

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

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| P.W., Appellant |) | |
| |) | |
| and |) | Docket No. 22-0218 |
| |) | Issued: November 28, 2022 |
| U.S. POSTAL SERVICE, CINCINNATI |) | |
| PROCESSING & DISTRIBUTION CENTER, |) | |
| Cincinnati, OH, Employer |) | |
| |) | |

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 22, 2021 appellant filed a timely appeal from a September 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 his burden of proof to establish greater than 42 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 28, 2002 appellant, then a 47-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that his knee locked up due to factors of his federal employment, including standing on a hard floor every night and repetitive twisting and turning during his shift. He noted that he first became aware of his condition and its relation to his federal employment on August 28, 2002. Appellant stopped work that day.² On September 4, 2002 Dr. Mark True, a Board-certified orthopedic surgeon, performed a diagnostic video arthroscopy, partial medial meniscectomy, and chondroplasty of the medial femoral condyle of the left knee. By decision dated October 7, 2002, OWCP accepted the claim for meniscus tear of the left knee and chondromalacia of the left knee and authorized left knee arthroscopy.

On November 25, 2003 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated August 1, 2005, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ The award ran for 181.44 days from April 7 through October 5, 2005.

On July 27, 2007 Dr. True performed an Oxford medial compartment hemiarthroplasty of the left knee.

On November 26, 2008 appellant filed a Form CA-7 claim for an additional schedule award. By decision dated June 7, 2010, OWCP granted appellant a schedule award for an additional 28 percent permanent impairment of the left lower extremity for a total of 37 percent. The award ran for 80.64 weeks from August 1, 2008 through February 16, 2010.

On October 31, 2018 Dr. True performed a revision left total knee arthroplasty.

Appellant retired from the employing establishment, effective February 28, 2019.

In a May 26, 2021 report, Dr. True indicated that appellant was seen for his yearly follow up for his left total knee replacement. He noted that appellant was doing fairly well, but had some limitations of activity with regard to strength and duration. Physical examination of the left lower extremity revealed a healed incision on the left knee, full extension and approximately 120 degrees of flexion, minimal swelling, good stability, and good quad strength. An x-ray of the left knee demonstrated a well-positioned total knee implant with a revision tibial component. Dr. True

² OWCP assigned the present claim OWCP File No. xxxxxx292. The record reflects that appellant has an additional traumatic injury claim (Form CA-1) involving the left knee. On December 20, 2009 appellant filed a Form CA-1 alleging that on October 2, 2009 he sustained a left knee meniscus tear when working on a delivery barcode sorter (DBCS) machine alone all night while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx784 and on January 6, 2010 accepted it for tear of lateral meniscus of the left knee. It has administratively combined the files for OWCP File Nos. xxxxxx784 and xxxxxx292, with the latter designated as the master file.

³ A.M.A., *Guides* (5th ed. 2001).

diagnosed unilateral primary osteoarthritis of the left knee. He opined that appellant had reached maximum medical improvement (MMI) with regard to his left knee.

On June 22, 2021 appellant filed a Form CA-7 claim for an additional schedule award.

In a development letter dated June 30, 2021, OWCP requested an impairment rating based on the sixth edition of the A.M.A., *Guides*, which provided appropriate measurements, findings, and a recommended percentage of permanent impairment of the affected member or members based on the applicable tables of the A.M.A., *Guides*. It afforded appellant 30 days to submit the requested evidence.

In response, appellant submitted a July 20, 2021 impairment rating by Dr. Simon-Alexandre Lovasco, a Board-certified family physician, who summarized his history of injury and treatment. Dr. Lovasco indicated that appellant did not return to work after the October 31, 2018 total knee replacement and still experienced popping in his left knee and a constant sensation of a band around the knee. He noted that appellant's claim had been accepted for unilateral post-traumatic osteoarthritis of the left knee, left knee medial meniscus tear, left knee chondromalacia patella, and long-term use of anticoagulants. An objective physical examination demonstrated left knee flexion loss, mild left upper thigh atrophy, and an inability to kneel on the left knee. Dr. Lovasco referred to the sixth edition of the A.M.A., *Guides*⁴ and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) for appellant's left total knee replacement resulted in a class 2 impairment with a default value of 25. He found that appellant had a good result, class 2, with a default grade of 25 percent impairment. Dr. Lovasco did not assign a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), or a grade modifier for clinical studies (GMCS) or provide a net adjustment formula computation.

