

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

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| S.M., Appellant |) | |
| |) | |
| and |) | Docket No. 20-1667 |
| |) | Issued: June 24, 2021 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| New Rockford, ND, Employer |) | |
| |) | |

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 28, 2020 appellant filed a timely appeal from an August 13, 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.³

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.*

³ The Board notes that following the August 13, 2020 decision, appellant submitted additional evidence to OWCP. 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 five percent permanent impairment of each lower extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On June 17, 2014 appellant, then a 40-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2014 she sustained a right knee injury when due to a misstep, she fell onto concrete steps on her mail delivery route while in the performance of duty. She did not stop work, but commenced performing limited-duty work. OWCP accepted appellant's condition for right knee contusion and right chondromalacia patella.

On December 12, 2014 Dr. Michael T. Dean, a Board-certified surgeon, performed arthroscopy and chondroplasty of the patella of the right knee and, on June 3, 2016, he performed chondroplasty of the right patellofemoral joint and open lateral release. On April 26, 2017 OWCP expanded the accepted conditions to include left knee sprain. On January 4, 2018 Dr. Dean performed chondroplasty of the left patellofemoral joint and open lateral release. Appellant's surgeries were authorized by OWCP.⁴ Appellant later relocated to Tucson, Arizona, and accepted a new position with the employing establishment.

On January 9, 2019 appellant filed a claim for a schedule award (Form CA-7) due to her accepted June 12, 2014 employment injury.

Appellant subsequently submitted a November 13, 2018 report from Dr. Dean who advised that he calculated a disability rating of 50 percent "based on a class 4 calculation of [class of diagnosis (CDX)] of 4, CMFH 3, CMPE 4, and CMCS not applicable. The sequels met adjustment of -1 and a class 4 grade B 50% disability rating for her bilateral knee arthritis."

In a January 24, 2019 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her schedule award claim, including a physician's opinion on permanent impairment based on the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵

Appellant submitted a February 13, 2019 report from Dr. Dean who indicated, "It is my impression that she has a permanent disability rating of 50% based on a class 4 calculation of CDX of 4, CMFH 3, CMPE 4 and CMCS not applicable. Sequels met adjustment of -1 and a class 4B 50 percent disability rating for bilateral knee injury and arthritis as a result."

On February 20, 2019 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested

⁴ OWCP periodically paid appellant wage-loss compensation on the supplemental rolls for disability from work related to her surgeries.

⁵ A.M.A., *Guides* (6th ed. 2009).

that he review the medical evidence of record, including Dr. Dean's reports, and provide an opinion on appellant's permanent impairment. In a February 22, 2019 report, Dr. Katz found that Dr. Dean's reports could not be accepted as probative with respect to assessing permanent impairment because Dr. Dean did not reference specific tables of the sixth edition of the A.M.A., *Guides*. He recommended that appellant be referred for a second opinion evaluation.

On February 27, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF) and a list of specific questions, for a second opinion examination with Dr. John Klein, a Board-certified orthopedic surgeon. It requested that he provide an opinion on appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In an April 9, 2019 report, Dr. Klein reported physical examination findings, noting that the right knee had mild anterior crepitus. He advised that there was no evidence in either knee of instability or joint line tenderness, and that there was full range of motion (ROM) of both knees. Dr. Klein 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 16-2 (Knee Regional Grid), page 511, the CDX for appellant's bilateral patellofemoral osteoarthritis with no cartilage interval⁶ resulted in a class 2 impairment with a default value of 20 percent (grade C). He assigned a grade modifier for functional history (GMFH) of 1 and a grade modifier for physical examination (GMPE) of 1, and noted that there "would be no shift to the left or right" from the default value. Dr. Klein concluded that appellant had a grade C or 20 percent permanent impairment of each lower extremity.

On May 2, 2019 OWCP again referred appellant's case to Dr. Katz, the DMA, for evaluation of permanent impairment. In a May 7, 2019 report, Dr. Katz asserted that the A.M.A., *Guides* required standing anteroposterior (AP) x-rays for the assessment of cartilage for primary joint and patellofemoral arthritis. He opined that, in the absence of such x-rays, Dr. Klein's report could not be utilized for impairment rating purposes. Dr. Katz recommended that Dr. Klein provide a supplemental report addressing his concerns or, if this was not possible, that appellant be referred for a new second opinion evaluation.

