

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

O.M., Appellant

and

**U.S. POSTAL SERVICE, VANDEVEER POST
OFFICE, Brooklyn, NY, Employer**

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**Docket No. 21-0084
Issued: June 4, 2021**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

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 October 28, 2020 appellant, through counsel, filed a timely appeal from an October 1, 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 to consider the merits of this case.

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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on another issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 2, 2017 appellant, then a 36-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 21, 2017 he injured a ligament tendon in his left knee joint and left foot when he tripped on a slippery stoop and twisted his left knee while in the performance of duty. He stopped work on April 22, 2017.⁴ OWCP accepted the claim for left knee contusion.⁵

On October 30, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated November 9, 2018, OWCP requested that appellant submit an impairment evaluation from his attending physician that addressed whether he had obtained maximum medical improvement (MMI) and to provide a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In response, appellant, through counsel, submitted a December 12, 2018 medical report from Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon. Dr. Kaufman described appellant's history of injury on April 21, 2017 and medical treatment, which included a surgical washout for a methicillin-resistant staphylococcus aureus (MRSA) infection with septic arthritis in his left knee. He also reviewed medical records. Dr. Kaufman reported findings on physical examination and reviewed the results of a May 9, 2017 left knee x-ray. He diagnosed sprain of the left knee with septic arthritis, status post surgery. Dr. Kaufman advised that appellant had reached MMI. He utilized the diagnosis-based impairment (DBI) rating method of the sixth edition

³ Docket No. 18-1055 (issued April 15, 2020).

⁴ Appellant was released to return to modified-duty work on July 31, 2017 by Dr. Yura Stoly, a physiatrist.

⁵ By decision dated August 11, 2017, it denied expansion of the acceptance of appellant's claim to include the additional conditions of left lateral collateral ligament sprain/strain, septic joint/pyogenic arthritis, staphylococcal arthritis, and left knee sprain with septic arthritis as caused or aggravated by his accepted April 21, 2017 work-related employment injury. Appellant requested an oral hearing. By decision dated March 26, 2018, an OWCP hearing representative affirmed the August 11, 2017 decision. Appellant appealed to the Board. By decision dated April 15, 2020, the Board affirmed OWCP's March 26, 2018 decision. *Supra* note 3. Appellant subsequently requested reconsideration. OWCP, by decision dated May 22, 2020, denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

⁶ A.M.A., *Guides* (6th ed. 2009).

of the A.M.A., *Guides* to calculate appellant's left knee permanent impairment. Dr. Kaufman found that, under Table 16-3, page 511, appellant had a class of diagnosis (CDX) of 2, thereby warranting a default value of C or 20 percent permanent impairment. He assigned a grade modifier for functional history (GMFH) of 1 under Table 16-6, page 517, a grade modifier for physical examination (GMPE) of 3 under Table 16-7, page 517, and a grade modifier for clinical studies (GMCS) of 0 under Table 16-8, page 519. Dr. Kaufman applied the net adjustment formula and concluded that appellant had 19 percent permanent impairment of the left lower extremity. He also utilized the range of motion (ROM) rating method to determine impairment to the left knee and tested three separate times with a goniometer. Dr. Kaufman used Table 16-23, page 549, and reported that a pain disability questionnaire (PDQ) was 75, 105 degrees of flexion represented 10 percent impairment and five degrees of extension represented 10 percent impairment, resulting in 20 percent permanent impairment. He concluded that, as the ROM left knee impairment rating was greater than the DBI left knee impairment rating, appellant had 20 percent permanent impairment of the left lower extremity.

On April 3, 2019 OWCP routed Dr. Kaufman's December 12, 2018 report, a statement of accepted facts (SOAF), and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of appellant's left lower extremity under the sixth edition of the A.M.A., *Guides*, and his date of MMI.

