United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 20-1490**
	)	**Issued: June 13, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Ozark, MO, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On August 7, 2020 appellant filed a timely appeal from an August 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees'

[1] Appellant 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 appellant's oral argument request, it was asserted that oral argument should be granted because the August 3, 2020 OWCP decision was based on inaccurate medical and personal information. The Board, in exercising its discretion, denies appellant's request for oral argument because the argument on appeal can adequately be 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. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than six percent permanent impairment of her left lower extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On January 21, 2019 appellant, then a 55-year-old assistant rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2019 she sustained a left knee when she slipped and fell on ice while in the performance of duty. She stopped work on January 20, 2019 and underwent left knee surgery on January 22, 2019.[4] OWCP accepted appellant's claim for closed fracture of the left patella. It paid appellant wage-loss compensation on the supplemental rolls, effective March 7, 2019.

On September 28, 2019 appellant returned to full-time, modified duty. She voluntarily resigned from her position, effective November 20, 2019.

On January 24, 2020 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated January 28, 2020, OWCP requested that appellant's treating physician submit an impairment evaluation report in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] It afforded her 30 days to submit additional medical evidence in support of her schedule award claim.

Appellant submitted physical therapy treatment notes dated August 27 through November 18, 2019.

In reports dated November 4 and December 23, 2019, Hillary Roberts, a certified physician assistant, recounted appellant's complaints of left knee pain. She reviewed appellant's history of injury and noted left knee examination findings of left knee pain and mild tenderness. Ms. Roberts

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the August 3, 2020 decision, appellant submitted additional evidence to OWCP. 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*.

[4] A January 22, 2019 operative note indicated that appellant underwent an open reduction, internal fixation (ORIF) of the left patella fracture. The preoperative diagnosis indicated left-closed displaced patella fracture.

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

assessed status-post left patellar hardware removal and left knee manipulation and status-post ORIF left patella fracture surgery.

A December 23, 2019 left knee x-ray scan showed postsurgical changes of the patella consistent with a healed fracture, fairly well-maintained joint spaces, and maintained bony alignment with no acute fracture or dislocation.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record to Dr. Michael S. Clarke, a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether she had sustained permanent impairment of a scheduled member or function of the body due to her accepted January 20, 2019 employment injury in accordance with the A.M.A., *Guides*. In a May 26, 2020 report, Dr. Clarke described the January 20, 2019 employment injury and noted the accepted condition of left patella fracture. Upon examination of appellant's left knee, he observed mild patellofemoral crepitation and mild tenderness on patellar compression. Range of motion testing revealed full extension and flexion was 120 degrees. Dr. Clarke diagnosed healed left patellar fracture. He indicated that appellant had reached maximum medical improvement (MMI). Dr. Clarke reported that no range of motion impairment was assessed due to normal range of motion of the left knee. He referred to 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 510, the class of diagnosis (CDX) for status-post displaced left patella fracture resulted in a class 1 impairment with a default value of 10 percent for articular surface displaced 3 millimeter (mm) or less. Dr. Clarke assigned a grade modifier for functional history (GMFH) of 0 based on no gait derangement. He assigned a grade modifier for physical examination (GMPE) of 1 based on a finding of crepitance. Dr. Clarke assigned a grade modifier for clinical studies (GMCS) of 2. He utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (0 - 1) + (1 - 1) + (2 - 1) = 0 and calculated that appellant had no adjustment, which resulted in 10 percent left lower extremity permanent impairment.

In a July 18, 2020 report, Dr. Jovito B. Estaris, a Board-certified occupational and physical medicine specialist, serving as DMA, reviewed the medical record, including Dr. Clarke's May 26, 2020 second opinion report, and noted that appellant's claim was accepted for closed fracture of the patellar. He reviewed the medical record and indicated that a left knee x-ray scan showed a healed fracture patella with alignment well-maintained. Dr. Estaris referred to the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 510, the CDX for fracture of patella was class 1, which was a default value of seven, for nondisplaced with abnormal examination findings. He assigned a GMFH of 0 for normal gait and a GMPE of 1 for mild tenderness and crepitus. Dr. Estaris explained that GMCS was not applicable as x-ray scans were used to establish the diagnosis and proper placement in the regional grid. He calculated that the net adjustment formula resulted in -1, which resulted in a grade B or six percent permanent impairment of the left lower extremity. Dr. Estaris also utilized the ROM rating method and referenced Table 16-23 (Knee Motion Impairments), page 549, to find zero percent permanent impairment for 120 degrees flexion and zero percent permanent impairment for 0 degrees extension. He concluded that, because the DBI method impairment rating was higher, appellant had six percent permanent impairment of the left lower extremity. Dr. Estaris reported a date of MMI of May 26, 2020. He explained that he disagreed with Dr. Clarke's CDX assignment because left knee x-ray scan taken after appellant's left knee surgery showed healed patella fracture

