United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 20-0316**
	)	**Issued: November 22, 2022**
U.S. POSTAL SERVICE, LOS GATOS DELL STATION, Campbell, CA, Employer	)	

Appearances:
Capp Taylor, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 25, 2019 appellant, through his representative, filed a timely appeal from a September 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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 September 23, 2019 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*.

Pursuant to the 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 25 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On July 24, 2007 appellant, then a 36-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee conditions due to factors of his federal employment. He indicated that he first realized his condition in August 2006 and first realized its relation to his federal employment on June 27, 2007. On July 20, 2007 appellant underwent a right knee magnetic resonance imaging (MRI) scan which demonstrated degenerative tearing of the posterior horn of the medial meniscus. OWCP accepted this claim for tear of the right medial meniscus under OWCP File No. xxxxxx976. Appellant returned to full duty with no restrictions on June 2, 2008.

On July 23, 2011 appellant filed a traumatic injury claim (Form CA-1) alleging that on July 20, 2011 he sprained his right ankle and sustained contusions to his back as well as abrasions to his right forearm when he fell down stairs while in the performance of duty. OWCP accepted this claim for right ankle sprain under OWCP File No. xxxxxx729.

On January 26, 2012 appellant underwent an authorized right ankle arthroscopy due to talar dome osteochondritis dissecans with talar dome microfracture.

On January 8, 2013 appellant filed another Form CA-2 under OWCP File No. xxxxxx976 alleging that he felt a sharp pain in his right knee immediately followed by swelling and inability to bend his right knee while delivering mail on a park and loop portion of his assigned route. He indicated that he first realized his condition and its relation to his federal employment on June 27, 2007.

OWCP expanded acceptance of appellant's claim to include right osteochondritis dissecans. It administratively combined OWCP File Nos. xxxxxx976 and xxxxxx729, with the latter serving as the master file.

On October 20, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award. He provided a report from Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, dated June 29, 2015 who calculated his right lower extremity impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

[3] 5 U.S.C. § 8101 *et seq*.

(A.M.A., *Guides*)[4] as 22 percent permanent impairment of the right foot and ankle due to severe limitations in range of motion (ROM).[5]

By decision dated April 28, 2016, OWCP granted appellant a schedule award for 22 percent permanent impairment of the right lower extremity due to loss of ROM of his right foot and ankle.

In a July 20, 2016 report, Dr. Bishai, found that appellant had reached maximum medical improvement (MMI) with regard to his right knee. He found that his main disability was due to reduced ROM of his right knee joint. Dr. Bishai applied Table 16-23, page 549 of the A.M.A., *Guides* to his findings of extension of 175 degrees, 10 percent permanent impairment and flexion of 100 degrees, 10 percent permanent impairment, and added these impairments to reach a total impairment of 20 percent of the right lower extremity due to loss of ROM.

Appellant filed a Form CA-7 for a schedule award due to his right knee condition on July 30, 2018. In a May 2, 2018 report, Dr. Mark A. Seldes, a Board-certified family practitioner, listed his findings for schedule award purposes noting that he reached MMI for his right knee on May 2, 2018. He related that appellant had previously received a schedule award due to his right foot and ankle impairments. Dr. Seldes diagnosed degenerative tearing of the posterior horn of the medial meniscus. He found 100 degrees of flexion, five degrees of extension and flexion contracture leading to extension lag as well as mild laxity of the medial and collateral ligaments. Dr. Seldes noted that he had conducted the ROM assessment after an initial warm-up and that the calculation was conducted three times as required by the A.M.A., *Guides*. He identified the diagnosis-based impairment (DBI) as class 1, meniscal injury, found in the A.M.A., *Guides* on page 509, Table 16-3 with an impairment range from 1 to 3 percent permanent impairment. Dr. Seldes then determined appellant's loss of ROM impairments in accordance with page 549, Table 23 of the sixth edition of the A.M.A., *Guides* finding 10 percent permanent impairment due to loss of flexion and 10 percent permanent impairment due to flexion contracture or 20 percent impairment of the right knee. He recommended combining his right lower extremity impairment of 22 percent for the right foot and ankle and 20 percent for the right knee in accordance with the Combined Values Chart, page 604 of the A.M.A., *Guides* to reach 38 percent permanent impairment of the right lower extremity. Dr. Seldes concluded that as appellant had previously received a schedule award for 22 percent permanent impairment, he was entitled to a schedule award for an additional 16 percent permanent impairment of the right lower extremity.

On September 13, 2018 OWCP referred the record and a statement of accepted facts (SOAF) to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review and rating of appellant's permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.

