United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 21-1428**
	)	**Issued: April 11, 2022**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Fort Gaines, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 29, 2021 appellant filed a timely appeal from a June 22, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the June 22, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met his burden of proof to establish any permanent impairment of the right lower extremity and/or greater than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On March 18, 2019 appellant, then a 44-year-old mechanic, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 2019 he slipped and twisted his left knee when he serviced a turbine bearing while in the performance of duty. He stopped work on March 18, 2019. By decision dated May 2, 2019, OWCP accepted appellant's claim for left knee sprain and left knee internal derangement. It paid him wage-loss compensation on the supplemental rolls effective May 6, 2019 and on the periodic rolls, effective May 26, 2019.

The record reflects that appellant underwent right knee arthroscopic surgery[3] on May 22, 2019 and OWCP-approved left knee arthroscopic surgery on December 4, 2019. The operative reports noted a diagnosis of left knee lateral meniscus tear.

On November 9, 2020 appellant returned to full duty.

On January 20, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

OWCP referred appellant, along with a statement of accepted facts and the medical record, to Dr. Tai Q. Chung, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding his schedule award claim and status of his March 8, 2019 employment injury. In a March 29, 2021 report, Dr. Chung reviewed appellant's history of injury and his medical records. He recounted appellant's complaints of pain, swelling, clicking, giving way, and loss of range of motion (ROM) in both knees. On physical examination, Dr. Chung noted tenderness at the medial and lateral joint lines of both knees and mild crepitus with motion. He also indicated that appellant limped slightly on both legs. Dr. Chung reported that three ROM measurements of appellant's left knee demonstrated 0 to 100 degrees flexion and three ROM measurements of the right knee revealed 0 to 110 degrees of flexion. He diagnosed left knee sprain and left knee internal derangement.

Dr. Chung referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-3 (Knee Regional Grid), page 509, the class of diagnosis (CDX) for a meniscal injury resulted in a class 1 impairment with a default value of two percent due to partial meniscectomy. He assigned a grade modifier for functional

[3] According to a May 29, 2019 memorandum of telephone call (Form CA-110), the surgeon performed surgery on the wrong knee and appellant had to undergo 5 to 6 weeks of physical therapy before undergoing surgery for the correct knee.

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

history (GMFH) of 1 and a grade modifier for physical examination (GMPE) of 2 due to moderate palpatory findings. Dr. Chung also assigned a grade modifier for clinical studies (GMCS) of 2 due to moderate problem. He utilized the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (1 – 1) + (2 – 1) + (2 – 1) = 2, which resulted in +2, and concluded that appellant had three percent permanent impairment of the left lower extremity. Dr. Chung also utilized the ROM method and indicated that, under Table 16-23, page 549, appellant had 10 percent permanent impairment due to 100 degrees flexion. He explained that, since the ROM method provided a higher impairment rating, appellant was entitled to 10 percent permanent impairment for his left knee condition. Dr. Chung further indicated that appellant had basically the same symptoms and physical findings in his right knee. He reported that, if appellant's right knee was accepted, appellant would have a right lower extremity permanent impairment of 10 percent permanent impairment. Dr. Chung noted a date of maximum medical improvement (MMI) of March 29, 2021.

OWCP forwarded Dr. Chung's March 29, 2021 impairment rating report and the medical record to Dr. James W. Butler, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA). In a May 6, 2021 report, Dr. Butler reviewed the case file and indicated that he disagreed with Dr. Chung's impairment evaluation of three percent permanent impairment of the left lower extremity. Utilizing the DBI rating method, the DMA referenced Table 16-3, page 509, of the A.M.A., *Guides* and assigned a CDX of 1 due to partial medial meniscectomy for a default impairment rating of two percent. He noted a GMFH of 1, a GMPE of 1 due to loss of ROM, and a GMCS of 2 due to moderate pathology. After applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (1 – 1) + (1 – 1) + (2 – 1) = 1, which resulted in +1, the DMA calculated that appellant had two percent permanent impairment of the left lower extremity. He reported that, although Dr. Chung assigned a GMPE of 2 based on moderate palpatory findings, the appropriate assignment for moderate palpatory findings was a GMPE of 1. The DMA also explained that the ROM rating method was inapplicable since it should only be used when no other alternative rating method was available. Regarding appellant's right knee, he recommended additional diagnostic testing to determine if there was a ratable permanent impairment utilizing the DBI rating method. The DMA noted a date of MMI of March 29, 2021, the date of Dr. Chung's second opinion evaluation report.

