity than already determined

[15] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[16] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[17] *See supra* notes 14 and 15.

[18] *See supra* note 16.

by OWCP. However, Dr. Hartunian's opinion represents one side of a conflict in the medical opinion evidence, which was resolved by the well-rationalized opinion of the impartial medical specialist, Dr. Pennell.[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 greater than 31 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2021
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

[19] *See S.I.*, Docket No. 13-1880 (issued April 18, 2014); *Richard O'Brien*, 53 ECAB 234 (2001).