

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

C.K., Appellant	)	
	)	
and	)	Docket No. 21-0237
	)	Issued: August 16, 2022
DEPARTMENT OF HOMELAND SECURITY,	)	
TRANSPORTATION SECURITY	)	
ADMINISTRATION, Rosemont, IL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 December 9, 2020 appellant, through counsel, filed a timely appeal from an October 22, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than 8 percent permanent impairment of the left upper extremity or 25 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation; and (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective May 6, 2020, as she no longer had disability causally related to her accepted October 31, 2014 employment injury.

## FACTUAL HISTORY

On November 2, 2014 appellant, then a 53-year-old supervisory transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on October 31, 2014 she twisted her left ankle and knee when she tripped on uneven pavement and a small hole in the ground as she attempted to board an employing establishment shuttle bus while in the performance of duty. She did not stop work. OWCP accepted appellant's claim for sprain of the left shoulder rotator cuff and arm and other tear of the medial meniscus of the left knee, current. It paid appellant wage-loss compensation on the supplemental rolls as of December 16, 2014. Appellant underwent OWCP-authorized left knee arthroscopic surgery on February 12, 2015 and total left knee arthroplasty on February 18, 2016, both performed by Dr. David J. Smith, an attending Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation on the periodic rolls, commencing February 8, 2015.

On November 22, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an April 10, 2017 report, Dr. David J. Smith, an attending Board-certified orthopedic surgeon, discussed appellant's factual and medical history and reported the findings of his physical examination. He noted that, upon examination, her left knee had range of motion (ROM) from 0 to 120 degrees. Dr. Smith indicated that appellant had a stable left knee.

In a September 11, 2017 report, Dr. Neil Allen, a Board-certified neurologist and internist, reported the findings of his August 7, 2017 examination and determined that appellant had 8 percent permanent impairment of the left upper extremity impairment and 37 percent permanent impairment of the left lower extremity impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

In a January 5, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), determined that referral of appellant for a second opinion examination and impairment rating was necessary due to the wide variance between the physical examination findings observed by Dr. Smith and the level of lower extremity permanent impairment found by Dr. Allen. He noted, however, that he agreed with Dr. Allen's assessment that she had eight percent permanent impairment of her left upper extremity due to

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

ROM deficits of the left shoulder as determined under Table 15-34 (Shoulder Range of Motion), page 475, of the sixth edition of the A.M.A., *Guides*.

In a March 7, 2018 report, Dr. William Dinenberg, a Board-certified orthopedic surgeon who served as an OWCP referral physician, determined that appellant had 8 percent permanent impairment of her left upper extremity impairment and 25 percent permanent impairment of her left lower extremity impairment under the standards of the sixth edition of the A.M.A., *Guides*.<sup>4</sup> For appellant's left lower extremity, he utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) for her left total knee replacement resulted in a class 2 impairment with a default value of 25 percent. Dr. Dinenberg assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 2, and a grade modifier for clinical studies (GMCS) of 3. He utilized the net adjustment formula,  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 2) + (2 - 2) + (3 - 2) = +1$ , which resulted in a grade D or 25 percent permanent impairment of the left lower extremity. With respect to the left upper extremity, Dr. Dinenberg indicated that the DBI rating method under Table 15-5 (Shoulder Regional Grid), only yielded three percent permanent impairment and therefore appellant's left extremity impairment was more appropriately represented by calculation under the ROM rating method, which yielded six percent permanent impairment under Table 15-34 (Shoulder Range of Motion), page 475.

In a March 15, 2018 report, Dr. Katz indicated that he agreed with Dr. Dinenberg's assessment that appellant had 25 percent permanent impairment of her left lower extremity impairment under the DBI rating method. However, he repeated the opinion he expressed in January 2018 that it was appropriate to find that she had eight percent permanent impairment of the left upper extremity as previously calculated by Dr. Allen, an impairment which was higher than Dr. Dinenberg's assessment of six percent permanent impairment.

By decision dated July 22, 2019, OWCP granted appellant a schedule award for 8 percent permanent impairment of her left upper extremity impairment and 25 percent permanent impairment of her left lower extremity impairment. The award was based on the March 7, 2018 impairment rating of Dr. Dinenberg and the March 15, 2018 impairment rating of Dr. Katz.

In a September 20, 2019 report, Dr. Julie Barre, an attending Board-certified orthopedic surgeon, indicated that a preexisting condition did not contribute to appellant's current medical condition. She advised that no clinical services were indicated at the present time and opined that appellant had reached MMI. Dr. Barre determined that appellant did not have any functional limitations identified or limitations prescribed. She did not provide any work restrictions in the portion of the report for identifying such restrictions.

By decision dated January 7, 2020, an OWCP hearing representative affirmed, in part, and remanded, in part, the July 22, 2019 decision. The hearing representative found that OWCP established the correct commencement date of the schedule on award, but remanded the case for appropriate calculation of the retroactive period based on monetary values and appropriate notification to appellant as to her right to receive OPM benefits during the schedule award period.

