

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

T.C., Appellant)	
)	
and)	Docket No. 20-1170
)	Issued: January 29, 2021
U.S. POSTAL SERVICE, MINERAL POST OFFICE, Mineral, VA, Employer)	
)	

Appearances:
*John L. DeGeneres, Esq., for the appellant*¹
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 May 19, 2020 appellant, through counsel, filed a timely appeal from a March 24, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than 25 percent permanent impairment of each lower extremity, for which she previously received

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.*

schedule award compensation; and (2) whether OWCP abused its discretion in denying appellant's request for a subpoena.

FACTUAL HISTORY

On June 24, 2016 appellant, then a 50-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral knee osteoarthritis due to factors of her federal employment, including standing, bending, twisting, pivoting, lifting, walking, and climbing into and out of her postal vehicle. By decision dated May 25, 2017, OWCP accepted her claim for primary osteoarthritis of the knees.

The record reflects that appellant underwent right total knee replacement surgery on August 20, 2012 and left total knee replacement surgery on April 15, 2013, performed by Dr. Harry J. Shaia, a Board-certified orthopedic surgeon. The operative reports noted a diagnosis of degenerative joint arthritis.

Appellant also received medical treatment from Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon. In a May 4, 2016 report, Dr. Hartunian reviewed appellant's medical records and noted that she underwent total knee replacement of both knees due to end-stage degenerative joint disease, as confirmed by diagnostic testing. He reported that she currently complained of stiffness in the knees, no instability, and restricted motion and pain with certain activity. Upon physical examination, Dr. Hartunian observed that squatting was limited to 50 percent due to restricted motion in both knees. Examination of appellant's bilateral knees revealed no palpable effusion or tenderness. Range of motion (ROM) of her right knee was 107 degrees flexion and 0 degrees extension; ROM of her left knee was 108 degrees flexion and 0 degrees extension. Dr. Hartunian diagnosed status post right and left total knee replacement for end-stage degenerative arthritis. He reported a date of maximum medical improvement (MMI) of the right total knee replacement of December 10, 2012 and a date of MMI of the left knee replacement of October 14, 2013.

On July 13, 2017 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted a June 1, 2017 impairment evaluation from Dr. Hartunian who referred to his previous examination report for physical examination findings, diagnoses, and dates of MMI. Dr. Hartunian referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) for a total knee replacement resulted in a class 3 impairment with a default value of 37 percent due to mild motion deficit. He assigned a grade modifier for functional history (GMFH) of 2 based on appellant's American Academy of Orthopedic Surgery (AAOS) Lower Limb Questionnaire, which showed a moderate deficit.⁴ Dr. Hartunian found that a grade

³ A.M.A., *Guides* (6th ed. 2009).

⁴ Dr. Hartunian also reported that appellant had GMFH of 0 due to no antalgic gait. However, he explained that according to the A.M.A., *Guides*, the highest class modifier should be used when determining grade modifiers. *Id.* at 515, Paragraph 16-3.

modifier for clinical studies (GMCS) and a grade modifier for physical examination (GMPE) were not applicable as clinical studies and physical examination were used to establish the diagnosis and proper placement in the regional grid. He also explained that since the GMFH differed by 2 or more from the GMCS and GMPE, the GMFH was considered unreliable and should be excluded from the calculation. As the net adjustment formula amounted to no adjustment, Dr. Hartunian determined that appellant had 37 percent permanent impairment of the right lower extremity. He reported that the analysis for the left total knee replacement was identical and resulted in 37 percent left lower extremity permanent impairment.

Following review by Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), the case was referred to Dr. William C. Andrews, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation and opinion on permanent impairment of the lower extremities.

In an August 10, 2017 report, Dr. Andrews referred to his May 3, 2017 medical examination of appellant and included a copy of the May 3, 2017 report. In his May 3, 2017 report, he observed excellent range of motion and good stability upon physical examination of both knees. Dr. Andrews diagnosed degenerative arthritis of both knees. He referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the CDX for total knee replacement with a good result resulted in a class 2 impairment with a default value of 25 percent permanent impairment.⁵ Dr. Andrews noted no grade modifiers. He calculated that 25 percent permanent impairment of each lower extremity equaled 20 percent whole person impairment.

The file was reviewed by Dr. Katz, who agreed with Dr. Andrews' rating of 25 percent permanent impairment of each lower extremity. Dr. Katz noted a date of MMI of May 3, 2017, the date of Dr. Andrews' second opinion report.

By decision dated June 26, 2018, OWCP granted appellant a schedule award for 25 percent permanent impairment of each lower extremity. The award ran for 144 weeks from May 3, 2017 to February 4, 2020.

On July 12, 2018 appellant, through her then-counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 6, 2018. By decision dated January 8, 2019, a hearing representative set aside the June 26, 2018 OWCP decision and remanded the case for an impartial medical examination due to a conflict in medical opinion between Dr. Hartunian for appellant and Dr. Williams for OWCP.