On May 9, 2019 OWCP requested that Dr. Klein provide a supplemental report. Dr. Klein obtained standing AP x-rays of appellant's knees on June 27, 2019. In a supplemental report dated July 2, 2019, Dr. Klein opined that the June 27, 2019 x-rays showed full-thickness articular cartilage defects in both knees and utilized Table 16-3 to find that appellant had conditions with a CDX of class 1, which warranted a default value of three percent impairment (grade C) in each lower extremity under the DBI rating method. He assigned a GMFH of 1, a GMPE of 1, and a grade modifier for clinical studies (GMCS) of 1. Dr. Klein utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (1 - 1) + (1 - 1) = 0$, which resulted in no movement from the default value. Therefore, he concluded that appellant had three percent permanent impairment of each lower extremity. Dr. Katz again reviewed appellant's case in his capacity as the DMA and produced a July 24, 2019 report in which he agreed with Dr. Klein that appellant had three percent permanent impairment of each lower extremity under the DBI rating

⁶ Dr. Klein indicated that arthroscopic findings revealed grade 4 full-thickness chondral loss of the patellofemoral joint of appellant's right knee, and that the January 4, 2018 surgery report showed grade 4 bone-on-bone osteoarthritis of the patellofemoral joint of her left knee.

method. He opined that Table 16-3 did not allow for application of the ROM rating method for appellant's knee conditions.

By decision dated July 30, 2019, OWCP granted appellant a schedule award for three percent permanent impairment of each lower extremity. The award ran for 17.28 weeks from April 9 through August 7, 2019 and was based on the July 2, 2019 report of Dr. Klein and the July 24, 2019 report of Dr. Katz, serving as the DMA.

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

Appellant submitted a November 20, 2019 impairment report from Dr. Mesfin Seyoum, Board-certified in family medicine. He discussed appellant's factual and medical history, noting that appellant complained of right knee pain and difficulty in functional mobility. A functional history survey revealed that appellant had difficulty in performing activities of daily living such as community mobility, home establishment/maintenance, meal preparation, shopping, and cleaning. Dr. Seyoum detailed the findings of his physical examination, including signs of crepitus in both knees. Appellant exhibited a guarded, limping gait and had reduced ROM in both knees. Palpation revealed marked tenderness in the peripatellar areas of both knees. Dr. Seyoum advised that appellant had 4/5 strength in both lower extremities and noted that he had reached maximum medical improvement (MMI).

Dr. Seyoum referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3, the CDX for bilateral patellofemoral arthritis (full-thickness articular cartilage loss) resulted in a class 1 impairment with a default value of three percent (grade C) for each lower extremity. He assigned a GMFH of 2 based on pain and antalgic gait, and a GMPE of 2 based on moderate palpatory findings and reduced ROM, and a GMCS of 1 due to positive findings. He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) + (2 - 1) = +2$, which resulted in a grade E or five percent permanent impairment of the each lower extremity. Dr. Seyoum also determined that, under the ROM rating method utilizing Table 16-23 (Knee Motion Impairments), page 549, appellant had 10 percent permanent impairment of each lower extremity due to deficits upon ROM of the right knee. He concluded that, because the ROM rating method resulted in a higher degree of permanent impairment than the DBI rating method, appellant had 10 percent permanent impairment of each lower extremity as calculated under the ROM rating method.

During the hearing held on December 10, 2019, counsel argued that Dr. Seyoum's November 20, 2019 report established that appellant was entitled to an increased schedule award.

By decision dated February 10, 2020, OWCP's hearing representative set aside the July 30, 2019 decision and remanded the case to OWCP for further development, including referral of appellant's case to a DMA for consideration of Dr. Seyoum's November 20, 2019 report. The hearing representative directed OWCP to issue a *de novo* decision after receipt of the DMA's report and the completion of any warranted additional development.

On remand, OWCP again referred appellant's case to Dr. Katz, the DMA. It requested that he review the medical evidence of record, including Dr. Seyoum's November 20, 2019 report, and

provide an opinion on appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In a February 28, 2020 report, Dr. Katz indicated that he had reviewed Dr. Seyoum's November 20, 2019 report. He referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3, the CDX for bilateral patellofemoral arthritis (full-thickness articular cartilage loss) resulted in a class 1 impairment with a default value of three percent (grade C) for each lower extremity. Dr. Katz assigned a GMFH of 2 and a GMPE of 2, and found that a grade modifier for GMCS was not applicable as the clinical studies were used for placement in the regional grid. He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in a grade E or five percent permanent impairment of the each lower extremity.⁷ Dr. Katz noted that "the key diagnostic factors" utilized in the DBI rating method were not eligible for an alternative ROM rating under Table 16-3. He, therefore, concluded that appellant had five percent permanent impairment of each lower extremity as had been calculated under the DBI rating method.

