

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

R.H., Appellant)	
)	
and)	Docket No. 20-1472
)	Issued: March 15, 2021
U.S. POSTAL SERVICE, POST OFFICE, Malden, MA, Employer)	
)	
)	

Appearances: *Case Submitted on the Record*
John L. De Generes, Jr., 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 August 3, 2020 appellant, through counsel, filed a timely appeal from a July 9, 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 Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). It was asserted that oral argument should be granted to fully resolve complicated issues regarding his schedule award claim. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence presented. As such, the Board finds that the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, appellant's oral argument request is denied and this decision is based on the case record as submitted to the Board.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 September 8, 2014 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an acceleration of bilateral knee osteoarthritis causally related to factors of his federal employment. He did not stop work, but was last exposed to the conditions identified as causing his condition on September 8, 2014. OWCP accepted appellant's claim for a permanent aggravation of preexisting bilateral osteoarthritis of the knees.

In a December 6, 2018 impairment evaluation, Dr. Byron V. Hartunian, an orthopedic surgeon, noted that appellant had undergone a right total knee arthroplasty (TKA) on December 15, 2011 and a left TKA on June 7, 2012. On examination he found no tenderness, effusion, or laxity of the knees. Dr. Hartunian reviewed the American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire completed by appellant indicating that he had moderately stiff lower extremities and mild-to-moderate pain walking and climbing stairs. He measured range of motion (ROM) of the right knee of 96 degrees flexion and zero degrees extension and ROM of the left knee of 99 degrees flexion and zero degrees extension. Dr. Hartunian noted that x-rays obtained on January 9, 2013 "confirmed good position of the total knee components on both sides." He opined that appellant had obtained maximum medical improvement in January 2013. Referencing Table 16-3 on page 511 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ Dr. Hartunian identified the diagnostic criteria (CDX) as a class 3 TKA with a mild motion deficit and x-rays showing fair knee position, which yielded a default impairment rating of 37 percent. He found that a grade modifier for clinical studies (GMCS) and a grade modifier for physical examination (GMPE) were inapplicable as both ROM and x-rays were used to identify the diagnosis. Dr. Hartunian found a grade modifier for functional history (GMFH) of two based on the AAOS Lower Limb Questionnaire. He determined that the GMFH was unreliable and should be excluded from the calculation as it differed by two or more from the GMCS and GMPE, which he indicated were zero for the purpose of modifier determination. Dr. Hartunian concluded that the net adjustment formula did not apply and that appellant had 37 percent permanent impairment of each lower extremity.

On December 21, 2018 appellant filed a schedule award claim (Form CA-7).

On January 16, 2019 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), identified the CDX for the bilateral knees as a class 3 TKA, which yielded a default value of 37 percent. For the right knee, he applied a GMFH of two and a

⁴ Docket No. 17-1477 (issued March 14, 2018).

⁵ A.M.A., *Guides* (6th ed. 2009).

GMCS of two, and found that a GMPE was not applicable as it was used to identify the diagnostic class. After applying the net adjustment formula he found 34 percent permanent impairment of the right lower extremity. For the left knee, Dr. Katz again applied a GMFH and GMCS of two but, after applying the net adjustment formula, found 31 percent permanent impairment of the left lower extremity. He noted that he had used the diagnosis-based impairment (DBI) method and that ROM was not an alternative method of diagnosis for the condition. Dr. Katz concluded that appellant had 31 percent permanent impairment of each lower extremity.

At OWCP's request, Dr. Hartunian reviewed the January 16, 2019 report from the DMA. He asserted that the DMA's opinion failed to conform to the impairment analysis approved by the Board, citing *W.B.*⁶

By decision dated May 23, 2019, OWCP granted appellant a schedule award for 31 percent permanent impairment of each lower extremity.⁷ The period of the award ran for 178.56 weeks from September 6, 2018 to February 6, 2022.

On June 4, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.⁸ On August 23, 2019 appellant, through counsel, requested a review of the written record in lieu of an oral hearing.

By decision dated November 29, 2019, OWCP's hearing representative set aside the May 23, 2019 decision. The hearing representative found that Dr. Katz had not explained the discrepancy between his finding of both 34 percent and 31 percent permanent impairment of the right lower extremity in his report. The hearing representative additionally found that the DMA should review *W.B.* and determine whether he should recalculate his impairment determination.

On December 23, 2019 Dr. Katz again identified the bilateral CDX as a class 3 TKA with a fair result, which yielded a default value of 37 percent. He applied GMFH and GMCS of two to find a net adjustment of two down from the default value, or 31 percent permanent impairment of each lower extremity. Dr. Katz indicated that he had not used x-rays in identifying the CDX, and noted that the x-rays showing good position of the prosthesis would be a class 2 impairment. Instead, he had used appellant's motion deficit to identify the CDX as a class 3 TKA. He asserted, "The existence of the knee replacement is not dependent on the x-rays cited by Dr. Hartunian. It is further my opinion that the fact that a grade modifier is excluded from the net adjustment calculation does not reduce its value to [zero]."

In a February 19, 2020 report, Dr. Hartunian advised that the A.M.A., *Guides* provided that if the GMFH differed by two or more grades from that of the GMPE or GMCS, it should be assumed to be unreliable. He enclosed copies of DMA reports excluding GMCS from arthroplasties as they were used to confirm class placement.