On September 2, 2021 OWCP referred the record, including a statement of accepted facts (SOAF), to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to determine appellant's percentage of permanent impairment and date of MMI. The Board notes that OWCP informed the DMA that appellant had previously been granted a schedule award for nine percent permanent impairment of the left lower extremity. However, OWCP failed to mention appellant's additional schedule award of 28 percent permanent impairment of the left lower extremity for a total of 37 percent. In a report dated September 27, 2021, Dr. Fellars noted his review of the medical record, including Dr. Lovasco's July 20, 2021 report. He opined that appellant had attained MMI as of July 28, 2021, the date on which he stated the measurements were taken for the impairment rating provided. Dr. Fellars referred to the sixth edition of the A.M.A., *Guides*, and utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the CDX for appellant's total knee replacement resulted in a class 2 impairment with a default value of 25. He assigned a GMFH of 1 and a grade modifier physical examination GMPE of 2 due to atrophy and an inability to kneel on the knee. Dr. Fellars found that GMCS was not applicable as the clinical studies were used to establish the diagnosis and proper placement in the regional grid. He applied the net adjustment formula and determined that the net adjustment was -1, resulting in 23 percent permanent impairment of the left lower

⁴ A.M.A., *Guides* (6th ed. 2009).

extremity. Dr. Fellars noted that his impairment rating was slightly lower than Dr. Lovasco's because Dr. Lovasco did not perform any adjustments for functional history.

By decision dated September 29, 2021, OWCP granted appellant a schedule award for an additional 14 percent permanent impairment of the left lower extremity (leg). The award ran for 40.32 weeks from July 28, 2021 through May 6, 2022. OWCP noted that the schedule award was based on the July 20, 2021 report from Dr. Lovasco and the September 27, 2021 report from Dr. Fellars, the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁵ and its implementing federal regulation,⁶ 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.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁸

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 509.⁹ 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).¹⁰ 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.¹¹

Section 8123(a) of FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician (known

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a); *see also* *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

¹⁰ *Id.* at 515-22.

¹¹ *Id.* at 23-28.

as a referee physician or impartial medical specialist) who shall make an examination.¹² For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹³ Where OWCP has referred the case to an impartial medical specialist to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

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

On September 2, 2021 OWCP provided Dr. Fellars, the DMA, with a SOAF indicating that appellant had previously been granted a schedule award for nine percent permanent impairment of the left lower extremity. The Board notes, however, that it did not mention appellant's additional schedule award of 28 percent permanent impairment of the left lower extremity for a total of 37 percent permanent impairment of the left lower extremity.

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 the DMA with an accurate SOAF as it did not accurately list appellant's previously granted schedule awards. Thus, the Board finds that reports from the DMA were not based on an accurate factual framework, and cannot represent the weight of the medical evidence sufficient to address appellant's claim for additional schedule awards.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, including all schedule awards, and request that the DMA submit clarifying reports regarding appellant's left lower extremity permanent impairment and explaining his disagreement, if any, with the findings and conclusions of

¹² 5 U.S.C. § 8123(a); *M.C.*, Docket No. 20-1656 (issued June 2, 2021); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹³ *M.C., id.; C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹⁴ *M.C., id.; W.M.*, Docket No. 18-0957 (issued October 15, 2018).

¹⁵ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *M.B.*, Docket No. 19-0525 (issued March 20, 2020); *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).

¹⁷ *M.B., supra* note 15; *G.C.*, Docket No 18-0842 (issued December 20, 2018).

¹⁸ *M.B., id.; D.S.*, Docket No. 19-0292 (issued June 21, 2019); *G.C., id.*

Dr. Lovasco. Following this and other such further development deemed necessary, it shall issue a *de novo* decision regarding appellant's claim for an additional schedule award.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2021 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 28, 2022
Washington, DC

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

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

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