United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 19-1719**
	)	**Issued: March 8, 2021**
U.S. POSTAL SERVICE, ENGLEWOOD POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 12, 2019 appellant, through counsel, filed a timely appeal from a July 12, 2019 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish more than 13 percent permanent impairment of her left lower extremity, for which she previously received schedule

[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.*

award compensation and whether she has established permanent impairment of her right lower extremity, warranting a schedule award.

FACTUAL HISTORY

On August 25, 2006 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sprained ligaments in both knees as a result of performing repetitive work duties. She noted that she first became aware of her condition on August 3, 2006 and realized its relationship to her federal employment on August 21, 2006. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on August 21, 2006. OWCP initially accepted appellant's claim for bilateral knee sprain. It later expanded its acceptance of her claim to include lateral and medial meniscus tears, internal derangement, synovitis/tenosynovitis, old bucket handle tear of the medial meniscus of the left knee, and aggravation of preexisting left knee osteoarthritis.

OWCP authorized left knee abrasion arthroplasty with partial synovectomy, which was performed on January 24, 2007, left knee arthroscopic excision of a torn medial and lateral meniscus, chondroplasty, partial synovectomy, and debridement of a partial tear of the anterior cruciate ligament (ACL), which were performed on September 18, 2007, left knee arthroscopy with chondroplasty, debridement of a partial tear involving the ACL, and partial synovectomy of the left knee, which were performed on November 20, 2008, arthroscopy with chondroplasty and removal of loose bodies of the left knee, which was performed on November 6, 2013, and left knee arthroscopy with resection of a tear of the lateral meniscus, which was performed on July 13, 2017.

By decisions dated January 25 and May 11, 2010 and March 26, 2015, OWCP granted appellant schedule awards totaling 13 percent permanent impairment of the left lower extremity.

On February 8, 2018 appellant filed a claim for an additional schedule award (Form CA-7).

In a development letter dated February 12, 2018, OWCP requested that appellant submit a detailed report from her treating physician which provided an impairment evaluation pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] It specifically requested an opinion as to whether she had reached maximum medical improvement (MMI), a diagnosis upon which the impairment was based, a detailed description of objective findings and subjective complaints, and a detailed description of any permanent impairment under the applicable criteria and tables in the A.M.A., *Guides*.

In response, appellant, through counsel, submitted an April 9, 2018 medical report from Dr. Neil Allen, a Board-certified internist and neurologist, who provided a history of clinical presentation. He described appellant's history of injury and medical treatment. Dr. Allen utilized the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides* to calculate appellant's bilateral knee permanent impairment. Regarding impairment of the right lower extremity, he found that, under Table 16-3, page 509, Knee Regional Grid, the historical data, medical records, and physical examination findings of a knee sprain/strain represented a class one impairment with a grade C or default value of two percent lower extremity permanent

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

impairment. Dr. Allen referenced Table 16-6, page 516, regarding appellant's functional history of an American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire score of 62 and antalgic gait, and assigned a grade modifier for functional history (GMFH) of 2. He referenced Table16-7, page 517, and found a grade modifier for physical examination (GMPE) of 2, based on consistently documented moderate palpatory findings with observed abnormalities, stability, negative Lachman's test, no motion deficit or alteration in alignment/deformity compared to unaffected side, and no muscle atrophy. Dr. Allen assigned a grade modifier for clinical studies (GMCS) of 1 in accordance with Table 16-8, page 519, based on April 9, 2018 bilateral knee x-ray findings.[4] Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he calculated that appellant had a net adjustment of (2-1)+ (2-1) + (1-1) = 2, which warranted movement two places to the right of the default value at class C to class E, totaling three percent permanent impairment of the right lower extremity.

