

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

G.S., Appellant)	
)	
and)	Docket No. 21-0023
)	Issued: May 7, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS MEDICAL CENTER,)	
Martinsburg, WV, Employer)	

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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 7, 2020 appellant, through counsel, filed a timely appeal from an August 24, 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.

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 her right lower extremity, warranting a schedule award.

FACTUAL HISTORY

On March 29, 2018 appellant, then a 62-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 20, 2018 she sprained her right knee when she slipped in snow and felt a “pop” in her knee while in the performance of duty. On December 18, 2018 OWCP accepted the claim for a right knee sprain.

In a report dated May 14, 2018, Dr. Troy D. Foster, an osteopath, obtained a history of appellant experiencing immediate knee pain after she fell on snow in a parking lot. He advised that an x-ray showed narrowing of the joint space at the patellofemoral joint and a magnetic resonance imaging scan showed a degenerative medial meniscal tear with a loose body and degenerative joint disease. Dr. Foster diagnosed degenerative joint disease of the right knee and a loose body.

By decision dated June 28, 2018, OWCP denied appellant’s traumatic injury claim. It found that the evidence of record was insufficient to establish that she sustained degenerative joint disease of the right knee causally related to the accepted March 20, 2018 employment injury.

In a report dated September 4, 2018, Dr. John C. Veltman, who specializes in family medicine, related that appellant had informed him of her right knee injury on May 2, 2018. He noted that her injury was not preexisting as afterward she was in too much pain to walk. Dr. Veltman diagnosed derangement of the posterior horn of the medial meniscus due to an old tear or injury of the right knee and a tear of the medial meniscus due to a current injury of the right knee. He attributed the injury to the employment incident.

On September 19, 2018 appellant, through counsel, requested reconsideration.

By decision dated December 18, 2018, OWCP vacated its June 28, 2018 decision and accepted appellant’s claim for a lateral collateral ligament sprain of the right knee. It noted, however, that the evidence was insufficient to establish that she was disabled due to her accepted employment injury or that she had sustained a degenerative medial meniscal tear of the right knee as a result of her employment injury.

On March 19, 2019 appellant filed a claim for a schedule award (Form CA-7).

In an impairment evaluation dated May 2, 2019, Dr. Joshua B. Macht, a Board-certified internist, obtained a history of appellant’s slip and fall trying to clear snow from her car. He noted that she had been treated with arthroscopic surgery. On examination Dr. Macht found moderate right knee crepitation with no effusion or instability and grade IV weakness. He measured range of motion (ROM) of the knees and found seven degrees of flexion contracture of the right knee joint. Dr. Macht diagnosed postoperative state of right knee, degenerative medial meniscal tear and advised that right knee x-rays showed 2.4 millimeters of medial joint space narrowing. He diagnosed status post-surgery right knee surgery, noting that the operative report was not available

for review. Dr. Macht determined that appellant had 22 percent permanent impairment of the right lower extremity using Table 16-3 on page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He further noted 10 percent permanent impairment due to flexion contracture of the right lower extremity using Table 16-23 on page 549, which he increased to 11 percent permanent impairment after adjusting for functional history. Dr. Macht advised that appellant had reached maximum medical improvement (MMI) on April 22, 2019.

In a development letter dated October 4, 2019, OWCP requested that appellant submit an impairment evaluation from her physician addressing whether she had reached MMI and rating any permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

On January 23, 2020 Dr. David I. Krohn, a Board-certified internist serving as a district medical adviser (DMA), noted that Dr. Macht indicated that appellant had undergone surgery, but had failed to describe the procedures. He opined that the record did not contain an x-ray report from a radiologist addressing the cartilage interval of the right knee and that he was, thus, unable to provide an impairment rating due to joint arthritis. Dr. Krohn further noted that ROM could not be used as an alternate method of assessment for primary joint arthritis under Table 16-3 of the A.M.A., *Guides*.

By decision dated February 19, 2020, OWCP denied appellant's schedule award claim.

On February 27, 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 June 9, 2020. Counsel contended that Dr. Macht had described the cartilage interval loss in his report and asserted that OWCP should have requested the information necessary to complete the impairment rating

By decision dated August 24, 2020, OWCP's hearing representative affirmed the February 19, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁴ and its implementing federal regulation,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

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

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

A schedule award can only be paid for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁸

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).⁹ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifiers for functional history (GMFH), a grade modifier for physical examination (GMPE), and a grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of the right lower extremity, warranting a schedule award.

Appellant submitted a May 2, 2019 impairment evaluation from Dr. Macht. Dr. Macht diagnosed status post right knee surgery, but noted that he did not have the operative report to review. He found that appellant had 22 percent permanent impairment of the right lower extremity due to arthritis of the right knee. Alternatively, Dr. Macht found 10 percent permanent impairment due to flexion contracture. The Board notes, however, that OWCP has only accepted right knee strain as employment related. A claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.¹³ Preexisting, underlying conditions should be considered only for rating impairment to the extent that the work-

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 Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, 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 *See P.H.*, Docket No. 20-0108 (issued December 18, 2020); *Veronica Williams*, 56 ECAB 357 (2005).

⁹ 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.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* at 411.

¹² *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ *See S.M.*, Docket No. 20-0469 (issued September 3, 2020); *G.S.*, Docket No. 18-0827 (issued May 1, 2019);

related injury has affected any residual usefulness in whole or in part of the scheduled member.¹⁴ Since appellant has not met her burden of proof to show any permanent impairment causally related to her accepted right knee strain, she is not entitled to 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 that appellant has not met her burden of proof to establish permanent impairment of the right lower extremity, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 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

¹⁴ *Supra* note 6 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5. See *F.T.*, Docket No. 16-1326 (issued March 12, 2018).