In a September 17, 2018 report, Dr. Harris reviewed the SOAF and the medical record, including the July 20, 2017 report from Dr. Bishai and the May 2, 2018 report from Dr. Seldes. He found that based on the DBI of meniscal injury appellant had three percent permanent

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

[5] *Id.* at 549, Table 16-22.

impairment based on Table 16-3, page 509 of the A.M.A., *Guides*. Dr. Harris noted that Dr. Bishai and Seldes had calculated his impairment using both the DBI and ROM rating methods. Referencing section 16.7, page 543, of the A.M.A., *Guides*, the DMA explained that the A.M.A., *Guides* allow for the ROM method to be used as a stand alone rating when there were no DBI sections that were applicable or in rare cases when a severe injury results in passive ROM loss qualifying for class 3 or 4 impairment or for amputation ratings. He explained that because the A.M.A., *Guides* did contain an appropriate DBI for appellant's diagnosed condition, it did not meet any of the criteria of section 16.7, page 543, of the A.M.A., *Guides* to allow for impairment to be calculated under the ROM method. The DMA combined the prior right lower extremity rating of 22 percent permanent impairment with the 3 percent permanent impairment due to his right knee and found that appellant had a total of 25 percent permanent impairment of his right lower extremity entitling him to a schedule award. He determined that the date of MMI was May 2, 2018.

On October 17, 2018 OWCP requested a supplemental report from Dr. Seldes addressing the findings and conclusions of the DMA regarding appellant's permanent impairment rating in accordance with the A.M.A., *Guides*. It afforded 30 days for a response.

By decision dated January 28, 2019, OWCP granted appellant a schedule award for an additional three percent permanent impairment of his right lower extremity for a total of 25 percent permanent impairment. The award ran for 8.64 weeks during the period May 2 to July 1, 2018.

Dr. Seldes completed an additional report on May 13, 2019. He disagreed with the application of the A.M.A., *Guides* by the DMA. Dr. Seldes contended that Chapters 1 and 2 of the A.M.A., *Guides* hold greater significance than the other chapters and that Chapter 2, page 20, Table 2-1, line 12 required that the rating method producing the higher impairment rating be used. He further contended that page 500 of Chapter 16 of the A.M.A., *Guides* asserted that ROM will, in some cases, serve as an alternative approach to impairment rating which was not combined with the DBI, and stood alone as an impairment rating. Dr. Seldes reviewed FECA Bulletin No. 17-06, issued May 8, 2017, regarding the upper extremity provisions of Chapter 15 of the sixth edition of the A.M.A., *Guides*, and noted that although there were no asterisks in the DBI Table 16-2 through Table 16-4, pages 501 through 515, of Chapter 16 of the sixth edition of the A.M.A., *Guides*, the upper and lower extremity chapters were otherwise almost identical. He asserted that he properly assessed both DBI and loss of ROM and found that loss of ROM was the appropriate impairment method for appellant's diagnosed condition of medial meniscus tear.

On May 21, 2019 appellant, through his representative, requested reconsideration of the January 28, 2019 decision relying on the arguments found in Dr. Seldes' May 13, 2019 report.

On May 29, 2019 OWCP requested a supplemental report from Dr. Harris clarifying the basis for his impairment rating. In a May 30, 2019 report, Dr. Harris repeated that the sixth edition of the A.M.A., *Guides* provided that loss of ROM is to be used as a stand alone rating when there are no DBI sections that are applicable or, in very rare cases, where a severe injury results in a passive loss of ROM. He found that appellant's diagnosed condition did not meet any of the criteria discussed in Chapter 16.7 page 543 of the A.M.A., *Guides*. Dr. Harris further noted that his condition identified on Table 16-3, page 509 also did not contain an asterisk identifying it as appropriate to be evaluated by ROM as a stand alone method.

OWCP referred Dr. Harris' May 30, 2019 report to Dr. Seldes for comment on June 12, 2019. It afforded him 30 days to comment. Dr. Seldes responded on June 26, 2019 and continued to dispute the interpretation of the A.M.A., *Guides* page 543 provided by the DMA. He contended that the exception on page 543 of the A.M.A., *Guides* for using ROM for primary stand alone impairment number 2, in very rare cases of severe injuries that resulted in passive ROM losses qualifying for class 3 or 4 impairment, should be applied to all instances in which the active ROM impairment percentage was greater than the percentage impairment from the DBI class.

By decision dated July 26, 2019, OWCP denied modification of its prior decision.

