United States Department of Labor
Employees' Compensation Appeals Board

B.G., Appellant	)	
and	)	**Docket No. 21-1052**
	)	**Issued: April 11, 2023**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Newark, NJ, Employer	)	

Appearances:
Stephen Larkin, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 3, 2021 appellant, through counsel, filed a timely appeal from a March 18, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the March 18, 2021 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 has met his burden of proof to establish greater than 27 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 7, 2008 appellant, then a 39-year-old enforcement agent, filed a traumatic injury claim (Form CA-1) alleging that on February 6, 2008 he injured his both knees and left ankle subduing a fugitive while in the performance of duty. OWCP accepted the claim for an aggravation of a preexisting medial meniscus tear of the left knee and a sprain of the left ankle. On April 9, 2008 appellant underwent a partial medial and lateral meniscectomies of the left knee, a synovectomy, removal of a loose body, and a partial abrasion arthroplasty of the medial femoral condyle. He stopped work on March 23, 2008 and returned to his usual employment on September 8, 2008.

By decision dated May 5, 2010, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity. The award ran for 23.04 weeks during the period March 3 through August 11, 2010. OWCP based its award on the March 3, 2010 report of Dr. Stuart L. Trager, a Board-certified orthopedic surgeon and impartial medical examiner, who found that appellant had eight percent permanent impairment of the left lower extremity due to left knee osteoarthritis.

On December 20, 2012 appellant filed a claim for compensation (Form CA-7) an increased schedule award.

On February 15, 2013 OWCP referred appellant to Dr. Emily Hoff-Sullivan, a Board-certified orthopedic surgeon, for an impairment rating.

In a report dated March 11, 2013, Dr. Hoff-Sullivan noted that February 5, 2013 x-rays of appellant's knees showed severe degenerative changes with one-millimeter joint interval of the medial and patellofemoral compartments. On examination, she measured range of motion (ROM) of the left knee as 100 degrees flexion and negative 5 degrees extension. Dr. Hoff-Sullivan found that appellant's ankle strain had resolved. Referencing Table 16-3 on page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] she identified the class of diagnosis (CDX) as Class 3 primary knee joint arthritis based on one-millimeter joint space narrowing demonstrated by x-ray, which yielded a default value of 30 percent. Dr. Hoff-Sullivan applied a grade modifier for functional history (GMFH) of two based on appellant's antalgic limp, a grade modifier for physical examination (GMPE) of two for knee effusions, palpable osteophytes, and reduced knee motion, and

[4] Docket No. 15-0556 (issued August 18, 2015); Docket No. 14-0076 (issued April 16, 2014).

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

determined that a grade modifier for clinical studies (GMCS) was not applicable as it was used to determine the diagnosis class. She applied the net adjustment formula and found 26 percent permanent impairment of the left lower extremity.

In reports dated April 16 and May 9, 2013, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that appellant's knee arthritis was a preexisting condition and thus should be excluded from the impairment evaluation. He found 10 percent left lower extremity impairment due to medial and lateral meniscal tears.

By decision dated June 5, 2013, OWCP granted appellant a schedule award for an additional 2 percent permanent impairment of the left lower extremity, for a total 10 percent impairment. The award ran for 5.76 weeks during the period March 11 to April 20, 2013. Following a review of the written record, by decision dated September 24, 2013, an OWCP hearing representative affirmed the June 5, 2013 decision.

Appellant appealed to the Board. By decision dated April 16, 2014, the Board set aside the June 5 and September 24, 2013 decisions.[6] The Board remanded the case for the DMA to consider appellant's preexisting knee arthritis in determining the extent of impairment.

On May 18, 2014 Dr. Berman apportioned the extent of appellant's arthritis due to appellant's employment injury and found that he had 13 percent left lower extremity impairment.

By decision dated June 4, 2014, OWCP granted appellant a schedule award for an additional 3 percent permanent impairment of the left lower extremity, less the 10 percent previously paid, for a total permanent impairment of 13 percent. The award ran for 8.64 weeks during the period April 21 to June 20, 2013. By decision dated December 2, 2014, an OWCP hearing representative affirmed the June 4, 2014 decision.

