

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

_____)	
I.C., Appellant)	
)	
and)	Docket No. 21-0005
)	Issued: October 18, 2021
U.S. POSTAL SERVICE, EDGEMOOR)	
BRANCH, Wilmington, DE, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2020 appellant, through counsel, filed a timely appeal from a May 26, 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 greater than 21 percent permanent impairment of her left lower extremity for which she previously received a schedule award.

FACTUAL HISTORY

On February 26, 2014 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim, alleging that on February 5, 2014 she injured her left leg when she slipped on stairs while in the performance of duty. OWCP initially accepted the claim on April 14, 2014 for left hip sprain and on October 30, 2014 it expanded the acceptance of the claim to include permanent aggravation of preexisting left hip avascular necrosis with superior femoral head acetabular fragment displacement. It paid appellant wage-loss compensation on the supplemental rolls as of May 3, 2014. OWCP authorized total left hip arthroplasty, which was performed on February 11, 2015.

In a November 5, 2015 report, Dr. Nicholas Diamond, an osteopathic physician Board-certified in pain management, provided left hip examination findings, including trochanteric tenderness, and femoral acetabular impingement. He reported that the lower extremity activity scale (LEAS) indicated an impairment level of 11/18 and totaled 39 percent for the left lower extremity. Dr. Diamond reported that range of motion (ROM) testing was performed three times with 120/120 degrees forward extension, 25/30 degrees extension, 20/40 degrees adduction, 20/45 degrees internal rotation with pain, and 20/45 degrees external rotation with pain. He diagnosed post-traumatic left hip strain and sprain, post-traumatic aggravation of preexisting left trochanteric avascular necrosis and anterior subchondral collapse, and status post left total hip arthroplasty. In accordance with the sixth edition of The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Table 16-4 on page 515, Dr. Diamond identified the class of diagnosis (CDX) as a Class 3 total hip replacement with mild ROM deficit, which yielded a default impairment value of 37 percent. When determining the impairment CDX, he noted that a Class 3 impairment was used for total hip arthroplasty. Dr. Diamond explained that the grade modifier for functional history (GMFH) would be 1 based on a LEAS score of 39 percent.⁴ He assigned a grade modifier for physical examination (GMPE) of 2,⁵ and a grade modifier for clinical studies (GMCS) of 3.⁶ Applying the net adjustment formula, Dr. Diamond calculated that appellant had a net adjustment of -3, resulting in 31 percent permanent impairment of the left lower extremity. He determined that appellant reached maximum medical improvement (MMI) on November 5, 2015, the date of his examination.

³ A.M.A., *Guides* (2009).

⁴ *Id.* at 516, Table 16-6.

⁵ *Id.* at 517, Table 16-7.

⁶ *Id.* at 519, Table 16-8.

On January 15, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On February 9, 2016 OWCP routed the case record, including Dr. Diamond's report and a statement of accepted facts (SOAF), to Dr. Jovito B. Estaris, Board-certified in occupational medicine serving as a district medical adviser (DMA), for review and an opinion of appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. The DMA was also asked by OWCP to provide a date of MMI.

In a report dated February 21, 2015, Dr. Estaris noted appellant's accepted conditions and reviewed the medical record, including Dr. Diamond's November 5, 2015 impairment rating evaluation. Utilizing Table 16-4, Hip Regional Grid, page 515, he identified a CDX of total hip replacement with a good result as Class 2 impairment. Dr. Estaris assigned a GMFH of 0, a GMPE of 1, and he noted that GMCS was not applicable as this was used in the diagnosis. Applying the net adjustment formula, Dr. Estaris calculated that appellant had a net adjustment of -3, which resulted in a Class 2, Grade A impairment, which equaled 21 percent permanent impairment of the left lower extremity. He noted that his impairment rating was less than Dr. Diamond's impairment rating, explaining that his review of the record showed that appellant's left hip had normal gait and no pain on ROM testing, while Dr. Diamond's ROM findings indicated more than a mild impairment. Dr. Estaris determined that appellant reached MMI on November 5, 2015 the date of Dr. Diamond's examination upon which the impairment rating was based.

In a July 27, 2016 report, Dr. Diamond noted that he had reviewed the February 21, 2016 report from Dr. Estaris. He reported that at the time of his examination appellant had complaints of daily and constant left hip stiffness and pain, which increased with weather changes and squatting. Appellant also related difficulty performing her letter carrier job, household work, and personal care, problems with prolonged waking and standing, and difficulty riding or driving a motor vehicle. He explained that on page 516, section 16.3a of the A.M.A., *Guides*, functional symptoms interfering with different activity levels could be considered when using LEAS in grading appellant's functional impairment, and thus the GMFH of 1 was reasonable. Dr. Diamond also explained that a GMPE of 2 was appropriate based on documented moderate palpatory findings and observed abnormalities. He also disagreed with Dr. Estaris regarding application of GMCS. In support of his opinion, Dr. Diamond noted prejoint replacement x-rays were used for the GMCS modifier. He also explained that he determined that appellant was a Class 3 impairment for CDX of hip replacement based on his physical examination findings including ROM deficits.

