

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

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<b>L.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1505</b>
	)	<b>Issued: June 7, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>West Milwaukee, WI, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq.,* for the appellant<sup>1</sup>  
*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 August 12, 2020 appellant, through counsel, filed a timely appeal from a May 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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.

<sup>2</sup> The Board notes that, following the May 20, 2020 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.*

Federal Employees' Compensation Act<sup>3</sup> (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 greater than three percent permanent impairment of the right lower extremity for which she previously received schedule award compensation.

### **FACTUAL HISTORY**

On February 10, 2018 appellant, then a 28-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging on that date she slipped on ice as she descended stairs injuring her right hip and lower right back while in the performance of duty.

On May 9, 2018 appellant underwent a magnetic resonance imaging (MRI) arthrogram scan of the right hip which demonstrated hypertrophy as well as a complex multidirectional tear involving the right superolateral labrum and extending anteriorly. She underwent right hip arthroscopy with labral repair on July 23, 2018.

On February 25, 2019 OWCP accepted appellant's claim for complex tear of the right hip labrum.

On March 20, 2019 appellant filed a claim for a schedule award (Form CA-7). In a March 22, 2019 development letter, OWCP advised appellant of the deficiencies of her schedule award claim. It requested additional medical evidence and afforded her 30 days for a response.

Appellant again requested a schedule award on March 26, 2019.

In a May 8, 2019 report, Dr. Neil Allen, a Board-certified internist, examined appellant for permanent impairment. He noted her history of injury and reviewed her MRI scan. Dr. Allen applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>4</sup> to his findings on physical examination. He utilized the range of motion (ROM) method to calculate right hip impairment. Dr. Allen listed appellant's right hip ROM as: flexion of 98, 96, and 96 degrees; extension of +5, +8, and +12 degrees; external rotation of 18, 19, and 17 degrees; internal rotation of 21, 18, and 12 degrees; abduction of 25, 26, and 18 degrees; and adduction of 18, 16 and 15 degrees. He applied Table 16-24, page 549 of the A.M.A., *Guides* and calculated that 98 degrees of flexion was 5 percent permanent impairment and that 19 degrees of external rotation was 10 percent permanent impairment. Dr. Allen determined that the remaining ROMs were not ratable impairments. He found that appellant had 15 percent right lower extremity impairment based on ROM. Dr. Allen further noted that, using the diagnosis-based impairment (DBI) estimates, resulted in three percent permanent impairment for acetabular labral tear.<sup>5</sup> He noted that 15 percent loss of ROM was consistent with grade

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> A.M.A., *Guides*, 6<sup>th</sup> ed. (2009).

<sup>5</sup> *Id.* at 513, Table 16-4.

modifier physical examination (GMPE) of 2 in accordance with Table 16-25, page 550 and Table 16-7, page 517. Dr. Allen found that appellant's grade modifier functional history (GMFH) was 1 in accordance with Table 16-6, page 516. He concluded that appellant had 15 percent permanent impairment of the right lower extremity.

On September 24, 2019 OWCP referred the record and a statement of accepted facts (SOAF) to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as district medical adviser (DMA), for review and rating of appellant's permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.

In an October 8, 2019 report, the DMA noted his review of Dr. Allen's report and the SOAF. He found that, in accordance with Table 16-4, page 513, appellant had three percent permanent impairment of the right lower extremity due to acetabular labral tear treated with repair, a class 1, grade E impairment. Referencing section 16.7, page 543, of the A.M.A., *Guides*, the DMA explained that the A.M.A., *Guides* allow for the ROM method to be used as a stand-alone rating when there were no DBI sections that were applicable or in rare cases when a severe injury results in passive ROM loss qualifying for class 3 or 4 impairment or for amputation ratings. He explained that, because the A.M.A., *Guides* did contain an appropriate DBI for appellant's diagnosed condition, it did not meet any of the criteria of section 16.7, page 543, of the A.M.A., *Guides* to allow for impairment to be calculated under the ROM method. The DMA determined that the date of MMI was May 8, 2019 when appellant was examined by Dr. Allen.

By decision dated December 12, 2019, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity. On December 17, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 20, 2020, OWCP's hearing representative found that the DMA was entitled to the weight of the medical evidence and established that appellant had no more than three percent permanent impairment of the right lower extremity as a result of the accepted employment injury.

