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

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| **R.N., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0763** |
| | ) | **Issued: January 21, 2022** |
| **U.S POSTAL SERVICE, POST OFFICE, North Attleboro, MA, Employer** | ) | |

*Appearances:*
*John L. DeGeneres, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On February 21, 2020 appellant, through counsel, filed a timely appeal from a February 13, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] OWCP assigned File No. xxxxxx294 to appellant's claim for the present appeal. In the appeal papers, counsel inadvertently reversed the third and second to last two digits of this file number. The Board finds that this constitutes harmless error in the filing of the present appeal as the content and context of the appeal papers, when considered as a whole, demonstrate the intent to file an appeal from OWCP's February 13, 2020 decision under OWCP File No. xxxxxx294.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

## ***ISSUES***

The issues are: (1) whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation; and (2) whether OWCP's Branch of Hearings and Review properly denied appellant's request for the issuance of a subpoena.

## ***FACTUAL HISTORY***

On September 16, 1992 appellant, then a 47-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging injury to his knees due to factors of his federal employment. OWCP accepted his claim for permanent aggravation of bilateral degenerative joint disease of the knees and paid wage-loss compensation for periods of disability. Appellant underwent OWCP-authorized knee surgery, including total right knee replacement on March 19, 2002 and total left knee replacement on April 30, 2002.[5]

On September 7, 2012 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an August 16, 2012 report, Dr. Bryon Hartunian, an attending Board-certified orthopedic surgeon, determined that appellant had 67 percent permanent impairment of each lower extremity based on the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[6] Dr. Morley Slutsky, a Board-certified occupational medicine specialist and OWCP district medical adviser (DMA) subsequently determined on December 4, 2012 that appellant had 31 percent permanent impairment of each lower extremity based on the standards of the sixth edition of the A.M.A., *Guides*. After extensive development of the medical evidence, including referral to multiple

[3] 5 U.S.C. § 8101 *et seq*.

[4] Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted in order to present argument demonstrating that he had greater lower extremity permanent impairment than had previously been found by OWCP. The Board, in exercising its discretion, denies his request for oral argument because this matter requires an evaluation of the medical evidence required. As such, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. Therefore, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

[5] OWCP administratively combined OWCP File No. xxxxxx239 with the file for the present claim, OWCP File No. xxxxxx294, with the latter serving as the master file.

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

impartial medical specialists, OWCP granted appellant schedule awards which, in total, provided compensation for 31 percent permanent impairment of each lower extremity.

In June 2019, OWCP determined that a conflict in the medical opinion evidence existed regarding permanent impairment and referred appellant, along with an updated statement of accepted facts, for an impartial medical examination with Dr. Alan Solomon, a Board-certified orthopedic surgeon. It requested that he provide an opinion on appellant's lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a July 26, 2019 report, Dr. Solomon discussed appellant's factual and medical history and reported the findings of his physical examination. He referenced the sixth edition of the A.M.A., *Guides* and 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 appellant's total left knee replacement resulted in a class 3 impairment for the left lower extremity with a default value of 37. Dr. Solomon noted that, upon examination, appellant had left knee flexion of 0 to 79 degrees, which under Table 16-23 on page 549 represented a class 3 condition.[7] For the left lower extremity, he assigned a grade modifier for functional history (GMFH) of 1 and a grade modifier for physical examination (GMPE) of 2. Dr. Solomon found that a grade modifier for clinical studies (GMCS) was not applicable as the clinical studies were used to establish the diagnosis and proper placement in the regional grid. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (1 - 3) + (2 - 3) = -3, which resulted in a grade A or 31 percent permanent impairment of the left lower extremity. Dr. Solomon provided a separate calculation for the right lower extremity to find 31 percent permanent impairment and found that appellant reached maximum medical improvement (MMI) on the date of his examination.

By decision dated August 14, 2019, OWCP determined that appellant was not entitled to additional schedule award compensation for either lower extremity. It found that the special weight of the medical evidence rested with the well-rationalized opinion of the impartial medical specialist, Dr. Solomon, who found 31 percent permanent impairment of each lower extremity.

On August 22, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, appellant submitted a September 3, 2019 report from Dr. John J. Walsh, a Board-certified orthopedic surgeon, who asserted that appellant was entitled to a class 4 rating, rather than a class 3 rating, for appellant's left knee under Table 16-3 and Table 16-23 of the sixth edition of the A.M.A., *Guides*. Dr. Walsh opined that, given such a class 4 rating, the permanent impairment of appellant's left lower extremity utilizing Table 16-3 would fall under the default value of 67 percent.

Prior to the hearing, appellant, through counsel, requested a subpoena for Dr. Solomon, which was denied by OWCP on November 6, 2019.

