United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
	)	**Docket No. 21-0060**
and	)	**Issued: March 17, 2022**
	)	
U.S. POSTAL SERVICE, MERCHANDISE MART POST OFFICE, Chicago, IL, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 13, 2020 appellant filed a timely appeal from a May 27, 2020 merit decision 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.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 23 percent permanent impairment of the right lower extremity or greater than 16 percent permanent

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the May 27, 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.*

impairment of the left lower extremity for which she previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decisions and order are incorporated herein by reference. The relevant facts are as follows.

On December 28, 1998 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 26, 1998 she sustained a right knee injury when she slipped and fell to the floor while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx040 and accepted it for right knee contusion, right knee strain, and right knee chondromalacia.

Appellant had previously filed a traumatic injury claim (Form CA-1) on January 15, 1992 that was accepted by OWCP for bilateral frostbite of the feet and bilateral plantar fibromatosis.[4] OWCP assigned OWCP File No. xxxxxx102 to the claim. It later expanded acceptance of that claim to include the additional conditions of bilateral tarsal tunnel syndrome and bilateral lesion of the plantar nerve as work related.

By decision dated May 30, 2013, under OWCP File No. xxxxxx102, OWCP granted appellant 16 percent permanent impairment of the left lower extremity and 23 percent permanent impairment of the right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5]

On December 5, 2013, under OWCP File No. xxxxxx102, OWCP referred appellant for a second opinion examination and impairment rating with Dr. Allan Brecher, a Board-certified orthopedic surgeon. In a January 20, 2014 report, Dr. Brecher reported the findings of his January 14, 2014 examination. He referred to the sixth edition of the A.M.A., *Guides* and noted that for the right knee, appellant's chondromalacia warranted a of Class 1 based under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) the right knee chondromalacia resulted in a Class 1 impairment with a default value of seven.[6] Dr. Brecher assigned a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 2. He utilized the net adjustment formula,

[3] Docket No. 14-1689 (issued July 2, 2015); Docket No. 16-1826 (issued May 15, 2017); *Order Remanding Case*, Docket No. 19-0525 (issued March 20, 2020).

[4] Appellant also has a prior claim for a traumatic injury on April 12, 1985, which was accepted by OWCP under OWCP File No. xxxxxx224 for lumbosacral strain.

[5] A.M.A., *Guides* (6th ed. 2009). OWCP indicated that it had previously awarded appellant schedule awards for a total of 20 percent permanent impairment of the right lower extremity and 13 percent permanent impairment of the left lower extremity. Therefore, the May 30, 2013 award granted an additional award of six percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity.

[6] Dr. Brecher indicated that appellant had reached maximum medical improvement (MMI) by the time of his January 14, 2014 examination.

(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 1) + (1 - 1) + (2 - 1) = 2, which resulted in a grade D or eight percent permanent impairment of the right lower extremity. As for appellant's right plantar fibromatosis, Dr. Brecher referenced Table 16-2 (Foot and Ankle Regional Grid), page 501, and found the CDX resulted in a Class 1 with a default value of one. He assigned a GMFH of 2, GMPE of 2, and GMCS of 1. Dr. Brecher utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) + (1 - 1) = 2, which resulted in a grade D or two percent permanent impairment of the right lower extremity. He added the 8 percent and 2 percent values to yield a rating of 10 percent permanent impairment for the right lower extremity. Dr. Brecher indicated that, for the left lower extremity, left plantar fibromatosis was accepted, but a left knee condition was not accepted. Therefore, using the same criteria as the right side, he determined that appellant would have two percent permanent impairment of the left lower extremity due to plantar fibromatosis.

OWCP then referred OWCP File No. xxxxxx102 to Dr. Cristopher Gross, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In a February 24, 2014 report and a March 17, 2014 supplemental report, Dr. Gross concurred with the impairment rating of Dr. Brecher. He found that appellant had 10 percent permanent impairment of the right lower extremity comprised of 8 percent permanent impairment due to right knee deficits and 2 percent permanent impairment due to plantar fibromatosis. Dr. Gross also found that appellant had two percent permanent impairment of the left lower extremity due to plantar fibromatosis.