On August 17, 2019 appellant, through his representative, requested reconsideration and submitted an additional report from Dr. Seldes. In a report dated August 5, 2019, Dr. Seldes repeated his arguments regarding ROM and DBI impairment ratings. He again contended that appellant was entitled to an additional schedule award of 16 percent permanent impairment of his right lower extremity due to loss of ROM of his knee.

On September 4, 2019 OWCP referred the August 5, 2019 report from Dr. Seldes to Dr. Harris as the DMA. In a September 6, 2019 report, the DMA again found that the A.M.A., *Guides*, provided an appropriate DBI for appellant's condition, meniscal tear, and that appellant's condition did not meet any of the criteria on page 543 of the A.M.A., *Guides* to allow for a stand alone ROM impairment rating. He emphasized that DBI was the method of choice for calculating impairments and that ROM was used primarily as a physical examination adjustment factor and only as a stand alone impairment rating in rare cases when it was not possible to otherwise define impairment.

By decision dated September 23, 2019, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

The schedule award provisions 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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates 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.[8] The Board has approved the use by OWCP of

[6] *Supra* note 3.

[7] 20 C.F.R. § 10.404.

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

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.[9]

In determining permanent impairment of 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, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[12]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[14] When there exists opposing reports of virtually equal weight and rationale and the case is 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.[15]

ANALYSIS

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

OWCP accepted appellant's claims for right ankle sprain and right osteochondritis dissecans as well as for right meniscal tear as causally related to his federal employment duties. It subsequently granted him a schedule award for 22 percent permanent impairment of the right lower extremity due to his ankle conditions. On July 30, 2018 appellant filed a Form CA-7 for a schedule award claim due to his accepted right knee condition.

[9] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

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

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

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

[13] 5 U.S.C. § 8123(a); *see R.P., supra* note 5; *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).

[14] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[15] *See R.P., supra* note 5; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

In support of his additional schedule award, appellant submitted reports from his physician Dr. Seldes dated May 2, 2018, May 13, June 26, and August 5, 2019 indicating that he had reached MMI as of May 2, 2018. Utilizing Table 16-23, page 549 of the A.M.A., *Guides*, he found that appellant had 20 percent permanent impairment of his right lower extremity due of extension of 175 degrees, 10 percent permanent impairment and flexion of 100 degrees, 10 percent permanent impairment.

In reports dated September 17, 2018 and May 30 and September 6, 2019, the DMA, Dr. Harris, opined that appellant was not entitled to a schedule award based on ROM impairments. He found that appellant had three percent permanent impairment based on Table 16-3, page 509 of the A.M.A., *Guides* due to the DBI of meniscal injury.

Appellant's attending physician, Dr. Seldes and Dr. Harris, an OWCP DMA disagree regarding the extent of appellant's permanent impairment of the right lower extremity due to his accepted work-related condition. Dr. Seldes opined that the nature of his right lower extremity impairment allowed rating under the sixth edition of the A.M.A., *Guides* utilizing the ROM method as the DBI method did not allow a rating for appellant's full functional loss, while the DMA opined that appellant's permanent impairment was not an exceptional circumstance which allowed rating under the ROM method, pursuant to the guidelines provided in section 16-7, page 543 of the A.M.A., *Guides*.[16]

The Board finds that a conflict in medical opinion exists between the opinions of Dr. Seldes, on behalf of appellant, and Dr. Harris, OWCP's DMA, regarding the degree of permanent impairment that appellant sustained for his accepted right knee condition.[17] While both physicians utilized the A.M.A., *Guides*, they differed on whether the ROM or DBI method should be utilized to assess his permanent impairment. As noted above, if there is a disagreement between an employee's physician and OWCP's physician, OWCP shall appoint a third physician, known as an impartial medical specialist, who shall make an examination.[18] Because the reports of Dr. Seldes and Dr. Harris are virtually of equal weight, he must be referred to an impartial medical specialist to resolve the existing conflict in the medical opinion evidence regarding the extent of the permanent impairment of his right lower extremity.[19]

On remand OWCP shall refer appellant, along with the case record and SOAF, to a specialist in the appropriate field of medicine for an impartial medical evaluation and report which includes a rationalized opinion as to the extent of his right lower extremity permanent impairment.

[16] *See S.A.*, Docket No. 20-0890 (issued January 27, 2010) (in which the Board found that OWCP had properly determined a conflict of medical evidence when the DMA and attending physicians disagreed whether the DBI or ROM methods should be applied to a lower extremity impairment rating).

[17] *C.B.*, Docket No. 20-0258 (issued November 2, 2020).

[18] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[19] *M.M.*, Docket No. 18-0235 (issued September 10, 2019); *L.W.*, Docket No. 19-1208 (issued July 19, 2019).

Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2019 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: November 22, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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