Appellant appealed to the Board. By decision dated August 18, 2015, the Board set aside the December 2, 2014 decision.[7] The Board noted that FECA had no provision for apportionment and remanded the case for OWCP to obtain a supplemental report from a DMA.

On September 10, 2015 Dr. Berman opined that appellant had 26 percent permanent impairment of the left lower extremity.

By decision dated December 18, 2015, OWCP granted appellant a schedule award for an additional 13 percent permanent impairment of the left lower extremity, for a total impairment of 26 percent. The award ran for 37.44 weeks during the period June 21, 2013 to March 10, 2014.

On January 8, 2018 appellant filed a claim for an increased schedule award.

OWCP, on September 17, 2018, referred appellant to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, for a second opinion examination.

[6] Docket No. 14-0076, *supra* note 4.

[7] Docket No. 15-0556 (issued August 18, 2015).

In a report dated October 5, 2018, Dr. Thompson measured left knee ROM as 0 to 90 degrees, and found diffuse synovitis, but no laxity. He noted that x-rays demonstrated a one-millimeter cartilage interval of the left knee, which yielded a default value of 30 percent according to Table 16-3 on page 511 of the A.M.A., *Guides*, and an impairment range of 26 to 34 percent. Dr. Thompson concurred with Dr. Hoff-Sullivan's finding of 26 percent permanent impairment of the left lower extremity due to post-traumatic knee arthritis.

On January 3, 2019 Dr. Todd Fellars, a Board-certified orthopedic surgeon, serving as a DMA, advised that he did not have Dr. Thompson's report available for review. He opined that appellant had no more than the previously awarded 26 percent left lower extremity impairment. Dr. Fellars noted that appellant's impairment had been rated using the diagnosis-based impairment (DBI) method and that ROM was not an appropriate rating method for the identified diagnosis.

By decision dated January 29, 2019, OWCP denied appellant's claim for an increased schedule award.

On February 4, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a March 19, 2019 impairment evaluation, Dr. Robert W. Macht, a surgeon, provided examination findings of a minor limp, tenderness to palpation of the anterior left knee, and mild left knee weakness. He measured flexion of the left knee as 60 degrees and found that appellant lacked 20 degrees of extension. Dr. Macht measured normal motion of the left ankle and foot. He noted that x-rays showed patellofemoral joint narrowing to 2.1 millimeters and medial joint narrowing to 2.3 millimeters. Dr. Macht determined that appellant had 55 percent permanent impairment of the left leg due to loss of ROM of the knee. He further found, using the DBI method, a Class 3 impairment for primary joint knee arthritis using Table 16-3 on page 511, for a default impairment rating of 30 percent. Dr. Macht indicated that appellant's GMFH was negative one and his GMPE was positive one, which yielded no change from the default value of 30 percent. Using Table 16-2 on page 501, he advised that appellant had one percent permanent impairment of the left lower extremity due to plantar fasciitis, and one percent permanent impairment of the left lower extremity due to a hip strain under Table 16-4 on page 512. Dr. Macht added the impairment ratings, using ROM of the knee as it yielded a higher impairment, and found 56 percent permanent impairment of the left lower extremity.

A telephonic hearing was held on June 7, 2019.

By decision dated August 15, 2019, OWCP's hearing representative vacated the January 29, 2019 decision. He remanded the case for OWCP to refer Dr. Macht's March 19, 2019 impairment evaluation to a DMA for review.

On December 12, 2019 Dr. Jovito B. Estaris, a Board-certified occupational medicine specialist serving as a DMA, opined that Dr. Macht's ROM findings were invalid as they differed substantially from the measurements of Dr. Thompson and Dr. Hoff-Sullivan. Using the DBI method, he identified the CDX of primary knee arthritis as a Class 3 impairment based on one-millimeter cartilage interval, for a default value of 30 percent.[8] Dr. Estaris applied a GMFH of

[8] A.M.A., *Guides* at 511, Table 16-3.

one based on appellant's antalgic gait, a GMPE of two due to left knee tenderness, and found a GMCS was not applicable. Using the net adjustment formula, he found 26 percent permanent impairment of the left lower extremity due to knee arthritis. Dr. Estaris further found a Class 1 impairment for a CDX of plantar fasciitis, which yielded a default value of one percent. He found that a GMFH had been used for the knee, that a GMPE was used to define the impairment value, and that the GMCS was 0 as there were no studies available. Applying the net adjustment formula moved the grade one to the left, for a one percent permanent impairment of the left lower extremity due to plantar fasciitis. Dr. Estaris combined the impairment values to find 27 percent permanent impairment of the left lower extremity. He opined that appellant had reached maximum medical improvement (MMI) on March 14, 2019.