During the hearing held on January 3, 2020, counsel advised that appellant was not contesting the permanent impairment rating he received for his right lower extremity. He argued that appellant was entitled to a class 4 rating, rather than a class 3 rating, for the left knee under

[7] Dr. Solomon also noted that appellant had right knee flexion of 0 to 85 degrees.

Table 16-3 of the sixth edition of the A.M.A., *Guides*. Counsel asserted that the permanent impairment of appellant's left lower extremity was properly calculated in Dr. Walsh's September 3, 2019 report which found 67 percent permanent impairment of that extremity. He argued that he needed to question Dr. Solomon in order to properly assess appellant's permanent impairment.

By decision dated February 13, 2020, OWCP's hearing representative affirmed the August 14, 2019 decision. The hearing representative noted that the prior denial of appellant's request to subpoena Dr. Solomon was now finalized and indicated that counsel failed to establish a sufficient basis to warrant issuance of such a subpoena as he did not prove that oral testimony was the best or only way to obtain additional information from Dr. Solomon. The hearing representative noted that Dr. Solomon had already provided detailed medical reasoning explaining his opinion regarding appellant's permanent impairment.

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

The schedule award provisions of FECA[8] and its implementing federal regulations[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is the primary method of calculation for the lower limb and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor.[12] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the range of motion section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.*; *see V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[11] 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).

[12] A.M.A., *Guides* (6th ed. 2009) 497, section 16.2.

other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[13]

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 left knee, the relevant portion of the left leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[14] After the CDX is determined from the Knee 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).[15] 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.[16]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[17] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[18] In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[19]

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he received schedule award compensation.

[13] *Id*. at 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[14] *Id*. at 509-11.

[15] *Id* at 515-22.

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

[17] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[18] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[19] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

OWCP properly determined that there was a conflict in the medical opinion evidence regarding appellant's lower extremity permanent impairment and, pursuant to 5 U.S.C. § 8123(a), referred him for an impartial medical examination and impairment evaluation with Dr. Solomon.[20]

In his July 26, 2019 report, Dr. Solomon discussed appellant's factual and medical history and reported the findings of his physical examination. He referenced the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the CDX for the total left knee replacement resulted in a class 3 impairment for the left lower extremity with a default value of 37. Dr. Solomon noted that, upon examination, appellant had left knee flexion of 0 to 79 degrees, which under Table 16-23 on page 549 represented a class 3 condition. For the left lower extremity, he assigned a GMFH of 1 and a GMPE of 2. Dr. Solomon found that a GMCS was not applicable as the clinical studies were used to establish the diagnosis and proper placement in the regional grid. He properly utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (1 - 3) + (2 - 3) = -2, which resulted in a grade A or 31 percent permanent impairment of the left lower extremity. Dr. Solomon found that appellant reached MMI on the date of his examination, July 26, 2019.

Appellant submitted a September 3, 2019 report from Dr. Walsh, who asserted that appellant was entitled to a class 4 rating, rather than a class 3 rating, for appellant's left knee under Table 16-3 and Table 16-23 of the sixth edition of the A.M.A., *Guides*. Dr. Walsh opined that, given such a class 4 rating, the permanent impairment of appellant's left lower extremity utilizing Table 16-3 would fall under the default value of 67 percent. The Board notes, however, that Dr. Walsh failed to adequately explain why appellant's left knee was entitled to a class 4 rating, rather than a class 3 rating.

The Board therefore finds that the special weight of the medical evidence with respect to the permanent impairment of appellant's left lower extremity rests with the well-rationalized opinion of the impartial medical specialist, Dr. Solomon and establishes that appellant has no greater than 37 percent impairment of the left lower extremity. 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.

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

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[21] The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[22] Abuse of discretion is generally shown through proof of manifest error, a

[20] *See supra* notes 17 and 18. The Board notes that appellant is not contesting OWCP's determination regarding right lower extremity permanent impairment.

[21] *See* 20 C.F.R. § 10.619.

[22] *See id*.

clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.[23]

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

The Board finds that OWCP's hearing representative properly denied appellant's request for the issuance of a subpoena.

OWCP's hearing representative did not commit an abuse of discretion in denying appellant's request, through counsel, to subpoena Dr. Solomon. The hearing representative noted that counsel failed to establish a sufficient basis to warrant issuance of such a subpoena when he did not prove that oral testimony was the best or only way to obtain additional information from those individuals. The hearing representative noted that Dr. Solomon had already provided detailed medical reasoning explaining his opinion regarding appellant's permanent impairment. The Board finds that the hearing representative's denial of counsel's request to subpoena Dr. Solomon did not constitute as abuse of discretion under the above-noted standard.[24]

## ***CONCLUSION***

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for the issuance of a subpoena.

[23] *B.M.*, Docket No. 17-1157 (issued May 22, 2018); *Gerald A. Carr*, 55 ECAB 225 (2004).

[24] *See id.*

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2022
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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