

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
L.P., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
SHEPPARD AIR FORCE BASE, TX, Employer)
_____)

Docket No. 21-0282
Issued: November 21, 2022

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 17, 2020 appellant filed a timely appeal from a September 24, 2020 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ (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 her burden of proof to establish greater than 12 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 16, 1995 appellant, then a 64-year-old office automation clerk (secretary), filed a claim for traumatic injury (Form CA-1) alleging that on December 15, 1995 she sustained a left knee injury when she stumbled down a flight of stairs. OWCP accepted her claim for left knee strain, left lateral meniscus tear, and head contusion.³

On August 29, 1997 appellant underwent a left knee arthroscopic procedure, for lateral meniscal tear, which was authorized by OWCP.

On February 10, 1998 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On September 8, 1998 OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The award ran for 6.24 weeks from December 2, 1997 through February 5, 1998.

Appellant filed a request for reconsideration on September 22, 1998. By decision dated September 28, 1998, OWCP denied modification of the schedule award.

On October 24, 1998 appellant filed another request for reconsideration, which OWCP denied on February 11, 1999 without reaching the merits of her claim.

Appellant filed a timely appeal with the Board on March 2, 1999. By decision dated July 3, 2000, the Board modified OWCP's September 28, 1999 decision with regard to the schedule award issue, finding that her schedule award for permanent impairment of her left lower extremity was comprised of two percent impairment rating for her August 29, 1997 partial lateral meniscectomy and five percent impairment rating for arthritis, which when combined represented a total permanent impairment of seven percent.⁴

In accordance with the Board's decision, OWCP issued a decision on August 1, 2000 granting appellant a schedule award for an additional five percent permanent impairment of her

² Docket No. 16-1446 (issued March 24, 2017), *petition for recon. denied*, Docket No. 16-1446 (issued October 26, 2017); Docket No. 11-1037 (issued December 16, 2011); *Order Dismissing Appeal*, Docket No. 10-0503 (issued May 12, 2010); Docket No. 08-1141 (issued September 22, 2008), *petition for recon. dismissed*, Docket No. 08-1141 (issued May 12, 2010); Docket No. 07-1388 (issued January 25, 2008); *Order Remanding Case*, Docket No. 06-0721 (issued November 29, 2006); Docket No. 04-1689 (issued December 9, 2004), *petition for recon. denied*, Docket No. 06-0721 (issued April 4, 2005); Docket No. 03-2172 (issued November 18, 2003), *petition for recon. denied*, Docket No. 03-2172 (issued March 30, 2004); *Order*, Docket Nos. 02-1154 & 02-1297 (issued January 31, 2003); Docket No. 00-2653 (issued May 10, 2001); and Docket No. 99-1407 (issued July 3, 2000).

³ Effective August 22, 1997, appellant resigned from the employing establishment.

⁴ Docket No. 99-1407 (issued July 3, 2000).

left lower extremity, for a total of seven percent impairment of the left lower extremity . The award ran from February 6 through May 17, 1998.

Appellant filed a timely appeal with the Board on August 15, 2000. By decision dated May 10, 2001, the Board affirmed OWCP's August 1, 2000 decision, finding that she had not established that she had more than seven percent permanent impairment of her left lower extremity.⁵

Appellant filed another Form CA-7 for a schedule award on October 25, 2012. By decision dated December 12, 2012, OWCP denied her claim for a schedule award, finding that she had not provided any probative medical evidence demonstrating greater impairment than the seven percent previously awarded for permanent partial loss of the use of the left lower extremity.

On January 4, 2013 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 11, 2013, OWCP's hearing representative set aside the December 12, 2012 decision and remanded the case for further development.

Following further development, by decision dated February 25, 2014, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the left lower extremity, for a total of 10 percent permanent impairment of the left lower extremity. The period of the award ran for 8.64 weeks from October 24 through December 23, 2013.

On March 13, 2014 appellant again requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 23, 2014, OWCP's hearing representative set aside the February 25, 2014 decision of OWCP and remanded the case for further development.

Following further development, by decision dated July 1, 2015, OWCP denied appellant's claim for additional schedule award compensation for permanent impairment of the left lower extremity.

Appellant filed a Form CA-7 claim for an increased schedule award on June 7, 2018.