By decision dated June 22, 2021, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity (leg) and zero percent permanent impairment of the right lower extremity. The award ran for 5.76 weeks from March 29 through May 8, 2021. OWCP accorded the weight of the medical evidence regarding the percentage of impairment to the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing 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. FECA, however, does not

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, 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 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 OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[12]

ANALYSIS

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

On January 20, 2021 appellant filed a claim for a schedule award. OWCP subsequently referred appellant's claim to Dr. Chung for a second opinion evaluation and opinion on whether appellant sustained permanent impairment causally related to his March 8, 2019 employment injury. In a March 29, 2021 report, Dr. Chung referenced Table 16-3 of the A.M.A., *Guides* and determined that, under the DBI rating method, appellant had three percent permanent impairment of the left lower extremity. He also determined that appellant had 10 percent permanent impairment of each lower extremity according to the ROM method.

[7] *Id*. at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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

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

[12] *See supra* note 8 at Chapter 2.808.6(f) (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

In a May 6, 2021 report, the DMA reviewed the case file and indicated that he disagreed with Dr. Chung's impairment evaluation. He explained that, according to the A.M.A., *Guides*, the ROM method should only be used to determine actual impairment values when it is not possible to otherwise define impairment. The Board finds that the DMA properly concluded that the ROM method was not applicable in rating permanent impairment for appellant's left knee since the DBI rating method was available.[13]

Utilizing the DBI rating method, the DMA determined that appellant had two percent permanent impairment of the left lower extremity for CDX of partial medial meniscectomy. The Board finds, however, that the DMA did not assign grade modifiers in accordance with the A.M.A., *Guides*.[14] The DMA reported that Dr. Chung assigned a GMPE of 2 based on moderate palpatory findings, but moderate palpatory findings would be a GMPE of 1. Although he assigned a GMPE of 1 due to moderate palpatory findings, Table 16-7, page 517, of the A.M.A., *Guides* indicates that a GMPE of 2 is the proper designation for moderate palpatory findings. A GMPE of 1 is described as "minimal palpatory findings."[15] Thus, the Board finds that the DMA did not adequately explain why he assigned a GMPE of 1 when appellant exhibited moderate palpatory findings, equal to a GMPE of 2. In addition, the DMA indicated that appellant had a GMPE of 1 based on loss of ROM. However, paragraph 16.3(d)[16] of the A.M.A., *Guides* provides that, if there are multiple components to a grade modifier, such as physical examination (which may include palpatory findings, alignment, instability), choose the most objective grade modifier with the highest value, associated with the diagnosis being rated. In this case, the DMA did not explain why he assigned a GMPE of 1 based on loss of ROM even though a grade modifier based on moderate palpatory findings would have produced the highest value.[17] In light of the inconsistent nature of his impairment rating, the Board finds that the DMA's report requires clarification.[18]

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[19] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[20] As OWCP undertook development of the evidence by referring appellant to an DMA, it had an obligation to do a complete job and obtain a proper evaluation and report that

[13] A.M.A., *Guides* 497.

[14] *See T.C.*, Docket No. 20-1170 (issued January 29, 2021).

[15] A.M.A, *Guides*, Table 16-7 at 517.

[16] *Id.* at 518-21.

[17] *See G.M.*, Docket No. 19-1931 (issued May 28, 2020).

[18] *See W.W.*, Docket No. 18-0093 (issued October 9, 2018).

[19] *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[20] *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

would resolve the issue in this case.[21] The case will therefore be remanded for further clarification from the DMA, Dr. Butler, regarding why he chose a GMPE of 1 instead of a GMPE of 2 based on moderate palpatory findings and for the DMA to conduct a proper analysis under the A.M.A., *Guides*. Furthermore, the Board notes that the DMA recommended additional diagnostic testing for appellant's right knee to determine if an impairment rating could be provided pursuant to the DBI rating method. On remand OWCP should obtain additional diagnostic imaging as requested. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2021 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: April 11, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[21] *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).