By decision dated April 7, 2014, under OWCP File No. xxxxxx102, OWCP denied modification of the May 30, 2013 decision, finding that appellant had not established greater than 16 percent permanent impairment of the left lower extremity and 23 percent permanent impairment of the right lower extremity.

Appellant appealed the April 7, 2014 decision to the Board and, by decision dated July 2, 2015,[7] under OWCP File No. xxxxxx102, the Board set aside the April 7, 2014 decision and remanded the case to OWCP for further development of the medical evidence.

During the pendency of the Board appeal, under OWCP File No. xxxxxx102, OWCP again referred the case to Dr. Gross, serving in his role as a DMA. In a May 3, 2014 report, Dr. Gross again found that appellant had a total of 10 percent permanent impairment of the right lower extremity, comprised of 8 percent permanent impairment due to right knee deficits and 2 percent permanent impairment due to plantar fibromatosis. He also found that appellant had two percent permanent impairment of the left lower extremity due to plantar fibromatosis. With respect to impairment of the right lower extremity due to right knee arthritis, Dr. Gross explained that appellant's right knee arthritis warranted eight percent permanent impairment of the right lower extremity due to three millimeters of cartilage interval (CDX of Class 1) when utilizing Table 16-3, page 511, of the sixth edition of the A.M.A., *Guides*. He assigned a GMFH of 2 because she used a cane and assigned a GMPE of 1 due to normal range of motion (ROM) of the right knee and minimal tenderness on palpation. Dr. Gross noted that a GMCS was not applicable because clinical studies were used in the determination of the diagnosis. He indicated that, utilizing the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (2-1) + (1-1) = +1, corresponded to

[7] *Supra* note 3.

grade D under Class 1 on Table 16-3 and warranted eight percent permanent impairment of the right lower extremity due to right knee deficits. Dr. Gross further found that, utilizing Table 16-2, appellant had two percent permanent impairment of each lower extremity due to her bilateral plantar fibromatosis.

OWCP, under OWCP File No. xxxxxx102, then referred appellant for a second opinion examination and evaluation with Dr. James Elmes, a Board-certified orthopedic surgeon. In a March 24, 2016 report, Dr. Elmes considered the impairment caused by appellant's bilateral plantar fibromatosis and referred to the sixth edition of the A.M.A., *Guides*, utilizing Table 16-2, page 501, he noted a CDX of Class 1 for bilateral plantar fibromatosis with a default value of one percent. He assigned a GMFH of 2, noting that she used a cane and limped. Dr. Elmes assigned a GMPE of 2 noting moderate palpable findings and tenderness with normal ROM. He indicated that the GMCS was not applicable. Dr. Elmes utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (2-1) + (2-1) = +2, which resulted in a grade D or two percent permanent impairment of each lower extremity.

With regard to the right knee, Dr. Elmes noted that, according to Table 16-3, page 511, appellant's three-millimeter cartilage interval related to primary knee joint arthritis resulted in a CDX of Class 1 with a default value of seven. He assigned a GMFH of 2 because appellant was known to utilize a cane and assigned a GMPE of 1 due to normal ROM with minimal tenderness on palpation. Dr. Elmes noted that a GMCS was not applicable. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (2-1) + (1-1) = +1, which resulted in a grade D or eight percent permanent impairment of the right lower extremity. Dr. Elmes noted that, when this 8 percent value was added to the above-described 2 percent impairment due to plantar fibromatosis, appellant had 10 percent permanent impairment of the right lower extremity. As noted above, he determined that appellant's left lower extremity permanent impairment was two percent.