Regarding permanent impairment of the left lower extremity, Dr. Allen again utilized Table 16-3 and identified the diagnoses of total medial and lateral menisectomies as a class C or 22 percent impairment. He again utilized Table 16-6, page 516, and assigned a GMFH of 2 based on appellant's functional history of an AAOS Lower Limb Questionnaire score of 62 and antalgic gait. Dr. Allen again assigned a GMPE of 2 in accordance with Table16-7, page 517, based on his examination findings. Additionally, he again assigned a GMCS of 1 in accordance with Table 16-8, page 519, based on the April 9, 2018 bilateral knee x-ray findings. Dr. Allen applied the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) to find a net adjustment of (2-2)+ (2-2) + (1-2) = -1, which warranted movement one place to the left of the default value at class C to class B, totaling 20 percent permanent impairment of the left lower extremity.

On May 14, 2018 OWCP routed Dr. Allen's report, a statement of accepted facts (SOAF), and the case record to Dr. Jovito Estaris, Board-certified in occupational medicine serving as a district medical adviser (DMA), for review and evaluation of appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. The DMA was also asked to provide a date of MMI.

In a May 29, 2018 report, the DMA noted that he had reviewed the case file and determined that appellant reached MMI on April 9, 2018. He disagreed with Dr. Allen's left knee permanent impairment rating and determined that the diagnosis of left knee medial and lateral menisci tears with partial lateral and medial meniscectomies amounted to a class 1 impairment with a default value of 10 percent in accordance with Table 16-3, page 509 of the sixth edition of the A.M.A., *Guides*. Utilizing Table 16-6, page 516, the DMA assigned a GMFH of 2, a GMPE of 2 under Table 16-7, page 517, and found a GMCS was not applicable as MRI scans which showed meniscus injuries were used to establish the diagnosis. Utilizing the net adjustment formula, he found a net adjustment of 2, which warranted movement two places to the right from the default value of grade C to E, totaling 13 percent left lower extremity permanent impairment. The DMA also used the ROM methodology and calculated, under Table 16-23, page 549 that 130 degrees of flexion and 0 degrees of extension each resulted in 0 percent permanent impairment of the left

[4] The Board notes that the April 9, 2018 bilateral knee x-rays are not contained in the case record.

lower extremity. He found that the DBI method provided the higher impairment rating at 13 percent permanent impairment and should be used as the method of evaluation.

The DMA explained the difference between his left lower extremity impairment rating and Dr. Allen's impairment rating was the class used in the DBI grid. He indicated that Dr. Allen used class 2 for a meniscal injury while the criteria for the DBI grid was total (medial and lateral). The DMA reviewed the operative reports of record which showed appellant only had partial medial and lateral meniscectomies. He maintained that use of class 2 was not appropriate as there was no operative report indicating that total medial and lateral meniscectomies were performed. Regarding impairment to the right lower extremity, the DMA noted the accepted condition of bilateral knee sprain and an August 3, 2006 date of injury. He related that sprains and strains typically resolve in four to eight weeks after an injury. The DMA advised that appellant's knee sprain resolved many years ago. He indicated that persistent symptoms regarding the right knee were not due to a strain or sprain. There was another underlying pathology to explain persistent symptoms. The DMA noted that there were no other accepted conditions for the right knee. He concluded, therefore, that no right knee impairment rating was warranted.

OWCP, in a June 7, 2018 letter, requested that Dr. Allen review the DMA's May 29, 2018 report and address the deficiencies raised in his report.

In an undated addendum to his April 9, 2018 report, Dr. Allen reviewed the DMA's report and concurred with his calculations that appellant had 13 percent permanent impairment of the left lower extremity. With respect to the right lower extremity, he reiterated his prior impairment calculations based on a diagnosis of right knee sprain/strain and concluded that appellant had three percent permanent impairment of the right lower extremity.

On July 18, 2018 OWCP requested that the DMA review Dr. Allen's April 9, 2018 addendum report and provide an opinion on whether he properly applied the A.M.A., *Guides* to his findings.

In a report dated July 23, 2018, the DMA reviewed Dr. Allen's April 9, 2018 report and restated his prior opinion that appellant had no right lower extremity permanent impairment due to her accepted right knee strain. He reiterated his prior explanation that her condition had resolved many years ago and that her current right knee symptoms were related to some other pathology. The DMA also provided an additional explanation in support of his impairment opinion. He noted that a December 27, 2017 report from Dr. Scott Rubenstein, a Board-certified orthopedic surgeon, an August 8, 2017 right knee MRI scan, and x-ray findings referenced by Dr. Allen in his April 9, 2018 addendum report established that appellant's right knee symptoms were due to arthritis.