By decision dated January 23, 2020, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the left lower extremity, for a total impairment of 27 percent. The period of the award ran for 2.88 weeks from March 14 to April 3, 2019.

On February 4, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On February 12, 2020 Dr. Macht advised that the ROM measurements provided by Dr. Huff-Sullivan and Dr. Thompson were invalid as she had not provided three ROM measurements or specified whether the motion was active or passive.

Following a preliminary review, by decision dated April 27, 2020, OWCP's hearing representative set aside the January 23, 2020 decision. The hearing representative found that Dr. Estaris should review Dr. Macht's February 12, 2020 report and advise whether appellant required a second opinion examination due to the discrepancies in ROM measurements between Dr. Macht and Dr. Huff-Sullivan.

On June 19, 2020 Dr. Estaris indicated that ROM measurements included in Dr. Macht's supplemental report did not change his December 12, 2019 impairment rating. He recommended a second opinion examination to obtain three independent ROM measurements of the knees.

By decision dated August 25, 2020, OWCP found that appellant had no more than the previously awarded 27 percent permanent impairment of the left lower extremity.

On August 25, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated September 9, 2020, Dr. Warren M. Silver, a chiropractor, provided ROM measurements for appellant's knees.

On October 5, 2020 Dr. Macht reviewed Dr. Silver's ROM findings and asserted that his ROM findings for the knee showing moderate loss of flexion and severe flexion contracture supported the validity of his own ROM measurements.

A telephonic hearing was held on December 3, 2020.

By decision dated January 15, 2021, OWCP's hearing representative vacated the August 25, 2020 decision. He instructed OWCP to obtain an opinion from a DMA regarding whether a ROM impairment rating was appropriate as the most impairing diagnosis.

On February 27, 2021 Dr. Estaris agreed that the measurements of Dr. Silver and Dr. Macht were consistent, but indicated that they both varied from the measurements obtained by Dr. Thompson. He thus opined that the ROM impairment rating method was not applicable and that appellant had no more than 26 percent permanent impairment of the left knee.

By decision dated March 18, 2021, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of FECA,[9] and its implementing federal regulations,[10] 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.[11] 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.[12]

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 and Health (ICF)*.[13] Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[14] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[15] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[16]

[9] *Supra* note 1.

[10] 20 C.F.R. § 10.404.

[11] 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 (March 2017); *see also id*. at Chapter 3.700, Exhibit 1 (January 2010).

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

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

[14] *Id*. at 494-531.

[15] *Id*. at 411.

[16] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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*.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 27 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

OWCP granted appellant schedule award compensation for 26 percent permanent impairment of the left lower extremity due to left knee osteoarthritis. It based its award on the March 11, 2013 report from Dr. Hoff-Sullivan, who identified the CDX of knee arthritis due to one-millimeter of joint space narrowing on x-ray as a Class 3 impairment, for a default value of 30 percent. Dr. Hoff-Sullivan applied a GMFH and GMPE of two and found a GMCS was not applicable as it was used to identify the CDX. She applied the net adjustment formula and found 26 percent permanent impairment of the left lower extremity.[18]

Appellant subsequently requested an increased schedule award. OWCP referred him to Dr. Thompson for a second opinion examination. In an October 5, 2018 report, Dr. Thompson identified a CDX knee arthritis as a Class 3 impairment, with a default value of 30 percent. He noted that the impairment range for Class 3 knee arthritis was 26 to 34 percent and concurred with Dr. Hoff-Sullivan's finding of 26 percent permanent impairment of the left lower extremity.

