United States Department of Labor
Employees' Compensation Appeals Board

N.T., Appellant	)	
and	)	**Docket No. 21-1308**
	)	**Issued: March 30, 2022**
DEPARTMENT OF VETERANS AFFAIRS, VA MEDICAL CENTER, Minneapolis, MN, 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, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 9, 2020 appellant filed a timely appeal from a March 31, 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]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the March 31, 2020 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*.

ISSUE

The issue is whether appellant met her burden of proof to establish more than 23 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 9, 2009 appellant, then a 33-year-old pharmacy technician, filed a traumatic injury claim (Form CA-1) alleging that on November 10, 2009 she injured her left knee when she tripped over a stack of totes. OWCP accepted the claim for left knee strain and authorized left kneecap repair/arthroscopic surgery, which was performed on July 26, 2012. It also authorized the removal of left support implant, which was performed on February 7, 2014, and total left knee arthroplasty, which was performed on January 21, 2015.

On December 17, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated February 8, 2016, OWCP granted appellant a schedule award for 23 percent left lower extremity permanent impairment. The award ran 66.24 weeks for the period January 23, 2016 to April 30, 2017 and was based on the impairment rating of Dr. Ann M. Reiner, an occupational and environment physician, and the January 14, 2016 report of Dr. David I. Krohn, a Board-certified internist, serving as an OWCP district medical adviser (DMA). The diagnostic basis for the schedule award was appellant's total knee replacement.

By decision dated July 29, 2016, OWCP expanded acceptance of the claim to include left leg sprain, left lower leg joint pain, left gait abnormality, closed dislocation of patella, cramp in limb, and venous embolism and thrombosis of deep vessels of the lower extremity.

On December 2, 2019 appellant filed a Form CA-7 claim for an increased schedule award.

On January 8, 2020 OWCP referred appellant, along with the case record, an updated statement of accepted facts (SOAF), and a series of questions to Dr. Chester A. DiLallo, a Board-certified orthopedic, for a second opinion evaluation regarding permanent impairment of appellant's left lower extremity. The January 8, 2020 SOAF provided to Dr. DiLallo included past treatment modalities and noted that appellant previously received a schedule award for 23 percent permanent impairment of the left lower extremity.

In a report dated February 4, 2020, Dr. DiLallo noted his review of the SOAF and appellant's medical records. He determined that appellant had reached MMI on February 4, 2020. Upon examination of the left knee, Dr. DiLallo found a slightly shortened stance on the left side,

[3] Docket No. 18-1620 (issued May 6, 2019).

tenderness in the inferior patella and lateral side of the knee in the collateral ligaments region, no effusion, some slight medial instability, and the patella could not be subluxed by manual pressure. He also reported full left knee extension and flexion to 120 degrees. Dr. DiLallo referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] Knee Regional Grid and noted that, for the left knee, the diagnostic key factor was a total knee replacement arthroplasty with a good result (good position, stable, and functional).[5] He noted a grade modifier for functional history (GMFH) of 3 based on a pain disability questionnaire, which yielded a raw score of 113. Dr. DiLallo found that a grade modifier for clinical studies (GMCS) was not applicable and that no other grade modifiers were applicable.[6] He explained that application of the net adjustment formula resulted in a finding of -+1 or grade D, which was the equivalent of 25 percent permanent impairment of the left lower extremity.

On February 7, 2020 OWCP referred Dr. DiLallo's report, the medical record, and SOAF, to Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). In a report dated March 21, 2020, Dr. Slutsky noted his disagreement with Dr. DiLallo's impairment rating of 25 percent left lower extremity permanent impairment. Based on his review of Dr. DiLallo's report and SOAF, Dr. Slutsky calculated 21 percent left lower extremity permanent impairment. In reaching this determination, he assigned a class of diagnosis (CDX) for the diagnosis of total knee replacement with fair or good result of class 2[7] (class 2, default value of 25 percent).[8] Dr. Slutsky assigned a GMFH of 0 as Dr. DiLallo related that appellant had no gait derangement, a grade modifier for physical examination (GMPE) of 2 due to general palpatory tenderness and no instability and no GMCS as it was used to define the class of impairment.[9] He explained that application of the net adjustment formula resulted in a finding of -2 or grade A, which was the equivalent of 21 percent permanent impairment of the left lower extremity.[10] Dr. DiLallo noted that this was less than her prior impairment rating.

By decision dated March 31, 2020, OWCP denied appellant's claim for an increased schedule award.

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

[5] *Id.* at 511, Table 16-3.

[6] *Id.* at 516, Table 16-6.

[7] Dr. Slutsky noted a class 3 instead of class 2. However, this appears to be a typographical error as he refers the midrange of 25 percent. The midrange is 25 percent for a class 2 while the midrange for a class 3 is 37 percent.

[8] *Supra* note 6.

[9] *Id.* at 516, Table 16-6, 517, Table 16-7, and 519, Table 16-8.

[10] *Id.* at 521.

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. 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.[13] 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.[14]

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 position of the left leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[15] After 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).[16] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[17]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[18]

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[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404.

[13] 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 Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

[14] *M.T.*, Docket No. 21-0169 (issued October 14, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[15] *See supra* note 5 at 509-11.

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

[17] *Id.* at 23-28; *see D.W.*, Docket No. 21-0840 (issued November 30, 2021); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[18] *See supra* note 16 at Chapter 2.808.6(f) (March 2017).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 23 percent permanent impairment of her left lower extremity for which she previously received a schedule award.

In a February 4, 2020 report, Dr. DiLallo, based upon a review of the medical records, a SOAF, and series of questions, diagnosed a total left knee replacement. He provided a permanent impairment rating based upon the sixth edition of the A.M.A., *Guides*. Dr. DiLallo assigned a CDX for the diagnosis of total knee replacement with fair or good result of class 2 based on a good result and a GMFH of 3 based on a pain disability questionnaire which yielded a raw score of 113. He applied the net adjustment formula and calculated 25 percent permanent impairment of the left lower extremity based upon the DBI methodology.

OWCP referred Dr. DiLallo's report to the DMA, Dr. Slutsky. In a report dated March 21, 2021, Dr. Slutsky found 21 percent left lower extremity permanent impairment. He disagreed with Dr. DiLallo's finding of 25 percent left lower agreement impairment, which he explained was due to the difference in the application of the GMFH. Dr. Slutsky explained that he determined appellant GMFH of 0 rather than GMFH 3, as found by Dr. DiLallo, which he explained was based Dr. DiLallo's finding of no gait derangement.

Dr. Slutsky properly reviewed the medical evidence and evaluated appellant's impairment of the left lower extremity in accordance with the A.M.A., *Guides*, as a GMFH of 0 rather than GMFH of 3, based upon no gait derangement. The Board further finds that Table 17-12, cited by Dr. DiLallo as the basis for finding a GMFH of 3 is inapplicable as it pertains to the pelvis and not the knee.

As there is no medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has greater impairment than that which was previously awarded, the Board finds that appellant has not met her burden of proof.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than 23 percent permanent impairment of her left lower extremity for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 30, 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