United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 21-0418**
	)	**Issued: January 6, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Scranton, PA, Employer	)	

Appearances:
Michael R. Mey, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 28, 2021 appellant, through counsel, filed a timely appeal from a January 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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] The Board notes that, following the January 12, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* 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*.

[3] 5 U.S.C. § 8101 *et seq*.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 34 percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 29, 1994 appellant, then a 46-year old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he was ascending stairs to deliver mail when the steps gave way, causing him to fall and sustain a right knee injury while in the performance of duty. He underwent right knee arthroscopic surgery, including a partial medial meniscectomy, on June 3, 1996. OWCP accepted the claim for right knee sprain. On August 7, 1998 it expanded the acceptance of the claim to include right medial meniscus tear, fracture tibia plateau, and degenerative joint disease of the right knee. On February 22, 2013 OWCP again expanded the acceptance of the claim to include localized primary osteoarthritis of the right lower extremity.

By decision dated September 16, 1998, OWCP found that appellant had 20 percent permanent impairment of the right lower extremity in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5]

On January 9, 2014 appellant underwent a total right knee replacement surgery.

By decision dated May 12, 2015, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*, for a total of 21 percent.[6]

Subsequently, appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on December 14, 2015.

By decision dated February 22, 2016, OWCP's hearing representative set aside the May 12, 2015 schedule award decision and remanded the case for further development.

By decision dated March 14, 2016, OWCP found that appellant was not entitled to an additional schedule award.

[4] Docket No. 17-0498 (issued June 5, 2017).

[5] A.M.A., *Guides* (4th ed. 1993).

[6] *Id.* at 6th ed. (2009).

On April 5, 2016 appellant, through counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 13, 2016.

By decision dated August 30, 2016, the hearing representative affirmed the March 14, 2016 OWCP decision.

On September 13, 2016 appellant, through counsel, requested reconsideration. No additional evidence was received.

By decision dated December 9, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim.

Appellant appealed to the Board. By decision dated June 5, 2017,[7] the Board set aside the August 30, 2016 OWCP decision and remanded the case to OWCP for further development of the medical evidence including a second opinion examination and opinion as to the permanent impairment to his right lower extremity.

OWCP subsequently received an October 20, 2017 report, wherein Dr. William J. Krywicki, a Board-certified orthopedic surgeon, performed a physical examination and found that appellant's right knee had range of motion (ROM) of "about 10 degrees" of flexion contracture and 95 degrees of flexion. Dr. Krywicki reported slight increase in anterior play and clicking in the knee joint. He determined that appellant had a flexion and extension gap and balance issue as well as increasing play possibly resulting from the patella overstuffing the extensor mechanism. Dr. Krywicki opined that surgical intervention was the only way of improving appellant's ROM.

On remand OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether appellant had additional right lower extremity permanent impairment in accordance with the A.M.A., *Guides*. In a February 14, 2018 report, Dr. Draper reviewed the SOAF and accepted conditions. He reported that appellant lacked 13 degrees of extension and had 72 degrees of flexion in the right knee. Dr. Draper found no instability, negative posterior drawer sign, negative Lachman's sign, and positive anterior drawer sign. He also found that appellant had reached maximum medical improvement. Dr. Draper rated appellant's impairment based on the diagnosis-based impairment (DBI) estimate, utilizing Table 16-3, page 511 of the A.M.A., *Guides* for total knee replacement. He found that appellant had a poor result, class IV, because of severe loss of ROM, and his reports of pain. Dr. Draper found that the default grade was 67 percent impairment and applied the net adjustment formula, with grade modifier functional history (GMFH) of 2, grade modifier physical examination (GMPE) of 4, and grade modifier clinical studies (GMCS) of 1, to reach a net adjustment of -5, resulting in 75 percent permanent impairment of the right lower extremity.

In a March 1, 2018 supplemental report, Dr. Draper clarified that the net adjustment of -5 resulted in grade A, or 59 percent impairment of the right lower extremity due to total knee replacement with a poor result due to moderate-to-severe motion deficit, in accordance with the A.M.A., *Guides* rather than the previously found 75 percent permanent impairment, which would

[7] *Supra* note 4.

have resulted from a net adjustment of +5. He further provided three ROM measurements, performed after warm up, of flexion 72, 67, and 67 degrees resulting in 20 percent permanent impairment, and flexion contraction of 13, 19, and 17 degrees or 19[8] percent permanent impairment in accordance with Table 16-23, page 549. Dr. Draper found that when utilizing the ROM method with ROM grade modifier 3, that the GMFH of 2, resulted in a net adjustment of 3 or 45 percent permanent impairment of the right lower extremity due to loss of ROM in accordance with Table 16-17, page 545 of the A.M.A., *Guides*. He concluded that the DBI estimate of 59 percent was greater and therefore more appropriate.