OWCP, under OWCP File No. xxxxxx102, then referred the case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as DMA. On April 29, 2016 Dr. Katz reviewed Dr. Elmes' calculations and concluded that he correctly determined impairment. However, he noted that appellant's right knee conditions were accepted under a different claim and, therefore, Dr. Elmes' determination of eight percent permanent impairment for the right lower extremity pertaining to the right knee should not be considered. By decision dated May 13, 2016, OWCP found that appellant had not established greater than 16 percent permanent impairment of her left lower extremity and 23 percent permanent impairment of her right lower extremity for which she previously received schedule awards. Appellant appealed to the Board and, by decision dated May 15, 2017, the Board affirmed OWCP's May 13, 2016 decision.[8]

On April 30, 2018, under the present claim, OWCP File No. xxxxxx040, appellant filed a claim for compensation (Form CA-7) for an increased schedule award. She submitted medical reports dated January 15, 2016 through September 8, 2017 regarding her accepted right knee condition(s).

[8] *Id*.

On June 12, 20218 OWCP administratively combined the present claim, OWCP File No. xxxxxx040, with OWCP File No. xxxxxx102, with the latter file designated the master file.[9]

On June 12, 2018 OWCP referred the combined case file, including a May 20, 2014 statement of accepted facts (SOAF), to Dr. Katz, serving as a DMA, to determine if appellant was entitled to additional impairment of the right knee. It indicated that the relevant case files had been administratively combined.

In a June 13, 2018 report, Dr. Katz noted that he previously had not recommended payment of a schedule award for right knee impairment in his April 29, 2016 report regarding OWCP File No. xxxxxx102 as he was not then aware that the case files were combined. He reported that, based on his current review, if prior awards paid for the right lower extremity included eight percent permanent impairment based on the conditions of the right knee, then there would be no additional award. Dr. Katz reported that a schedule award for 10 percent permanent impairment of the right lower extremity due to a right knee condition had been recommended in a medical report dated October 4, 2002, under OWCP File No. xxxxxx040, and so it would be reasonable to assume that at some point appellant was paid at least 8 percent permanent impairment for her right knee condition. As such, he determined that appellant would be entitled to no further award for impairment of the right knee.

On August 20, 2018 OWCP requested an addendum report from Dr. Katz as to whether appellant had additional permanent impairment of the right lower extremity. It noted that he should review the SOAF dated May 20, 2014. OWCP noted again that appellant had received schedule award compensation for 23 percent permanent impairment of the right lower extremity. It instructed Dr. Katz that, in providing a rating of appellant's current permanent impairment of the right knee, he should stipulate whether the rating was included in the prior percentage awarded or if there should be consideration of an additional award.

In an August 31, 2018 report, Dr. Katz related that, while medical evidence had been received in OWCP File No. xxxxxx102 regarding appellant's right knee permanent impairment and an eight percent permanent impairment rating had been proposed, he had not recommended acceptance of the proposed impairment rating in his April 29, 2016 report as the claims had not been administratively combined. He concluded, however, that based on OWCP's August 20, 2018 memorandum, it appeared that all prior recommended awards had been paid and, thus, the prior awards paid with respect to the conditions of the right knee exceeded the present impairment of eight percent permanent impairment of the right lower extremity.

By decision dated September 6, 2018, OWCP denied appellant's claim for an increased schedule award under OWCP File No. xxxxxx040, finding that she had no greater impairment of the right lower extremity than the 23 percent previously awarded.

Appellant appealed to the Board and, by order dated March 20, 2020,[10] the Board set aside OWCP's September 6, 2018 decision and remanded the case for further development. The Board

[9] It is noted that OWCP File No. xxxxxx102 had previously been combined with OWCP File No. xxxxxx224.

[10] *Supra* note 3.

found that the SOAF provided to Dr. Katz was inaccurate, as it did not list the schedule awards appellant had previously received for her lower extremities and did not clarify whether the awards were paid for permanent impairment caused by appellant's right knee condition or for permanent impairment caused by conditions of other regions of appellant's right lower extremity. The Board directed OWCP to prepare a complete and accurate SOAF and request that Dr. Katz submit a clarifying report regarding appellant's right lower extremity permanent impairment. Following this and any further development deemed necessary, OWCP was to issue a *de novo* decision.