On May 2, 2019 Dr. Katz reviewed the findings in Dr. Kaufman's December 12, 2018 report. He opined that the medical records, including Dr. Kaufman's report, lacked sufficient detail to assign an impairment rating. The DMA noted that Dr. Kaufman calculated 19 percent left lower extremity permanent impairment under Table 16-3, although he did not specify the diagnostic key factor he utilized as the basis for his impairment rating. He further noted that in fact, Dr. Kaufman had rated impairment under the category of primary knee arthritis with a two millimeter (mm) cartilage interval, although a specific x-ray cartilage interval measurement must be submitted. The DMA advised that he was unable to locate any specific plain radiograph interpretation indicating loss of articular cartilage down to two mm thickness in the affected knee, which was required by the A.M.A., *Guides*, page 518, to establish the class of impairment under the key diagnostic indicator of primary knee joint arthritis. He further advised that a ROM impairment rating was not available as an alternative to the DBI method because appellant's accepted diagnosis of left knee contusion was not eligible for the ROM method under the A.M.A., *Guides*. The DMA recommended that Dr. Kaufman submit a supplemental report addressing his expressed concerns and if he was unable to comply, then appellant should be referred for a second opinion impairment evaluation.

On May 20, 2019 OWCP requested that Dr. Kaufman review Dr. Katz' May 2, 2019 report and provide whether he concurred with his findings. In a July 2, 2019 letter, it requested that he provide an impairment evaluation addressing whether appellant had reached MMI and provide a permanent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

In response, Dr. Kaufman submitted a July 3, 2019 addendum report in which he reviewed Dr. Katz' May 2, 2019 report and, as Dr. Katz indicated that it was inappropriate, he deleted his ROM impairment rating assessment. He stood by his DBI impairment rating of 19 percent permanent impairment based on a diagnosis of left knee sprain with a subsequent MRSA infection

resulting in a diagnosis of septic arthritis. Dr. Kaufman explained that there was no specific key diagnostic factor for the diagnosis of left knee sprain. He noted that, since this was acute, the radiographic stigma of chronic arthritis was not present yet and the only key factor he could use was one for arthritis.

On July 15, 2019 OWCP referred appellant, together with a SOAF, and the case file to, Dr. Robert A. DeFalco, a Board-certified orthopedic surgeon, for a second opinion evaluation of his permanent impairment for schedule award purposes.

In an August 8, 2019 report, Dr. DeFalco noted appellant's history of injury and medical treatment. On physical examination of the left knee, he reported two well-healed arthroscopic portal sites, no redness, infection, swelling, or effusion. There was no pain on ROM. There was no medial or lateral joint line tenderness. Ligament stability testing revealed negative anterior and posterior drawer tests, Lachman test, valgus stress test, varus stress test, and McMurray's test that was medially and laterally, and pivot shift test. ROM was tested three separate times with a goniometer and was found to be normal. There was one degree of extension each time and 116 degrees, 114 degrees, and 116 degrees of flexion. Circumference of the left leg, 4 inches above the superior pole of the patella was 21 inches. Dr. DeFalco diagnosed the accepted condition of left knee contusion. He determined that appellant had reached MMI. Dr. DeFalco utilized the DBI method of the sixth edition of the A.M.A., *Guides* to calculate appellant's left knee permanent impairment. He found that, according to page 509, appellant had a CDX of 1 with a mild mid-level default value of two percent. Dr. DeFalco assigned a grade modifier of 1 for GMFH due to mild deficit, a grade modifier 0 for GMPE due to no deficit, and a grade modifier of 0 for GMCS due to an unremarkable x-ray. He applied the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (0 - 1) + (0 - 1) = -2$, which resulted in zero percent permanent impairment of the left knee. Dr. DeFalco also used the ROM method to rate impairment to the left knee. He determined that 114 degrees, 116 degrees, and 116 degrees of flexion rounded up to 120 degrees. Dr. DeFalco advised that one degree of extension measured three times rounded up to zero degrees. He concluded that appellant had zero percent left lower extremity permanent impairment and zero percent whole body impairment according to page 549 of the A.M.A. *Guides*. Dr. DeFalco noted that appellant had a PDQ score of 65, which indicated a mild disability that converted to zero percent whole body impairment according to page 40 of the A.M.A., *Guides*.

