United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 21-0174**
U.S. POSTAL SERVICE, BROOKLYN PARK POST OFFICE, Brooklyn Park, MN, Employer	)	**Issued: June 7, 2021**

Appearances:
Alan J. Shapiro, *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 November 24, 2020 appellant, through counsel, filed a timely appeal from an October 27, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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 her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On July 30, 2015 appellant, then a 54-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left hand and both ankles while in the performance of duty. OWCP accepted the claim for a left knee sprain, a left knee contusion, and a left ankle fracture.

A magnetic resonance imaging (MRI) scan of the left knee, obtained on September 3, 2015 revealed a mild-to-moderate medial collateral ligament (MCL) sprain with no other ligamentous injuries, a mild bony contusion, reactive marrow edema or a stress change at the posterolateral aspect of the lateral femoral condyle, and mild-to-moderate joint effusion.

On August 2, 2017 Dr. Steven Greer, Board-certified in family medicine, indicated that appellant had reached maximum medical improvement (MMI).

Appellant, on October 6, 2017, filed a schedule award claim (Form CA-7).

In a development letter dated October 12, 2017, OWCP requested that appellant submit a report from a physician addressing whether she had reached MMI and rating any employment-related permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

In an impairment evaluation dated November 11, 2017, Dr. Neil Allen, a Board-certified internist and neurologist, discussed appellant's current complaints of left knee pain with instability. On examination of the left knee, he found no atrophy, mild patellofemoral crepitus, intact sensation, no laxity, and full strength. Dr. Allen measured range of motion (ROM) three times, finding a maximum of 134 degrees flexion and 10 degrees extension. He noted that a September 3, 2015 MRI scan had shown a mild-to-moderate sprain of the MCL with mild-to-moderate effusion and a mild bony contusion. Using Table 16-3 on page 509 of the A.M.A., *Guides*, Dr. Allen identified the class of diagnosis (CDX) as a class 1 knee sprain with palpatory findings, which yielded a default value of two percent. He applied a grade modifier for functional history (GMFH) of one based on the lower limb questionnaire. Dr. Allen found that a grade modifier for physical examination (GMPE) and a grade modifier for clinical studies (GMCS) were both inapplicable as they had been used for grid placement. After applying the grade modifier, he found no change from the default value of two percent. Dr. Allen concluded that appellant had two percent permanent impairment of the left lower extremity.

On January 30, 2018 Dr. Jovito Estaris, Board-certified in occupational medicine serving as a district medical adviser (DMA), advised that the applicable CDX was a class 0 collateral ligament injury of the left knee under Table 16-3 page 510, which yielded no impairment of the

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

left lower extremity. He further found no impairment based on loss of ROM. Dr. Estaris disagreed with Dr. Allen's use of the diagnosis of strain/tendinitis, asserting that the applicable diagnosis was an MCL strain. He advised that an MCL injury with no laxity or instability yielded no impairment. Dr. Estaris found that appellant had reached MMI on November 11, 2017.

By decision dated February 23, 2018, OWCP denied appellant's claim for a schedule award.

In addendum reports dated December 21, 2018 and January 9, 2019, Dr. Allen disagreed with Dr. Estaris' finding, noting that the A.M.A., *Guides* provided that, if two or more diagnoses could be used, the evaluator should use the diagnosis that characterizes the impairment and its impact on activities. He advised that appellant had symptoms compatible with a muscle strain rather than an MCL injury/sprain.

On September 15, 2019 Dr. Estaris advised that appellant's only diagnosis was a left knee sprain. He indicated that the most accurate diagnosis was an MCL sprain rather than a left knee sprain. Dr. Estaris reiterated that appellant had no impairment due to a collateral ligament injury under Table 16-3 on page 10 of the A.M.A., *Guides*.

By decision dated September 17, 2019, OWCP denied appellant's schedule award claim as there was no measurable impairment.

On September 26, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on January 14, 2020.