Following further development, by decision dated May 14, 2019, OWCP granted appellant a schedule award for an additional 2 percent permanent impairment of the left lower extremity, for a total of 12 percent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from September 13 through October 23, 2018.

On May 15, 2020 appellant requested reconsideration of OWCP's May 14, 2019 decision. She enclosed the results of x-rays of her knees dated November 26, 2019, interpreted by

⁵ Docket No. 00-2653 (issued May 10, 2001).

Dr. Michael Sheen, an orthopedic surgeon, which indicated findings of severe bilateral knee osteoarthritis with valgus deformity.

By decision dated February 20, 2020, OWCP denied appellant's request for reconsideration.

In a report dated March 19, 2020, Dr. Ronnie Shade, a Board-certified orthopedic surgeon, reviewed the medical record and the results of a physical examination taken by Dr. Aaron Ford, a chiropractor, on that date. On examination of the left lower extremity, chiropractor Dr. Ford observed decreased range of motion (ROM) of the left knee, recorded ROM three times, and obtained the following results in degrees: flexion of 100, 95, and 100/110+; and extension of -10, -10, and -5/0. He noted left knee synovitis and mild valgus deformity. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ Table 16-6, Table 16-7, and Table 16-8, Dr. Ford found a grade modifier for functional history (GMFH) of 1 for a mild problem, a grade modifier for physical examination (GMPE) of 1 for a mild problem, and a grade modifier for clinical studies (GMCS) of 2 for a mild problem.

In reviewing the medical records, Dr. Shade referred to left knee x-rays obtained on June 7, 2018 and November 26, 2019. He related that the June 7, 2018 x-ray report from chiropractor Dr. Andrew Garrett related significant changes to include osteophyte formation as well as loss of cartilage interval of the left knee, with less than 2 millimeter (mm) joint spacing noted. Dr. Shade noted compensable diagnoses of left knee sprain, unspecified internal derangement of the left knee, and head contusion. He stated that appellant reached maximum medical improvement (MMI) on March 19, 2020. Referring to the sixth edition A.M.A., *Guides* Table 16-23 and 16-25, Dr. Shade rated her using the ROM method with a left lower extremity impairment of 19 percent, noting a functional history difficulty of zero. Utilizing the diagnosis-based impairment (DBI) method with reference to Table 16-2 to Table 16-4 and Table 16-6 through Table 16-8, he applied the net adjustment formula to the grade modifiers recommended by Dr. Ford. Dr. Shade noted a default percentage of impairment for appellant's diagnosis of 20 percent and a grade of C. The net adjustment was plus one, resulting in a grade of D. Dr. Shade noted that the class assignment, using the regional grid for class 2 under "primary knee joint arthritis -- 2 mm cartilage interval," and the grade of D, resulted in a final left lower extremity percentage of impairment of 22 percent. He noted that, as the value obtained by the DBI method exceeded the value obtained under the ROM method, it would be applied as the final rating.

On July 29, 2020 OWCP referred the record, including a SOAF, to Dr. Morley Slutsky, Board-certified in occupational medicine, serving as the DMA. It noted that appellant had previously been paid schedule awards totaling 12 percent permanent impairment of the left lower extremity.

In a report dated August 6, 2020, Dr. Slutsky reviewed the medical record and disagreed with the May 19, 2020 impairment rating of Dr. Shade. He noted that he had not been provided with radiology reports from a Board-certified radiologist with joint space measurements of all three knee compartments confirming that there was 2 mm of narrowing in the lateral or medial

⁶ A.M.A., *Guides* (6th ed. 2009).

compartments, which was the diagnosis used by Dr. Shade to rate appellant's left knee. Dr. Slutsky further noted that Drs. Ford and Shade used a "Class 1 diagnosis for 2 mm of Primary Joint Space Narrowing" of the left knee, but noted that this was a Class 2 diagnosis according to the Knee Impairment Grid on Table 16-3, page 511, and that as such, the net adjustment calculations provided by Drs. Ford and Shade were in error.