⁶ Docket No. 14-1982 (issued August 26, 2015).

⁷ OWCP indicated that it was awarding appellant 31 percent permanent impairment of the bilateral lower extremities; however, the period of the award establishes that the schedule award was for 31 percent permanent impairment of each lower extremity.

⁸ On August 1, 2019 counsel requested a subpoena be issued for Dr. Katz. On August 14, 2019 OWCP denied his request or a subpoena.

On March 24, 2020 Dr. Katz asserted that his position remained unchanged after reviewing Dr. Hartunian's February 19, 2020 report.

In a May 14, 2020 letter, OWCP requested that counsel provide appellant's treating physician with the DMA's report for review. It requested a response within 30 days. No response was received.

By decision dated July 9, 2020, OWCP found that appellant had no more than 31 percent permanent impairment of each lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁹ and its implementing federal regulation,¹⁰ 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 2009.¹¹ 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.¹²

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.¹³ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE and (GMCS).¹⁴ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁶

⁹ *Supra* note 2.

¹⁰ 20 C.F.R. § 10.404.

¹¹ 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 Award and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

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

¹³ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement.

¹⁴ *Id.* at 494-531.

¹⁵ *Id.* at 411.

¹⁶ *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

On December 6, 2018 Dr. Hartunian discussed appellant's history of bilateral TKAs. On examination he found no tenderness, effusion, or laxity of the knees. Dr. Hartunian measured ROM of 96 degrees flexion and zero degrees extension for the right knee and 99 degrees flexion and zero degrees extension for the left knee. He identified the CDX as a class 3 total knee replacement based on appellant's mild motion deficit and x-ray showing fair knee position. Dr. Hartunian found that a GMCS and a GMPE were inapplicable as he had used ROM and x-rays to confirm the CDX. He determined that the GMCS and GMPE were zero for purposes of determining the modifier and that, consequently, a GMFH was also inapplicable. Dr. Hartunian found no change from the default impairment value of 37 percent. In a supplemental report dated February 19, 2020, he asserted that as the GMFH differed by two or more grades from that of the GMPE and GMCS, it was assumed unreliable. Dr. Hartunian, however, incorrectly assigned grade modifiers of zero for physical examination and clinical studies as they are excluded from the net adjustment calculation.¹⁷ The A.M.A., *Guides* provides, "If a particular criterion, such as range of motion, was used to determine impairment class, it may not be used again to determine the grade and is disregarded in the impairment calculation."¹⁸ As Dr. Hartunian found that ROM and x-rays were used to place the knees into the correct diagnosis class, he improperly assigned a grade modifier of zero for physical examination and clinical studies.¹⁹ Dr. Hartunian's impairment rating, consequently, is not in accordance with the provisions of the A.M.A., *Guides*.

Dr. Katz, the DMA, reviewed Dr. Hartunian's findings and concurred that the applicable CDX was a class 3 TKA, with a default value of 37 percent. He applied a GMFH and GMCS of two, and found that a GMPE was inapplicable as it was used in identifying the CDX. Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or (2-3) + (2-3), yielded an adjustment of two places to the left, or 31 percent impairment of each lower extremity. In a report dated December 23, 2019, Dr. Katz advised that x-rays showed good position and thus met the criteria for a GMCS of two. He asserted that he had used appellant's loss of motion rather than x-rays to identify the CDX for grid placement as a class 3 TKA.²⁰ The Board has reviewed Dr. Katz's opinion and finds that it confirms to the provisions of the A.M.A., *Guides*. Dr. Katz properly reviewed the medical evidence and evaluated appellant's impairment of the lower extremities in accordance with the A.M.A., *Guides*. There is no medical evidence in conformance with the A.M.A., *Guides* showing greater impairment.²¹

¹⁷ *W.B.*, *supra* note 7.

¹⁸ A.M.A., *Guides* 411.

¹⁹ *Supra* note 7.

²⁰ In Example 16-11 on page 527 of the A.M.A., *Guides*, clinical studies are not used to identify the CDX for a TKA.

²¹ See *L.D.*, Docket No. 19-0495 (issued February 5, 2020).

The Board thus finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

On appeal counsel asserts that Dr. Hartunian properly excluded the GMCS as it was used to confirm class placement. As discussed, however, Dr. Katz explained that clinical studies showed a good result, or class 2 impairment, and that he had used ROM rather than clinical studies to identify the CDX. Counsel further contends that Dr. Katz failed to support his finding of a GMCS of two. He asserts that x-rays were used to assess arthritis rather than a TKA. Table 16-3, however, indicates that a TKA with good position is a class 2 CDX. Dr. Katz used the x-rays showing good position to find a GMCS of two. Counsel, citing *J.C and W.B.*,²² contends that the GMFH should be excluded as it differed more than two grades from the GMPE. However, in *J.C. and W.B.*, the GMFH was deemed unreliable as two components of the GMFH, the AAOS score and gait derangement, differed by two or more.²³

Appellant may request a schedule award or increased schedule award 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 that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

²² Docket No. 15-0534 (issued August 26, 2015).

²³ *Id.* See A.M.A., *Guides* 516, Table 16-6.

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 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