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<sup>4</sup> Dr. Dinenberg determined that appellant had reached maximum medical improvement (MMI) by March 7, 2018.

In an April 1, 2020 notice of proposed termination OWCP advised appellant that it would terminate her wage-loss compensation, but not her medical benefits. It explained that the weight of the medical evidence regarding work-related disability rested with the September 20, 2019 report of Dr. Barre. OWCP afforded appellant 30 days to challenge the proposed termination of her wage-loss compensation. Appellant did not submit medical evidence addressing disability within the afforded period.

By decision dated May 4, 2020, OWCP determined that appellant had not established that she had greater than 8 percent permanent impairment of her left upper extremity impairment or 25 percent permanent impairment of her left lower extremity impairment. It found that the weight of the medical evidence regarding permanent impairment continued to rest with the September 11, 2017 impairment rating of Dr. Allen, January 8, 2018 impairment rating of Dr. Katz, March 7, 2018 impairment rating of Dr. Dinenberg and the March 15, 2018 impairment rating of Dr. Katz.

By decision dated May 6, 2020, OWCP finalized its termination of appellant's wage-loss compensation, effective the same date.

Appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative of OWCP's Branch of Hearings and Review with respect to the May 4 and 6, 2020 decisions. A hearing was held on August 7, 2020. By decision dated October 22, 2020, OWCP's hearing representative affirmed the May 4 and 6, 2020 decisions.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>5</sup> and its implementing federal regulations<sup>6</sup> 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 and the Board has concurred in such adoption.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

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, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.<sup>9</sup> After the CDX is determined from the Knee Regional Grid (including

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.*; see *V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

<sup>9</sup> *Id.* at 509-11.

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).<sup>10</sup>

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder 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).<sup>11</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish greater than 8 percent permanent impairment of her left upper extremity or 25 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

In a March 7, 2018 report, Dr. Dinenberg utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, of the A.M.A., *Guides*, the CDX for appellant's left total knee replacement resulted in a class 2 impairment with a default value of 25 percent. He assigned a GMFH of 2, a GMPE of 2, and a GMCS of 3. Dr. Dinenberg utilized the net adjustment formula,  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 2) + (2 - 2) + (3 - 2) = +1$ , which resulted in a grade D or 25 percent permanent impairment of the left lower extremity. With respect to the left upper extremity, he indicated that the DBI rating method under Table 15-5 (Shoulder Regional Grid) only yielded three percent impairment and therefore appellant's left extremity impairment was more appropriately represented by calculation under the ROM rating method, which yielded six percent permanent impairment under Table 15-34 (Shoulder Range of Motion), page 475. In a March 15, 2018 report, Dr. Katz indicated that he agreed with Dr. Dinenberg's assessment that she had 25 percent permanent impairment of her left lower extremity impairment under the DBI rating method. However, he repeated the opinion he expressed in January 2018 that it was appropriate to find that appellant had eight percent permanent impairment of her left upper extremity as previously calculated by Dr. Allen, an impairment which was higher than Dr. Dinenberg's assessment of six percent permanent impairment.

The Board finds that OWCP properly based its July 22, 2019 schedule award on the combined assessments of Dr. Dinenberg, an OWCP referral physician, and Dr. Katz, the DMA. As appellant has not presented probative medical evidence demonstrating that she has greater than

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<sup>10</sup> *Id* at 515-22.

<sup>11</sup> See A.M.A., *Guides* (6<sup>th</sup> ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using section 15.7 (ROM impairment). Such a nROM rating stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

8 percent permanent impairment of her left upper extremity and 25 percent permanent impairment of her left lower extremity, she has not met her burden of proof.

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 permanent impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>12</sup> After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>13</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective May 6, 2020, as she no longer had disability causally related to her accepted October 31, 2015 employment injury.

The weight of the medical evidence is represented by the opinion of Dr. Barre, an attending physician. The September 20, 2019 report of Dr. Barre establishes that appellant had no disability due to her accepted October 31, 2014 employment injury after May 6, 2020. In a September 20, 2019 report, Dr. Barre indicated that a preexisting condition did not contribute to appellant's current medical condition. She advised that no clinical services were indicated at the present time and opined that appellant had reached MMI. Dr. Barre determined that appellant did not have any functional limitations identified or limitations prescribed. She did not provide any work restrictions in the portion of the report for identifying such restrictions.

The Board has reviewed the opinion of Dr. Barre and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of work-related disability.<sup>15</sup> The case record does not contain probative medical evidence demonstrating

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<sup>12</sup> *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>13</sup> *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>14</sup> *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>15</sup> *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).

that appellant was unable to work on or after May 6, 2020 due to her October 31, 2014 employment injury. Thus, OWCP properly terminated her wage-loss compensation, effective May 6, 2020.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish greater than 8 percent permanent impairment of her left upper extremity or 25 percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation. The Board further finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective May 6, 2020, as she no longer had disability causally related to her accepted October 31, 2014 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 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