On remand OWCP referred the case record to Dr. Katz, in his capacity as a DMA, and provided him with an updated SOAF dated May 14, 2020, which referenced appellant's combined claims for the lower extremities and noted only, that appellant had received schedule awards for 23 percent permanent of the right lower extremity and 16 percent permanent of the left lower extremity.

In a May 20, 2020 report, Dr. Katz indicated that he reviewed the submitted records including the May 3, 2014 report of Dr. Gross and the updated SOAF of May 14, 2020. He noted that on May 3, 2014 Dr. Gross reviewed the impairment evaluation of Dr. Brecher, dated January 20, 2014, in which Dr. Brecher determined eight percent permanent impairment of the right lower extremity on the basis of a CDX due to impairment under the key factor of primary knee arthritis resulting in a Class 1 impairment, grade D. Dr. Katz advised that Dr. Gross concurred with Dr. Brecher's rating and recommended the same level of impairment, *i.e.*, 10 percent permanent impairment of the right lower extremity (knee and foot) and 2 percent permanent impairment of the left lower extremity (foot). He advised that Dr. Gross reviewed prior records in arriving at his conclusions and appeared to have done so correctly. Dr. Katz noted that the case record, including the updated SOAF, demonstrated that at least 10 percent of the permanent impairment awarded for each extremity stemmed from foot impairment. He indicated that it appeared that, given the prior "overlapping award" of 23 percent for the right lower extremity, there would be no net additional award due for the right lower extremity on the basis of Dr. Gross' May 3, 2014 assessment, since his recommended impairment of 8 (constancy within the same sentence) percent for the right lower extremity "does not exceed the prior overlapping award." Dr. Katz noted, likewise, his recommendation of 2 percent permanent impairment for the left lower extremity does not exceed the prior overlapping award of 16 percent permanent impairment for the left lower extremity. Therefore, he found there is no net additional award now due for the left lower extremity based on his recommendation of May 13, 2014.

By decision dated May 27, 2020, OWCP determined that appellant had not met her burden of proof to establish greater than 23 percent permanent of the right lower extremity or greater than 16 percent permanent of the left lower extremity for which she previously received schedule award compensation.

LEGAL PRECEDENT

The schedule award provisions of FECA[11] and its implementing federal regulations[12] 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.[13] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[14]

ANALYSIS

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

On remand from the Board's March 20, 2020 order, OWCP provided Dr. Katz with a May 14, 2020 SOAF, which briefly discussed appellant's combined claims for the lower extremities and noted, without elaboration, that appellant had received schedule awards for 23 percent permanent of the right lower extremity and 16 percent permanent of the left lower extremity. The May 14, 2020 SOAF did not identify each individual schedule award that appellant received, nor did it explain what portions of each schedule award represented impairment caused by deficits in different areas of the lower extremities (*e.g.*, knee deficits *versus* foot deficits).

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.[15] OWCP's procedures dictate that when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[16] OWCP did not provide Dr. Katz with a complete SOAF as it did not list the previous individual schedule awards appellant had received for her lower extremities and did not clarify whether the awards were paid for permanent impairment of appellant's right knee or for permanent impairment of other areas of appellant's lower extremities. Thus, the Board finds that the May 27, 2020 report produced by

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

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

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

[15] *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[16] *R.W.*, Docket No. 19-1109 (issued January 2, 2020); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

Dr. Katz was not based on an accurate factual framework and cannot represent the weight of the medical evidence sufficient to deny appellant's claim for an additional schedule award.[17]

Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.[18] Accordingly, the Board finds that the case must be remanded to OWCP. On remand OWCP shall prepare a complete and accurate SOAF and request that Dr. Katz, the DMA, submit a clarifying report regarding appellant's lower extremity permanent impairment. Following 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 May 27, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 17, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[17] *G.C.*, Docket No 18-0842 (issued December 20, 2018).

[18] *D.S.*, Docket No. 19-0292 (issued June 21, 2019).