Dr. Slutsky rated appellant using magnetic resonance imaging (MRI) scan and surgical findings for the left knee, with the most impairing diagnoses of lateral and medial meniscal tears, as in his prior report of October 10, 2018. He noted a date of MMI of March 19, 2020. Using the sixth edition A.M.A., *Guides*, Dr. Slutsky found a GMFH of 1 for remaining symptoms in the knee joint, a GMPE of 2 for mild tenderness to palpation, mild crepitus, and abnormal valgus deformity, and that the GMCS was inapplicable under the DBI method. The net adjustment was plus one with a final grade of D, corresponding under Table 16-3 on pages 509-511 of a final left lower extremity impairment of 12 percent. Dr. Slutsky noted that lower extremity impairment was based primarily on the DBI rating method and that the A.M.A., *Guides* specifically stated that the DBI method was the method of choice for lower extremity ratings, with the ROM method to be used as a physical examination grade modifier. He explained that the Knee Impairment Grid did not direct physicians to use the ROM method for the diagnoses being rated in this report and that the lower extremity calculation summary section on page 552 stated that the ROM method was only to be used if not other approach was available for rating. However, in this claim, there was clearly a lower extremity diagnosis ratable using the DBI method, and therefore, the ROM measurements may only be used as a grade modifier.

By decision dated September 24, 2020, OWCP denied modification of the February 20, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ 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 2009.⁹

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability*

⁷ *Supra* note 1.

⁸ 20 C.F.R. § 10.404.

⁹ 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 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

and Health (ICF): A Contemporary Model of Disablement.¹⁰ Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by GMFH, GMPE, and GMCS.¹¹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹² The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.¹³

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 12 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

In a report dated May 19, 2020, Dr. Shade reviewed the medical record and the results of a physical examination taken by Dr. Ford on that date. Referring to the sixth edition A.M.A., *Guides* Table 16-6, Table 16-7, and Table 16-8, he noted a GMFH of 1 for a mild problem, a GMPE of 1 for a mild problem, and a GMCS of 2 for a mild problem. Referring to the sixth edition A.M.A., *Guides* Table 16-23 and Table 16-25, Dr. Shade rated appellant using the ROM method for a total left lower extremity permanent impairment of 19 percent. Utilizing the DBI method with reference to Table 16-2 to Table 16-4 and Table 16-6 through Table 16-8, he applied the net adjustment formula to the grade modifiers recommended by Dr. Ford. Dr. Shade noted that the class assignment, using the regional grid for class 2 under "primary knee joint arthritis -- 2 mm cartilage interval," and the grade of D, resulted in a final left lower extremity percentage of impairment of 22 percent. He noted that as the value obtained by the DBI method exceeded the value obtained under the ROM method, it would be applied as the final rating.

In his August 6, 2020 report, Dr. Slutsky discussed appellant's factual and medical history with respect to her accepted left knee conditions. He disagreed with Dr. Shade's impairment rating. Dr. Slutsky explained that he rated appellant using MRI scan and surgical findings for the left knee, with the most impairing diagnoses of lateral and medial meniscal tears, as in his prior report of October 10, 2018. Using the sixth edition A.M.A., *Guides*, he found a GMFH of 1 for remaining symptoms in the knee joint, a GMPE of 2 for mild tenderness to palpation, mild crepitus,

¹⁰ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

¹¹ *Id.* at 494-531.

¹² *Id.* at 521.

¹³ *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *B.B.*, Docket No. 18-0782 (issued January 11, 2019); *supra* note 9 at Chapter 2.808.6(f) (March 2017).

and abnormal valgus deformity, and that the GMCS was inapplicable under the DBI method. Dr. Slutsky applied the net adjustment formula to arrive at a final left lower extremity impairment of 12 percent. He noted that lower extremity impairment was based primarily on the DBI rating method and that the A.M.A., *Guides* specifically stated that the DBI method was the method of choice for lower extremity ratings, with the ROM method to be used as a physical examination grade modifier. Dr. Slutsky explained that the Knee Impairment Grid did not direct physicians to use the ROM method for the diagnoses being rated in this report and that the lower extremity calculation summary section on page 552 stated that the ROM method was only to be used if not other approach was available for rating. However, he noted that, in this claim, there was clearly a lower extremity diagnosis ratable using the DBI method, and therefore, the ROM measurements may only be used as a grade modifier.

The Board finds that OWCP properly relied on the opinion of Dr. Slutsky, serving as the DMA, as he appropriately applied the sixth edition of the A.M.A., *Guides* in determining that appellant had no greater than 12 percent permanent impairment of the left lower extremity.

As appellant has not established greater than 12 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation, the Board finds she 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 12 percent permanent impairment of the left lower extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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