United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 21-0346**
	)	**Issued: August 17, 2022**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Imperial, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 4, 2021 appellant filed a timely appeal from December 4 and 22, 2020 merit decisions 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 15 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On February 27, 2015 appellant, then a 56-year-old supervisory border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left knee kneeling on the ground during firearms training while in the performance of duty.[2] OWCP accepted the claim for a strain of the left knee and leg. On May 20, 2015 appellant underwent an OWCP-authorized left knee arthroscopy with removal of loose bodies and a chondroplasty of the patellar trochlea. He returned to modified employment on May 23, 2015 and to his regular work duties on July 29, 2015.

In an impairment evaluation dated August 25, 2015, Dr. Christopher T. Behr, a Board-certified orthopedic surgeon, found that appellant had 10 percent permanent impairment of the left knee due to a loss of patellofemoral cartilage interval, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

On October 17, 2015 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), applied the provisions of the sixth edition of the A.M.A., *Guides*[4] to Dr. Behr's findings. He used the diagnosis-based impairment (DBI) rating method to find that appellant had 10 percent permanent impairment of the lower left extremity due to joint space narrowing of the patellofemoral joint, according to Table 16-3, the Knee Regional Grid, on page 511 of the A.M.A., *Guides*.

By decision dated March 1, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity.

On August 8, 2017 OWCP expanded acceptance of the claim to include a loose body in the left knee and an aggravation of left knee unilateral tricompartmental osteoarthritis.

In a report dated August 25, 2017, Dr. Stuart C. Marshall, a Board-certified orthopedic surgeon, opined that appellant had seven percent permanent impairment of the left lower extremity due to patellar subluxation pursuant to the fifth edition of the A.M.A., *Guides*.

On October 4, 2017 appellant filed a claim for an increased schedule award.

By decision dated November 15, 2017, OWCP denied appellant's claim for an increased schedule award.

In an impairment evaluation dated December 2, 2017, Dr. Marshall advised that appellant had reduced motion and crepitation of the left patellofemoral joint with tenderness and mild

[2] Appellant indicated that the injury occurred on February 27, 2014 instead of February 27, 2015; however, this appears to be a typographical error.

[3] A.M.A., *Guides* (5th ed. 2001).

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

swelling. He found 14 percent permanent impairment of the left lower extremity according to Table 16-3 of the A.M.A., *Guides* due to patellar subluxation and patellofemoral degeneration.

On December 6, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated March 6, 2018, OWCP's hearing representative vacated the November 15, 2017 decision. She instructed OWCP to refer Dr. Marshall's December 2, 2017 impairment evaluation to a DMA for review.

On March 29, 2018 OWCP authorized a left knee arthroscopy. On May 25, 2018 appellant underwent a left patella release of the lateral capsule, transverse retinacular ligament, and synovium, and a synovectomy of the anterior and lateral compartments.

In a report dated June 4, 2019, Dr. Marshall found full range of motion (ROM) of the left knee with mild crepitation and swelling of the patellofemoral joint with tenderness. He opined that appellant had reached maximum medical improvement (MMI). Dr. Marshall identified the class of diagnosis (CDX) as a class 2 patellar subluxation with moderate instability, which yielded a default value of 16 percent according to Table 16-3 on page 510 of the A.M.A., *Guides*. He applied a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 2, which yielded a net adjustment of negative two and 14 percent permanent impairment of the left lower extremity.

Appellant, on June 27, 2019, filed a claim for an increased schedule award.

On July 15, 2019 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, identified the CDX as class 2 patellofemoral arthritis with a one millimeter (mm) cartilage interval, which he found yielded a default value of 16 percent according to Table 16-3 on page 511.[5] He applied a GMFH of 1, a GMPE of 1, and GMCS of 2, which yielded a net adjustment of negative two and 14 percent permanent impairment of the left lower extremity. Dr. Katz opined that appellant had reached MMI on May 20, 2019.

On August 13, 2019 OWCP requested that Dr. Katz clarify whether the 14 percent permanent impairment included the prior 10 percent award for permanent impairment of the left lower extremity.

In a supplemental report dated August 15, 2019, Dr. Katz advised that his finding of 14 percent permanent impairment included the prior award for 10 percent permanent impairment of the left lower extremity. He opined that appellant had an additional four percent permanent impairment of the left lower extremity.

[5] The default value for class 2 patellofemoral arthritis with a one mm cartilage interval is 15 percent rather than 16 percent.

By decision dated April 14, 2020, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the left lower extremity. The period of the award ran for 11.52 weeks from May 20 to August 8, 2019.

In a report dated June 8, 2020, Dr. Michael R. Lenihan, a Board-certified orthopedic surgeon, discussed appellant's complaints of moderate left knee pain. He found an antalgic gait on the left with left knee effusion, crepitation of the patellofemoral joint, and left calf and thigh atrophy. Dr. Lenihan measured ROM of the knee three times, finding that appellant had a loss of 10 degrees extension and had 80 degrees of flexion. He indicated that x-rays revealed one mm of joint space with "significant residual lateral subluxation of the patella." Dr. Lenihan diagnosed arthritis, sprain, loose bodies, and internal derangement of the left knee.