By decision dated January 10, 2019, OWCP denied appellant's claim for an additional schedule award, finding that the medical evidence of record did not support more than 13 percent permanent impairment of her left lower extremity for which she had previously received schedule award compensation. It further found that the medical evidence of record was insufficient to establish entitlement to a schedule award for her right lower extremity.

On January 15, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 14, 2019.

By decision dated July 12, 2019, the hearing representative affirmed the January 10, 2019 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[5] and its implementing federal regulations,[6] 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 the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

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.[9] 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).[10] 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.[11]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's DMA providing rationale for the percentage of impairment specified.[12]

Section 8123(a) 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

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id.* at § 10.404(a).

[8] 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).

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

[10] *Id.* at 515-22.

[11] *Id.* at 23-28.

[12] *See supra* note 8 at Chapter 2.808.6(e) (March 2017).

examination.[13] 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.[14]

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.[15]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than 13 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

Regarding impairment to the left lower extremity, appellant's physician, Dr. Allen, and the DMA, Dr. Estaris, ultimately agreed that appellant had 13 percent permanent impairment. The physicians utilized the DBI method for rating appellant's permanent impairment due to her accepted left knee medial and lateral menisci tears with partial lateral and medial meniscectomies under Table 16-3, Knee Regional Grid, page 511 of the sixth edition of the A.M.A., *Guides*. The Board finds that the medical evidence does not establish more than 13 percent impairment of appellant's left lower extremity for which she previously received a schedule award.[16]

The Board further finds that the case is not in posture for decision regarding whether she has met her burden of proof to establish permanent impairment of her right lower extremity, warranting a schedule award.

Regarding impairment to the right lower extremity, Dr. Allen used the DBI method and calculated, under Table 16-6, page 516, that appellant had three percent right lower extremity permanent impairment due to the accepted knee sprain/strain. He provided his impairment calculations within his April 9, 2018 and undated addendum reports.

The DMA reviewed Dr. Allen's reports and explained that appellant had no right lower extremity permanent impairment as the accepted bilateral knee sprain had resolved many years ago, noting that the condition typically resolved within four to eight weeks after an injury. Furthermore, he explained that her persistent right knee symptoms were due to arthritis as supported by objective findings of record. The DMA opined that appellant had no permanent impairment due to her accepted bilateral knee sprain. The Board finds that there remains an unresolved conflict in medical opinion between Dr. Allen and the DMA regarding whether appellant's work-related bilateral knee sprain had resolved, and whether appellant had a permanent impairment of the right lower extremity causally related to the accepted injury. As noted above,

[13] 5 U.S.C. § 8123(a); *D.D.*, Docket No. 19-1037 (issued November 6, 2019).

[14] 20 C.F.R. § 10.321.

[15] *S.J.*, Docket No. 19-0623 (issued October 28, 2019); *Barry Neutuch*, 54 ECAB 313 (2003).

[16] *See K.L.*, Docket No. 19-0090 (issued May 3, 2019); *D.K.*, Docket No. 18-0135 (issued August 20, 2018).

if there is disagreement between an employee's physician and the DMA, OWCP shall appoint a referee physician or impartial medical specialist who shall make an examination.[17] The case is therefore remanded for OWCP to refer appellant to an appropriate specialist for an impartial medical examination pursuant to 5 U.S.C. § 8123(a) to determine the extent and degree of right lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides*.[18] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than 13 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation. The Board further finds that this case is not in posture for decision regarding whether she has established permanent impairment of her right lower extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for further action consistent with this decision of the Board.[19]

Issued: March 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[17] *Supra* note 13.

[18] *See S.J., supra* note 15; *P.R.*, Docket No. 18-0022 (issued April 9, 2018); *G.W.*, Docket No. 17-0957 (issued June 19, 2017).

[19] Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board effective January 20, 2021.