In an addendum dated January 27, 2020, Dr. Allen disagreed with Dr. Estaris' finding that appellant had no permanent impairment of the left lower extremity, noting that the A.M.A., *Guides* provided that if two diagnoses were present, the examiner should use the one which yielded the highest rating.

By decision dated March 25, 2020, OWCP's hearing representative vacated the September 17, 2019 decision and remanded the case for a DMA to review Dr. Allen's January 27, 2020 report.

On April 9, 2020 Dr. Estaris advised that the specific diagnosis in this case was an MCL strain, and that a strain was a nonspecific diagnosis. He asserted that the specific diagnosis should be used for rating diagnosis-based impairments (DBI) under the A.M.A., *Guides*.

By decision dated April 22, 2020, OWCP denied appellant's schedule award claim as the medical evidence did not demonstrate a measurable impairment.

On May 1, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on August 12, 2020.

By decision dated October 27, 2020, OWCP's hearing representative affirmed OWCP's April 22, 2020 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,[4] and its implementing federal regulations,[5] 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 loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

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).[8] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[9] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

ANALYSIS

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

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[4] *Supra* note 2.

[5] 20 C.F.R. § 10.404.

[6] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

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

[8] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id*. at 494-531.

[10] *Id*. 411.

[11] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

In support of her schedule award claim, appellant submitted a November 11, 2017 impairment evaluation from Dr. Allen. On examination, Dr. Allen found no atrophy, full sensation, mild patellofemoral crepitus, and no laxity of the left knee. He measured ROM of 134 degrees flexion and 10 degrees extension. Dr. Allen indicated that a September 3, 2015 MRI scan had revealed a mild-to-moderate MCL sprain with mild-to-moderate effusion and a mild bony contusion. Using Table 16-3 on page 509 of the A.M.A., *Guides*, he identified the CDX as a class 1 knee sprain, which yielded a default value of two percent. Dr. Allen found no change from the default value after application of the grade modifier, and thus concluded that appellant had two percent permanent impairment of the left lower extremity.

Dr. Estaris, a DMA, reviewed Dr. Allen's report on January 30, 2018 and disagreed with his finding that the CDX was a left knee strain. He identified the CDX as a class 0 collateral ligament injury using Table 16-3 on page 510. As appellant had no laxity at the MCL, he found no ratable impairment.

In addendum reports dated December 21, 2018 and January 9, 2019, Dr. Allen advised that if appellant had two or more diagnoses, the evaluator should use the one that better characterized the impairment.

On September 15, 2019 Dr. Estaris asserted that a MCL sprain was a more accurate diagnosis than a left knee sprain. He again found that appellant had no ratable injury using the CDX of a cruciate or collateral ligament injury set forth at Table 16-3 on 510 of the A.M.A., *Guides*.

The Board finds that Dr. Estaris failed to sufficiently explain why appellant's permanent impairment could not be rated for the accepted condition of left knee sprain. OWCP has not accepted a collateral ligament injury as employment related.[12] Dr. Allen opined that appellant's residual symptoms were compatible with a muscle strain rather than an MCL injury. Dr. Estaris failed to address whether Dr. Allen's impairment rating was sufficient to show that she had two percent permanent impairment due to her left knee sprain, rating her instead for an MCL injury, a condition not accepted by OWCP which he found to be a more accurate diagnosis.

It is well established that proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[13] Once OWCP undertook development of the evidence by referring appellant's case file to an OWCP medical adviser, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[14] The case is, therefore, remanded to OWCP to refer the record to another DMA, or a specialist in the appropriate field of medicine, to determine whether appellant has a permanent impairment of the left lower extremity as a result of her accepted employment injury of a left knee sprain.

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[12] The Board notes that OWCP accepted left knee sprain, identified by the International Classification of Disease (ICD)-10 code S83.92XA. A sprain of the MCL of the knee is identified as S83.412.

[13] *See W.W.*, Docket No. 18-0093 (issued October 9, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[14] *P.R.*, Docket No. 20-1199 (issued February 8, 2021).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 27, 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

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