In an addendum dated July 19, 2020, Dr. Lenihan found that appellant had 20 percent permanent impairment of the left lower extremity due to loss of motion of the knee. Using the DBI rating method, he identified the CDX as class 2 patellofemoral arthritis with a one mm cartilage interval, which yielded a default value of 15 percent using Table 16-3 on page 511 of the A.M.A., *Guides*. Dr. Lenihan found that applying a GMFH and a GMPE yielded a net adjustment of zero, and that a GMCS was not applicable as it was used to define the CDX. He concluded that appellant had 15 percent permanent impairment of the left lower extremity using the DBI method. Dr. Lenihan asserted that using the ROM to rate the impairment was more appropriate.

On August 6, 2020 Dr. Katz identified the CDX as class 2 patellofemoral arthritis with one mm cartilage interval, which yielded a default value of 15 percent. He applied a GMFH and a GMPE of two and found that a GMCS was not applicable as it was used to assign the CDX. Dr. Katz found no change from the default value after applying the net adjustment formula. He concluded that appellant had 15 percent permanent impairment of the left lower extremity. Dr. Katz noted that Table 16-3 did not provide ROM as an alternative rating method for the diagnosed impairing condition. He opined that appellant had reached MMI on June 8, 2020. Dr. Katz advised that the 15 percent impairment rating included the prior 14 percent permanent impairment rating. He, thus, found that appellant was entitled to a schedule award for an additional one percent permanent impairment of the left lower extremity.

On September 4, 2020 OWCP requested that Dr. Lenihan review the DMA's August 6, 2020 report and discuss the difference in the impairment rating.

In a supplemental report dated September 27, 2020, Dr. Lenihan opined that Dr. Katz' report was consistent with the A.M.A., *Guides*. He noted that, while he felt that using the ROM method better reflected appellant's left lower extremity impairment, the A.M.A., *Guides* provided that ROM was only used when the DBI method was not available. Dr. Lenihan concurred with Dr. Katz' finding of 15 percent permanent impairment of the left lower extremity and a net additional award of 1 percent "due to the prior overlapping 14 [percent] left lower extremity impairment."[6]

[6] In a handwritten note dated October 3, 2020, Dr. Lenihan indicated that appellant should be informed that using ROM was not allowed in appellant's case and that he should accept the DMA's findings.

By decision dated December 4, 2020, OWCP vacated in part its April 14, 2020 decision, finding that appellant had 15 percent permanent impairment of the left lower extremity.

By decision dated December 22, 2020, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the left lower extremity. The period of the award ran for 2.88 weeks from June 8 to 28, 2020.

LEGAL PRECEDENT

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] 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.[9] 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.[10]

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).[11] Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by a GMFH, GMPE, and/or GMCS.[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both

[7] *Supra* note 1.

[8] 20 C.F.R. § 10.404.

[9] 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 Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

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

[11] 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.

[12] *Id*. at 494-531.

[13] *Id*. 411.

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

cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 15 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

In a June 8, 2020 report, Dr. Lenihan found that appellant had an antalgic gait on the left side, left knee effusion, crepitation of the left patellofemoral joint, and atrophy of the left thigh and calf. He measured ROM and found 20 percent permanent impairment of the left lower extremity due to reduced motion. However, Table 16-3 does not provide the ROM impairment rating method as an alternative to the DBI method for appellant's impairment condition.[16] Consequently, appellant is not entitled to a schedule award for loss of ROM of the left lower extremity.

Dr. Lenihan noted that x-rays revealed one mm of joint space with patella subluxation. He identified the CDX as class 2 patellofemoral arthritis with one mm of joint space, which yielded a default value of 15 percent. Dr. Lenihan found no change from the default value after applying a GMFH and a GMPE, and found that a GMCS was not applicable as it was used to identify the diagnosis.

Dr. Katz, the DMA, reviewed Dr. Lenihan's report on August 6, 2020 and concurred with his finding of 15 percent permanent impairment of the left lower extremity using the DBI method. He properly advised that ROM was not an alternative method for rating the condition, according to Table 15-3, as there was no asterisk next to the diagnosis in the Knee Regional Grid.[17] Dr. Katz opined that the 15 percent impairment duplicated the prior award for 14 percent permanent impairment. When the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.[18] Thus, Dr. Katz properly found that appellant was entitled to a schedule award for an additional one percent permanent impairment of the left lower extremity.

Dr. Lenihan reviewed Dr. Katz' opinion on September 7, 2020 and concurred with his finding that appellant had 15 percent permanent impairment of the left lower extremity. There is no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that

[15] 20 C.F.R. § 10.404(d). *See D.P.*, Docket No .19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

[16] Table 16-3, p. 511. *See A.K.*, Docket No. 19-1927 (issued March 31, 2021).

[17] *Id*. *See D.L.*, Docket No. 20-0059 (issued July 8, 2020); *D.M.*, Docket No. 20-1146 (issued December 18, 2020).

[18] *Supra* note 15.

he has greater than 15 percent permanent impairment and, thus, he has not established that he is entitled to additional schedule award compensation.[19]

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 his burden of proof to establish greater than 15 percent permanent impairment of the left lower extremity for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the December 4 and 22, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[19] *See K.H.*, Docket No. 20-1198 (issued February 8, 2021).