On August 29, 2016 OWCP found a conflict in the medical evidence between Dr. Estaris, the DMA, and Dr. Diamond, appellant's treating physician, and referred appellant, along with a SOAF and list of questions to Dr. William Spellman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 6, 2016, Dr. Spellman reviewed appellant's history regarding the February 5, 2014 employment injury, subsequent February 11, 2015 total left hip arthroplasty, and noted that she was working a full-time limited-duty job. On physical examination of her left lower extremity, he found no pain with either hip abduction or adduction, both hips were stable and free to toggling, a curve linear scar about five inches over the hip posterior lateral aspect, a well-healed wound, no lateral hip tenderness or induration, and bilateral hip pain free ROM. Dr. Spellman

reported that appellant's examination was without functional impairment and the only measurable/observable difference was the presence of a well-healed left hip surgical scar. Referencing Table 16-4 of the sixth edition of the A.M.A., *Guides*, he identified a CDX of total hip replacement with a good result as a Class 2 impairment, thereby warranting 25 percent impairment. Dr. Spellman assigned a GMFH of 0 for no gait derangement, and a GMPE of 0, based on a normal examination and no tenderness. He explained that a GMCS was not applicable as the imaging study was part of the diagnosis. Applying the net adjustment formula, Dr. Spellman calculated that appellant had a net adjustment of -4, resulting movement two spaces to the left of the default value on Table 16-4 and Class 2, Grade A impairment, which equaled 21 percent permanent impairment of the left lower extremity.

On November 28, 2016 OWCP referred the case record to Dr. Michael M. Katz, an OWCP district medical adviser (DMA) Board-certified in orthopedic surgery. In a November 30, 2016 report, Dr. Katz reviewed Dr. Spellman's report and the corresponding evidence of record. He concurred with Dr. Spellman's assessment of 21 percent permanent impairment of the left lower extremity based on a Class 2, Grade A impairment for a left hip replacement arthroplasty with a good result. Dr. Katz determined the date of MMI to be October 6, 2016, the date of Dr. Spellman's report.

By decision dated December 13, 2016, OWCP granted appellant a schedule award for 21 percent permanent impairment of the left lower extremity. The award ran for 60.48 weeks from October 6, 2016 to December 13, 2017 and was based on the opinion of Dr. Spellman as confirmed by Dr. Katz.

On December 20, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received follow-up letters dated December 5, 2017 and December 16, 2019 in which appellant, through counsel, advised that OWCP had not scheduled an oral hearing as requested on December 20, 2016 and requested that an oral hearing be scheduled.

A telephonic hearing was held on March 17, 2020. Counsel contended that Dr. Spellman did not properly apply the A.M.A., *Guides* as he did not perform a LEAS or any other evaluation documenting appellant's functional history.

By decision dated May 26, 2020, OWCP's hearing representative affirmed the December 13, 2016 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.⁷ 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

⁷ 5 U.S.C. § 8107; 20 C.F.R. § 10.404

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.⁸ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹

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 hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.¹⁰ After the CDX is determined from the Hip 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).¹¹

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹² For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹³ Where OWCP has referred the case to an impartial medical examiner (IME) to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 21 percent permanent impairment of the left lower extremity for which she previously received a schedule award.

OWCP properly determined that a conflict in medical opinion arose between Dr. Diamond, an examining physician, and Dr. Estaris, the DMA, regarding the extent of appellant's permanent impairment of the left lower extremity. It referred her to Dr. Spellman for an impartial medical examination.

Dr. Spellman was selected as the IME to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). In his October 6, 2016 report, he noted no gait derangement, no tenderness

⁸ *Id.* at § 10.404; *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Chapter 2.808.5(a) (March 2017).

¹⁰ A.M.A., *Guides* 512-15

¹¹ *Id.* at 515-22.

¹² 5 U.S.C. § 8123(a); *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹³ *A.D.*, Docket No. 20-0553 (issued April 19, 2021); *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹⁴ *A.D., id.*; *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

on left hip palpation, negative examination findings, and a left hip surgical scar. Using Table 16-4 of the sixth edition of the A.M.A., *Guides*, Dr. Spellman identified a CDX of total hip replacement with a good result as a Class 2 impairment, thereby warranting a 25 percent default impairment placement. He assigned a GMFH of 0 for no gait derangement and a GMPE of 0, based on a normal examination and no tenderness. Dr. Spellman noted that a grade modifier for GMCS was not applicable as the imaging study was part of the diagnosis. Applying the net adjustment formula, he properly calculated that appellant had 21 percent permanent impairment of the left lower extremity.

The Board finds that Dr. Spellman's impartial medical opinion is sufficiently rationalized, having properly applied the appropriate standards of the A.M.A., *Guides* to the diagnostic tests and findings on physical examination, and based upon a proper factual and medical background such that it is entitled to special weight of the medical opinion evidence accorded an IME.¹⁵ The evidence of record, therefore, establishes that appellant has 21 percent permanent impairment of the left lower extremity.

On appeal, counsel asserts that Dr. Spellman's opinion should not be accorded the special weight as he failed to utilize LEAS in his impairment rating and that Dr. Diamond provided a more thorough examination as he used LEAS to more accurately assess appellant's experience day-to-day. As explained above, the Board finds that Dr. Spellman correctly applied the A.M.A., *Guides* to his examination findings and accurately applied the A.M.A., *Guides*.

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 greater than 21 percent permanent impairment of the left lower extremity for which she previously received a schedule award.

¹⁵ See *A.D., id.*; *V.S.*, Docket No. 19-1679 (issued July 8, 2020); *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *Anna M. Delaney*, 53 ECAB 384 (2002).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 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