On remand, OWCP referred appellant to Dr. John Aldridge, a Board-certified orthopedic surgeon, for an impartial medical examination on June 27, 2019 to resolve the conflict regarding the extent of appellant's bilateral lower extremity impairment. In his August 1, 2019 report, Dr. Aldridge reviewed appellant's history and noted that her claim was accepted for bilateral primary knee osteoarthritis. He indicated that x-ray examination of the knees revealed a slight bit of varus alignment with no evidence of loosening, instability, or other abnormality. Upon physical examination of appellant's knees, Dr. Aldridge observed ROM findings of full extension of 0

⁵ *Id.* at 511, Table 16-3.

degrees to 105 degrees flexion. He also noted no varus valgus instability, no paresthesias, and good overall alignment. Sensation and motor strength in the lower extremities were normal.

Dr. Aldridge explained that the basis of the conflict between Dr. Hartunian and Dr. Andrews was whether, for the CDX of total knee replacement appellant was a class 2 for moderate problem or class 3 for severe problem. He reported that based on appellant's functioning knees with good range of motion from 0 to 105 degrees, with no instability, and the ability to work a full-time job, he would classify appellant as a class 2 for moderate problem. Dr. Andrews assigned GMFH of 1 (mild problem) based on appellant's complaints of stiffness. He assigned a GMPE of 1 (mild problem) due to range of motion from 0 to 105 degrees and a GMCS of 1 (mild problem) based on slight varus position of the knee. Dr. Andrews calculated that appellant had no adjustment, which resulted in a default impairment of 25 percent permanent impairment of the bilateral knees.

By decision dated September 6, 2019, OWCP found that appellant was entitled to no more than the previously awarded schedule award for 25 percent impairment of each lower extremity. The award ran for 144 weeks from May 3, 2017 to February 4, 2020.

On September 16, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 24, 2019 letter, appellant, through counsel, requested the issuance of subpoenas to compel Dr. Aldridge, Dr. Andrews, and Dr. Katz, the DMA, to testify during the oral hearing. Counsel asserted that the anticipated testimony of these physicians was necessary to determine which findings formed the basis of their decision and to assess the proper weight to be given to them.

In a December 10, 2019 letter, OWCP's hearing representative denied appellant's request for subpoenas. In denying the request, she explained that appellant had not demonstrated that evidence from Drs. Aldridge, Andrews, and Katz could not be obtained without the use of subpoenas, including obtaining such evidence in writing if further clarification was deemed necessary to resolve the underlying issue of the present case.

In a December 12, 2019 memorandum, counsel for appellant argued that Dr. Aldridge erroneously assigned a class 2, moderate problem, under the CDX of total knee replacement. He noted that according to Table 16-23, page 549, of the A.M.A., *Guides*, a mild motion deficit for the knee was flexion of 80 to 109 degrees. Counsel indicated that by Dr. Aldridge's own physical examination findings, appellant had 105 degrees flexion bilaterally, which classified as mild motion deficit, thereby placing appellant in class 3 for a severe problem. He also argued that Dr. Aldridge erroneously assigned a GMFH of 1 due to appellant's complaints of "stiffness." Counsel noted that according to Table 16-6, page 516, of the A.M.A., *Guides*, identification of GMFH required an analysis of gait derangement and the AAOS Lower Limb instrument. He reported that appellant's AAOS form demonstrated a GMFH of 2.

A telephonic hearing was held on January 9, 2020. Counsel argued that Dr. Aldridge had incorrectly applied the A.M.A., *Guides* in assigning a class 2, instead of a class 3 for the CDX of total knee replacement. He contended that appellant was entitled to 37 percent permanent

impairment for each lower extremity and asserted that the controlling case was *W.B.*,⁶ which also involved a total knee replacement. Counsel also argued that if he had been given the right to question Dr. Aldridge, he would have agreed that appellant's physical examination findings showed mild motion deficit due to the range of motion of her knees.

Counsel subsequently submitted a memorandum dated January 9, 2020, which reiterated his arguments at the telephonic hearing.

By decision dated March 24, 2020, an OWCP hearing representative affirmed the September 6, 2019 decision finding that appellant was entitled to no more than 25 percent permanent impairment of each lower extremity. The hearing representative also finalized its prior denial of appellant's request for issuance of subpoenas to Drs. Aldridge, Andrews, and Katz.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.¹¹ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² Under Chapter 2.3, evaluators are directed to

⁶ Docket No. 14-1982 (issued August 26, 2015).

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ 20 C.F.R. § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

¹² *Id.* at 515-22.

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 This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁵ When there exist 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.¹⁶

ANALYSIS -- ISSUE 1

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

OWCP determined that a conflict arose between Dr. Hartunian, an attending physician, and Dr. Andrews, the second opinion physician, regarding the extent of appellant's permanent impairment of each lower extremity. Appellant was subsequently referred to Dr. Aldridge for an impartial medical examination to resolve the conflict in medical evidence.