On May 28, 2019 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.

In an August 15, 2019 report, Dr. Herbert White, Jr., a Board-certified specialist in occupational medicine serving as OWCP district medical adviser (DMA), noted that appellant had previously received right lower extremity schedule awards totaling 21 percent permanent impairment. He indicated that he was unable to rate the impairment with the information in the record. The DMA found that Dr. Draper's ROM figures for flexion of 72 degrees of flexion contracture were significantly different from those previously obtained by Dr. Krywicki of 95 degrees and that his ROM of 19 degrees for flexion contracture was greater than that of Dr. Krywicki.[9] He therefore determined that Dr. Draper's figures were inconsistent and unreliable. The DMA further found that Dr. Draper's ROM figures could not be used to determine a class 4 rating and that a class 3 rating was more appropriate. He determined that appellant's class of diagnosis was 3, good result, mild instability, in accordance with Table 16-3, page 511 of the A.M.A., *Guides*. Dr. White indicated that he had a GMFH of 2 due to an antalgic gain, GMPE of 3 due to severe atrophy and tenderness, and that GMCS was excluded. He applied the net adjustment formula and determined that the net adjustment was -1 resulting in a final right lower extremity impairment of 34 percent permanent impairment.

By decision dated November 8, 2019, OWCP granted appellant a schedule award for an additional 13 percent permanent impairment of his right lower extremity for a total right lower extremity impairment rating of 34 percent permanent impairment. The award ran for 37.44 weeks for the period February 14 to November 3, 2018.

On October 19, 2020 appellant, through counsel, requested reconsideration. Counsel disagreed with the findings of the DMA and contended that there was no basis to discount the physical findings of Dr. Draper.

By decision dated January 12, 2021, OWCP denied modification of its prior decision.

[8] A.M.A., *Guides*, 549, Table 16-23 indicated that flexion contracture of 10 degrees to 19 degrees is 20 percent permanent impairment of the lower extremity, while flexion contracture of greater than 19 degrees is a severe or 35 percent permanent impairment of the lower extremity.

[9] Dr. White indicated that Dr. Krywicki had found 0 degrees of flexion contracture, while the Board notes that his report repeatedly states 10 degrees of flexion contracture.

LEGAL PRECEDENT

The schedule award provisions of FECA[10] and its implementing federal regulations[11] 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.[12] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[13]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI 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 ROM. ROM is primarily used as a physical examination adjustment factor.[14] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[15]

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.[16] 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).[17] Under Chapter 2.3, evaluators

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] *Id.*; *see V.J.*, Docket No. 19-1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

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

[15] *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).

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

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

are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[18]

ANALYSIS

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

On remand from the Board's June 5, 2017 decision, OWCP referred appellant's case to Dr. Draper for a second-opinion evaluation in order to determine whether appellant had sustained additional right lower extremity permanent impairment in accordance with the A.M.A., *Guides*. In February 14 and March 1, 2018 reports, Dr. Draper provided three ROM measurements for appellant's right knee. He utilized the ROM method under the A.M.A., *Guides* and calculated that appellant had 45 percent permanent impairment due based on findings of 72 degrees of flexion, 20 percent permanent impairment in accordance with Table 16-23, page 549, and 19 degrees of flexion contraction, 19 percent permanent impairment extremity permanent impairment.[19] Under the DBI method, Dr. Draper referenced Table 16-3, page 511 of the A.M.A., *Guides* for total knee replacement and found 59 percent permanent impairment. He explained that, since the DBI impairment rating method was more substantial, appellant had 59 percent right lower extremity permanent impairment. However, Dr. Draper did not provide rationale explaining why he lowered the percentage of impairment from 75 to 59 percent.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[20] 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.[21] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[22] Accordingly, as OWCP undertook development of the evidence by referring appellant to a second-opinion physician, it has a duty to secure an appropriate report addressing the relevant issues.[23]

The Board thus finds that further development of the medical evidence is required to determine the extent of appellant's permanent impairment for schedule award purposes since Dr. Draper failed to provide a rationalized opinion on permanent impairment in accordance with the relevant standards.[24] On remand, OWCP should refer him back to Dr. Draper or to another

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

[19] *Supra* note 9.

[20] *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).

[21] *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).

[22] *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[23] *M.S.*, Docket No. 19-1401 (issued July 8, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

[24] *M.A.*, Docket No. 19-1732 (issued September 9, 2020).

second-opinion physician in the appropriate field of medicine. The second-opinion physician should provide an impairment rating in keeping with the appropriate protocols of the A.M.A., *Guides*. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's right lower extremity permanent impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 12, 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: January 6, 2022
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