### **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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified

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<sup>6</sup> *Supra* note 1.

<sup>7</sup> 20 C.F.R. § 10.404.

edition of the A.M.A., *Guides*, published in 2009.<sup>8</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>9</sup>

In determining permanent impairment of 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 hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.<sup>10</sup> After the CDX is determined from the Hip 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).<sup>11</sup> Under Chapter 2.3, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>12</sup>

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>13</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>14</sup> When there exists opposing 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.<sup>15</sup>

### ANALYSIS

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

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<sup>8</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); 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, Exhibit 1 (January 2010).

<sup>9</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> A.M.A., *Guides* 512-15 (6<sup>th</sup> ed. 2009).

<sup>11</sup> *Id.* at 515-22.

<sup>12</sup> *Id.* at 23-28.

<sup>13</sup> 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); *M.S.*, 58 ECAB 328 (2007).

<sup>14</sup> 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

<sup>15</sup> *See Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

OWCP accepted appellant's claim for complex tear of the right hip labrum as causally related to her federal employment. On March 20 and 26, 2019 appellant filed a schedule award claim due to her accepted condition.

In support of her schedule award, appellant submitted a report from her physician, Dr. Allen, dated May 8, 2019 utilizing the ROM method to calculate a right hip impairment. Utilizing Table 16-24, page 549 of the A.M.A., *Guides*, he calculated that 98 degrees of flexion was 5 percent permanent impairment and that 19 degrees of external rotation was 10 percent permanent impairment. Dr. Allen found that appellant had 15 percent right lower extremity impairment based on loss of ROM. He further noted that, using the diagnosis-based impairment (DBI) estimates, resulted in three percent permanent impairment for acetabular labral tear.<sup>16</sup> Dr. Allen ultimately concluded that appellant had 15 percent permanent impairment of the right lower extremity.

In a report dated October 8, 2019, the DMA found that, in accordance with Table 16-4, page 513, appellant had three percent permanent impairment of the right lower extremity due to acetabular labral tear treated with repair, a class 1, grade e impairment. He opined that, because the A.M.A., *Guides* did contain an appropriate DBI for appellant's diagnosed condition, it did not meet any of the criteria of section 16.7, page 543, of the A.M.A., *Guides* to allow for impairment to be calculated under the ROM method the appellant was, therefore, not entitled to a schedule award based on ROM impairments.

Appellant's attending physician, Dr. Allen, and Dr. Harris, an OWCP DMA, disagree regarding the extent of appellant's permanent impairment of the right lower extremity due to appellant's accepted work-related condition. Dr. Allen opined that the nature of appellant's right lower extremity impairment allowed rating under the sixth edition of the A.M.A., *Guides* utilizing the ROM method as the DBI method did not allow a rating for appellant's full functional loss, while the DMA opined that appellant's permanent impairment was not an exceptional circumstance which allowed rating under the ROM method, pursuant to the guidelines provided in section 16-7, page 543 of the A.M.A., *Guides*.<sup>17</sup>

The Board finds that a conflict in medical opinion exists between the opinions of Dr. Allen, on behalf of appellant, and Dr. Harris, OWCP's physician, regarding the degree of permanent impairment that appellant sustained for her accepted right hip condition.<sup>18</sup> While both physicians utilized the A.M.A., *Guides*, they differed on whether the ROM or DBI method should be utilized to assess her permanent impairment. 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.<sup>19</sup> Because the

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<sup>16</sup> A.M.A., *Guides* 513, Table 16-4.

<sup>17</sup> See *S.A.*, Docket No. 20-0890 (issued January 27, 2010) (in which the Board found that OWCP had properly determined a conflict of medical evidence when the DMA and attending physicians disagreed as to whether the DBI or ROM methods should be applied to a lower extremity impairment rating).

<sup>18</sup> *C.B.*, Docket No. 20-0258 (issued November 2, 2020).

<sup>19</sup> 5 U.S.C. § 8123(a); see *R.S.* and *S.T.*, *supra* note 13.

reports of Dr. Allen and Dr. Harris 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 right lower extremity.<sup>20</sup>

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 right lower extremity permanent impairment. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 20, 2020 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: June 7, 2021  
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

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<sup>20</sup> *M.M.*, Docket No. 18-0235 (issued September 10, 2019); *L.W.*, Docket No. 19-1208 (issued July 19, 2019).