By decision dated March 27, 2020, OWCP granted appellant compensation for an additional two percent permanent impairment of each lower extremity, for a total of five percent permanent impairment bilaterally. The award ran for 11.52 weeks from November 29, 2019 through February 8, 2020 and was based on the February 28, 2020 report of Dr. Katz, serving as DMA.

On April 17, 2020 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing held on July 8, 2020, appellant testified regarding her continuing bilateral knee symptoms. Following the hearing, she submitted July 2, 2020 magnetic resonance imaging (MRI) scans of her knees, which showed abnormal infrapatellar fat, degenerative changes, mild patella alta, and small suprapatellar joint effusion. She also submitted a July 9, 2020 report from Dr. Ty Endean, an osteopath Board-certified in orthopedic surgery, who diagnosed Hoffa's fat pad disease of the knees.

By decision dated August 13, 2020, OWCP's hearing representative denied modification of the March 27, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁸ and its implementing federal regulations⁹ 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

⁷ Dr. Katz noted that appellant had reached MMI on November 20, 2019, the date of Dr. Seyoum's examination.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.¹⁰ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹¹

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is the primary method of calculation for the lower limb and that most impairments are based on the diagnosis-based impairment 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.¹² 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.¹³

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 509.¹⁴ 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).¹⁵ 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.¹⁶

ANALYSIS

The Board finds appellant has not met her burden of proof to establish greater than five percent permanent impairment of each lower extremity, for which she previously received schedule award compensation.

¹⁰ *Id.*; see *V.J.*, Docket No. 19-1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² A.M.A., *Guides* (6th ed. 2009) 497, section 16.2.

¹³ *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).

¹⁴ *Id.* at 509-11.

¹⁵ *Id.* at 515-22.

¹⁶ *Id.* at 23-28.

In a February 28, 2020 report, Dr. Katz, the DMA, reviewed the November 20, 2019 report of Dr. Seyoum, an attending physician, and properly applied the standards of the sixth edition of the A.M.A., *Guides* to the findings of record. Dr. Katz utilized the DBI rating method to find that, under Table 16-3, the CDX for bilateral patellofemoral arthritis (full-thickness articular cartilage loss) resulted in a class 1 impairment with a default value of three percent (grade C) for each lower extremity.¹⁷ Dr. Katz assigned a GMFH of 2 and a GMPE of 2, and found that a grade modifier for GMCS was not applicable as the clinical studies were used for placement in the regional grid. He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (2 - 1) + (2 - 1) = +2$, which resulted in a grade E or five percent permanent impairment of each lower extremity.¹⁸ Dr. Katz properly noted that “the key diagnostic factors” utilized in the DBI rating method were not eligible for an alternative ROM rating under Table 16-3, page 511.¹⁹ He, therefore, properly concluded that appellant had five percent permanent impairment of each lower extremity as had been calculated under the DBI rating method.

Appellant submitted November 13, 2018 and February 13, 2019 reports from Dr. Dean, an attending physician, who determined that she had 50 percent permanent impairment of each lower extremity. However, Dr. Dean’s reports are of limited probative value regarding appellant’s schedule award claim because he did not support his rating by referencing specific portions of the A.M.A., *Guides*. The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.²⁰

For these reasons, appellant has not met her burden of proof to establish greater than five percent permanent impairment of each lower extremity, for which she previously received a schedule award.

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 appellant has not met her burden of proof to establish greater than five percent permanent impairment of each lower extremity, for which she previously received schedule award compensation.

¹⁷ *Id.* at 511, Table 16-3.

¹⁸ *See supra* note 13. Dr. Katz noted that appellant had reached MMI on November 20, 2019, the date of Dr. Seyoum’s examination.

¹⁹ A.M.A., *Guides* 511, Table 16-3.

²⁰ *See N.A.*, Docket No. 19-0248 (issued May 17, 2019); *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board