In an August 1, 2019 report, Dr. Aldridge noted bilateral knee examination findings of full extension of 0 degrees to 105 degrees flexion. He also noted no varus valgus instability, no paresthesias, and good overall alignment. Dr. Aldridge determined that according to the A.M.A., *Guides*, Table 16-3 (Knee Regional Grid), appellant was a class 2 for a moderate problem based on good range of motion from 0 to 105 degrees. The Board finds, however, that Dr. Aldridge provided a contradictory and inconsistent opinion regarding appellant's permanent impairment. Although Dr. Aldridge noted examination findings of 105 degrees flexion, he assigned class 2 for good results from total knee replacement surgery instead of class 3 for fair results. A class 3 assignment is described as mild instability and/or mild motion deficit.¹⁷ According to Table 16-23, page 549, a mild motion impairment for the knee is 80 to 109 degrees flexion. The Board finds that Dr. Aldridge did not adequately explain why he assigned a class 2 for good results when appellant's range of motion examination findings showed 105 degrees flexion, equal to mild

¹³ *Id.* at 23-28.

¹⁴ 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).

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁷ A.M.A., *Guides* 511, Table 16-3.

motion deficit. In light of the inconsistent nature of his impairment rating, the Board finds that his report requires clarification.¹⁸

Additionally, the Board notes that Dr. Aldridge did not assign grade modifiers in accordance with the A.M.A., *Guides*. Dr. Aldridge assigned a GMFH of 1 (mild problem) due to appellant's complaints of stiffness. According to Table 16-6,¹⁹ grade modifiers for functional history are determined by gait derangement or AAOS Lower Limb score, not complaints of stiffness. Dr. Aldridge also assigned a GMPE of 1 (mild problem) due to range of motion. However, paragraph 16.3²⁰ of the A.M.A., *Guides* provides that, if a grade modifier was used to establish the diagnosis and proper placement in the regional grid, it may not be used again in the impairment calculation. In this case, Dr. Aldridge indicated that he assigned class 2 due, in part, to appellant's ROM. Since he utilized appellant's examination findings in determining appellant's class placement, he should not have assigned a grade modifier for physical examination.

Furthermore, the Board notes that Dr. Aldridge incorrectly calculated the net adjustment formula. Dr. Aldridge assigned a GMFH of 1 due to appellant's complaints of stiffness, a GMPE of 1 due to range of motion, and a GMCS of 1 due to slight varus position of the knee. Dr. Andrews calculated that appellant had no adjustment, which resulted in a default impairment of 25 percent permanent impairment of the both knees. The Board finds, however, that application of the net adjustment formula²¹ $(1 - 2) + (1 - 2) + (1 - 2)$ results in an adjustment of -3, instead of no adjustment. As Dr. Aldridge's impairment rating report does not properly conform to the A.M.A., *Guides*, his opinion is of diminished probative value and requires clarification.²²

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification and/or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.²³

For the above-described reasons, the opinion of Dr. Aldridge requires clarification. Therefore, in order to address the unresolved conflict in the medical opinion evidence, the case will be remanded to OWCP for referral to Dr. Aldridge for a supplemental opinion regarding the degree and extent of appellant's bilateral lower extremity permanent impairment. If Dr. Aldridge is unable to clarify his opinion or if his requested supplemental report is also lacking rationale, OWCP shall refer appellant to a new impartial medical examiner for the purpose of obtaining a

¹⁸ See *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

¹⁹ A.M.A., *Guides* 516.

²⁰ *Id.* at 515-16.

²¹ *Supra* note 13.

²² See *L.L.*, Docket No. 19-0214 (issued May 23, 2019).

²³ *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

rationalized medical opinion on the issue.²⁴ After carrying out this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.²⁵ The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.²⁶ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.²⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP's hearing representative did not abuse her discretion when she denied appellant's subpoena request for the testimony of Drs. Aldridge, Andrews, and Katz. In denying the request, the hearing representative explained that appellant had not demonstrated that evidence from Drs. Aldridge, Andrews, and Katz could not be obtained without the use of subpoenas. The Board finds that there is no reason to find that the hearing representative's denial of appellant's request for subpoenas constituted an abuse of discretion under the above-noted standard.²⁸

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that this case is not in posture for decision with respect to the schedule award determination. The Board also finds that OWCP did not abuse its discretion in denying appellant's request for subpoenas.

²⁴ *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Harold Travis*, 30 ECAB 1071 (1979).

²⁵ *See* 20 C.F.R. § 10.619.

²⁶ *Id.*

²⁷ *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

²⁸ *See E.S.*, Docket No. 20-0559 (issued October 29, 2020).

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part, and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 29, 2021
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