with well-maintained and near anatomic alignment. Dr. Estaris also reported that Dr. Clarke should not have assigned a GMCS grade modifier because clinical studies were used for class placement.

By decision dated August 3, 2020, OWCP granted appellant a schedule award for six percent permanent impairment of the left lower extremity. The award ran for 17.28 weeks from May 26 to September 23, 2020, based on the opinion of the DMA.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] 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 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.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[9]

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.[10] 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).[11] 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.[12]

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

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] 20 C.F.R. § 10.404(a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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

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

impairment in accordance with the A.M.A., *Guides,* with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

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

On January 24, 2020 appellant filed a claim for a schedule award. OWCP subsequently referred appellant for a second opinion examination. In a May 26, 2020 second opinion report, Dr. Clarke utilized the DBI rating method and determined that under Table 16-3 (Knee Regional Grid) of the A.M.A, *Guides,* appellant had a CDX of class 1 with a default value of 10 percent permanent impairment for articular surface displaced 3 mm or less. He assigned a GMFH of 0, a GMPE of 1, and a GMCS of 2. After applying the net adjustment formula, Dr. Clarke calculated that appellant had no net adjustment, which resulted in 10 percent left lower extremity permanent impairment.

In accordance with its procedures, OWCP forwarded Dr. Clarke's second opinion report and the medical record to Dr. Estaris, a DMA, for review. In a July 18, 2020 report, Dr. Estaris utilized the DBI rating method, and determined that, under Table 16-3 (Knee Regional Grid), appellant had a CDX of class 1 with a default value of seven percent permanent impairment for abnormal examination findings. Dr. Clarke assigned a GMFH of 0 and a GMPE of 1. He indicated that he did not utilize a grade modifier for clinical studies because x-ray scans were used to establish the proper class placement. Dr. Estaris applied the net adjustment formula, which resulted in -1, for a total of six percent left lower extremity permanent impairment.

OWCP's procedures provide that if there was a second opinion examination, and the DMA provides a detailed and rationalized opinion in accordance with the A.M.A., *Guides,* but does not concur with the second opinion doctor's impairment rating, the claims examiner should seek clarification or a supplemental report from the second opinion examiner.[14] After receiving clarification, the claims examiner should refer the case back to the DMA for review.[15] In this case, Dr. Clarke, the second opinion examiner, determined in a May 26, 2020 report that appellant had 10 percent left lower extremity permanent impairment. Dr. Estaris, serving as the DMA, calculated that appellant had six percent left lower extremity permanent impairment. Both physicians referenced appropriate tables in the A.M.A., *Guides* and explained how they applied the provisions of the A.M.A., *Guides* when calculating permanent impairment. Despite their disagreement, OWCP, however, failed to follow its procedures and seek clarification from Dr. Clarke regarding his impairment rating.

The Board, therefore, finds that the case must be remanded for OWCP to seek clarification and obtain a supplemental report from Dr. Clarke regarding the degree of appellant's left lower

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, 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).

[14] Federal (FECA) Procedure Manual, *id.* at Chapter 2.808.6(f)(2) (March 2017).

[15] *Id.*

extremity permanent impairment.[16] On remand OWCP should request that Dr. Clarke address whether he agrees or disagrees with Dr. Estaris' impairment rating and support his conclusion with medical rationale. After this and other such further development as deemed necessary, OWCP 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 August 3, 2020 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: June 13, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[16] *See C.C.*, Docket No. 19-0467 (issued August 7, 2019).