In a March 19, 2019 impairment evaluation, Dr. Macht found one percent permanent impairment of the left lower extremity due to plantar fasciitis using Table 16-2 on page 501 and one percent permanent impairment due to hip strain under Table 16-4 on page 512. He indicated that x-rays revealed patellofemoral joint narrowing to 2.1 millimeters and medial joint narrowing to 2.3 millimeters. Dr. Macht identified the CDX of knee arthritis as a Class 3 impairment using Table 16-3 on page 511, with a default impairment rating of 30 percent. He advised that the GMFH was negative one and the GMPE was positive one, for no change from the default value of 30 percent. However, Dr. Macht did not explain how he identified the CDX as Class 3 knee arthritis given his finding that x-rays showed joint space narrowing of two millimeters, which constitutes a Class 2 rather than a Class 3 impairment under Table 16-3. Additionally, he failed to apply grade modifiers to his impairment rating for plantar fasciitis and a hip strain and failed to explain how he reached his determination of the grade modifiers applied to the CDX of left knee arthritis. Consequently, Dr. Macht failed to perform an impairment rating using the DBI method in accordance with the A.M.A., *Guides*. The Board, therefore, finds that his report lacks probative value and is insufficient to establish appellant's claim for an increased schedule award.[19]

[17] *Supra* note 11 at Chapter 2.808.6f (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

[18] Utilizing the net adjustment formula discussed above, (GMFH - CDX) + (GMPE - CDX) or (1-2) + (1-2) = -2, yielded a downward adjustment of two.

[19] *See A.T.*, Docket No. 20-0370 (issued September 27, 2021); *L.C.*, Docket No. 19-0564 (issued September 16, 2019).

Dr. Macht further found, using the ROM method, that appellant had 55 percent permanent impairment of the left lower extremity due to loss of ROM of the knee. However, according to Table 15-3 ROM is not an alternative method for rating left knee arthritis as there is no asterisk next to the diagnosis in the Knee Regional Grid in the A.M.A., *Guides*.[20]

On December 12, 2019 Dr. Estaris, a DMA, reviewed the evidence of record and found the CDX knee arthritis as a Class 3 impairment based on one-millimeter cartilage interval, for a default value of 30 percent using Table 15-3. He applied a GMFH of one due to appellant's antalgic gait, a GMPE of two based on appellant's left knee tenderness and found a GMCS was not applicable. Using the net adjustment formula, Dr. Estaris found 26 percent permanent impairment of the left lower extremity due to knee arthritis. He further found CDX of Class 1 plantar fasciitis, which yielded a default value of one percent. Dr. Estaris opined that GMFH and GMPE were not applicable, and a GMCS of 0 as there were no studies available. Applying the net adjustment formula moved the grade one to the left, which did not change the default impairment of one percent. Dr. Estaris combined the impairment ratings to find 27 percent permanent impairment of the left lower extremity. He reviewed the medical evidence and evaluated appellant's left lower extremity rating in accordance with the A.M.A., *Guides*. The Board consequently finds that OWCP properly relied upon the DMA's assessment to find that appellant had no more than the previously awarded 27 percent permanent impairment of the left lower extremity.

In subsequent reports dated February 12 and October 5, 2020, Dr. Macht contended that his ROM measurements for the left knee were valid. However, as discussed, ROM is not provided as an alternate means of assessing impairment for left knee arthritis under Table 15-3.[21] There is no medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that appellant has greater than 27 percent permanent impairment of the left lower extremity, and thus he has not established that he is entitled to additional schedule award compensation.[22]

On appeal appellant's representative contends that Dr. Macht's report is entitled to the greater weight, asserting that Dr. Thompson failed to adequately explain his impairment rating and did not provide three ROM measurements. As discussed, however, Dr. Macht's report fails to conform to the provisions of the A.M.A., *Guides* and this is of diminished probative value.[23]

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.

[20] Table 16-3, p. 511. *See A.R.*, Docket No. 21-0346 (issued July 1, 2021); *D.L.*, Docket No. 20-0059 (issued July 8, 2020).

[21] *Id*.

[22] *A.R.*, *supra* note 20; *K.H.*, Docket No. 20-1198 (issued February 8, 2021).

[23] *Supra* note 19.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 27 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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