On September 12, 2019 OWCP requested that the DMA, Dr. Katz, review Dr. DeFalco's August 8, 2019 report and provide whether he agreed with his findings.

In a September 20, 2019 report, the DMA, Dr. Katz, utilized the findings in Dr. DeFalco's August 8, 2019 report. He determined that, under Table 16-3, appellant's CDX of 1 for a left knee contusion represented a class 1 impairment with a default value of two percent. The DMA assigned a grade modifier of 1 for GMFH and a grade modifier of 0 for GMCS. He noted that a grade modifier for GMPE was not applicable. The DMA applied the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (0 - 1) = -1$, which moved the default value two spaces to the left resulting in a class 1, grade B, two percent permanent impairment of the left lower extremity. He noted that Dr. DeFalco did not identify the diagnostic key factor he used to find that appellant had zero percent permanent impairment of the left lower extremity under the DBI method. The DMA determined that appellant reached MMI on August 8, 2019 the date of Dr. DeFalco's impairment evaluation.

OWCP, by letter dated October 8, 2019, requested that Dr. Kaufman clarify his July and December 2018 reports, noting that appellant's claim had not been accepted for left knee sprain. It requested that he provide an opinion on permanent impairment based on the accepted condition of left knee contusion.

In an addendum report dated November 4, 2019, Dr. Kaufman noted that he could not respond to the question posed by OWCP as the May 9, 2017 left knee x-ray and appellant's history of injury established his diagnosis of left knee sprain.

On February 28, 2020 OWCP requested that the DMA, Dr. Katz, review Dr. Kaufman's November 4, 2019 report and provide whether he agreed with his findings.

The DMA, Dr. Katz, in a March 5, 2020 report, reviewed the medical record, including Dr. Kaufman's November 4, 2019 supplemental report and advised that his opinion that appellant had two percent permanent impairment of the left lower extremity remained unchanged.

By decision dated March 19, 2020, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The award ran for 5.76 weeks from August 8 through September 17, 2019 and was based on the impairment ratings of Dr. DeFalco and the DMA, Dr. Katz.

On April 17, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 11, 2020.

By decision dated October 1, 2020, an OWCP hearing representative affirmed the March 19, 2020 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions 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. 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁹ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁰ The Board has approved the

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5(a) (March 2017).

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.¹¹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹² Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.¹³ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁴

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹⁵ 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.

In determining impairment for the lower extremities, 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 509.¹⁶ 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).¹⁷ 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.¹⁸

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹⁹

¹¹ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹³ *Id.* at 493-556.

¹⁴ *Id.* at 521.

¹⁵ A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹⁶ *Id.* at 509-11.

¹⁷ *Id.* at 515-22.

¹⁸ *Id.* at 23-28.

¹⁹ *See supra* note 10 at Chapter 2.808.6(f) (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

ANALYSIS

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

In support of his schedule award claim, appellant submitted a December 12, 2018 report from Dr. Kaufman, who diagnosed left knee with septic arthritis and found that appellant had reached MMI due to his diagnosed condition. Using the DBI method found at Table 16-3²⁰ of the sixth edition of the A.M.A., *Guides*, Dr. Kaufman determined that appellant had 19 percent permanent impairment of the left lower extremity. Using the ROM method at Table 16-23,²¹ he determined that appellant had 20 percent permanent impairment of the left lower extremity due to his diagnosed left knee sprain with septic arthritis. Dr. Kaufman concluded that appellant had 20 percent permanent impairment of the left lower extremity as the ROM permanent impairment rating was greater than the DBI permanent impairment rating.

In accordance with its procedures, OWCP properly referred the medical record to Dr. Katz, a DMA,²² who reviewed the clinical findings of Dr. Kaufman on May 2, 2019. The DMA advised that he could not make an impairment determination because Dr. Katz' report did not specify the diagnostic key factor he used to determine that appellant had 19 percent permanent impairment of the left lower extremity based on the DBI method under Table 16-3 and there was no radiographic evidence to support his finding of impairment due to left knee primary arthritis. He further advised that a ROM impairment rating was not available as an alternative to the DBI rating method because appellant's accepted diagnosis of left knee contusion was not eligible for the ROM rating method under the A.M.A., *Guides*. The DMA recommended that either Dr. Kaufman submit a supplemental report addressing his concerns or appellant should be referred for a second opinion impairment evaluation.

Following review by the DMA, Dr. Katz, OWCP properly referred appellant to Dr. DeFalco for a second opinion evaluation to determine the nature and extent of his employment-related permanent impairment. In his August 8, 2019 report, Dr. DeFalco determined that appellant had zero percent permanent impairment of the left lower extremity under the DBI and ROM rating methods.

In accordance with its procedures, following the second opinion evaluation, OWCP properly referred the evidence of record to the DMA, Dr. Katz, for review. On September 20, 2019 the DMA reviewed the medical evidence of record, including the August 8, 2019 report of Dr. DeFalco, and concluded that appellant had two percent permanent impairment of the left lower extremity and reached MMI on August 8, 2019. He utilized the DBI method at Table 16-3²³ and determined that appellant had a CDX of 1 for a contusion which represented a class 1 impairment

²⁰ A.M.A., *Guides* 509, Table 16-3.

²¹ *Id.* at 549, Table 16-23.

²² *Supra* note 20.

²³ *Supra* note 17.

with a default value of two percent. The DMA assigned a grade modifier of 1 for GMFH and a grade modifier of 0 for GMCS. He noted that a grade modifier for GMPE was not applicable. The DMA applied the net adjustment formula and concluded that appellant had two percent permanent impairment of the left lower extremity. He noted that Dr. DeFalco did not identify the diagnostic key factor he used to find that appellant had zero percent permanent impairment of the left lower extremity under the DBI method. In a March 5, 2020 report, the DMA reiterated his prior opinion that appellant had two percent permanent impairment of the left lower extremity.

OWCP subsequently requested that Dr. Kaufman review the DMA's May 2, 2019 report. On July 3, 2019 Dr. Kaufman agreed with the DMA that his 20 percent ROM left lower extremity impairment rating was not appropriate. He noted that his DBI impairment rating was based on appellant's diagnosis of left knee sprain with arthritis. The Board notes that OWCP has not accepted appellant's claim for left knee sprain or arthritis as employment related. For conditions not accepted by OWCP as being employment related, it is the employee's burden of proof to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.²⁴ Dr. Kaufman did not offer an opinion explaining how appellant's diagnosed conditions were causally related to the accepted April 21, 2017 employment injury. In a November 4, 2019 addendum report, he continued to maintain that appellant had permanent impairment of the left lower extremity due to his diagnosis of left knee sprain. For the stated reasons, the Board finds that Dr. Kaufman's reports are insufficient to establish appellant's entitlement to an increased schedule award.

The Board finds that the two percent left lower extremity permanent impairment rating from the DMA represents the weight of the medical evidence in this case as he properly applied the appropriate provisions of the A.M.A., *Guides* to the clinical findings of record.²⁵ There was no evidence establishing greater impairment in conformance with the A.M.A., *Guides*.

On appeal, counsel contends that OWCP's decision does not recognize the seriousness of appellant's injury and residual infection. As previously explained, however, Dr. Kaufman's opinion that appellant had 19 percent permanent impairment of the left lower extremity due to a diagnosis of left knee sprain with a subsequent MRSA infection resulting in a diagnosis of septic arthritis is of diminished probative value as he failed to explain how the diagnosed condition was causally related to the accepted April 21, 2017 employment injury.

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.

²⁴ *E.F.*, Docket No. 18-1723 (issued May 1, 2019); *T.W.*, Docket No. 16-0176 (issued January 10, 2018); *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

²⁵ *K.M.*, Docket No. 19-1526 (issued January 22, 2020); *G.S.*, Docket No. 19-0277 (issued August 22, 2019); *J.H.*, Docket No. 18-1207 (issued June 20, 2019).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 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