United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 22-0613**
	)	**Issued: April 4, 2023**
U.S. POSTAL SERVICE, HYANNIS POST OFFICE, Hyannis, MA, Employer	)	

Appearances:
Daniel B. Shapiro, Esq., 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 March 16, 2022 appellant, through counsel, filed a timely appeal from an October 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Counsel for appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, he asserted that he would like the opportunity to address technical issues under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

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 46 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

On February 24, 1993 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day, he fell on ice and twisted his left knee while in the performance of duty.

OWCP initially accepted the claim for left knee contusion, left knee medial collateral ligament (MCL) sprain, and left knee medial meniscus tear. Appellant underwent an accepted left knee arthroscopy with partial medial meniscectomy on May 4, 1993.

By decision dated November 30, 1999, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity (leg). The period of the award ran from May 7, 1999 to October 15, 1999, for a total of 23.04 weeks.[4]

By decision dated April 1, 2008, OWCP granted appellant a schedule award for 27 percent permanent impairment of the left lower extremity, less the 8 percent previously paid. The period of the award ran from March 2, 2007 to March 19, 2008, for a total of 54.72 weeks.

On February 1, 2010 OWCP expanded acceptance of the claim to include traumatic left knee osteoarthritis and authorized a left knee total arthroplasty, which was performed on February 19, 2010.

Appellant filed a claim for compensation (Form CA-7) on August 24, 2011 requesting an additional schedule award.

By decision dated April 3, 2012, OWCP denied appellant's claim for an additional schedule award, finding that he did not sustain an additional impairment beyond that which had previously been accepted.

On October 1, 2012 OWCP received appellant's request for reconsideration of the April 3, 2012 decision. By decision dated December 18, 2012, it denied his request for reconsideration, finding that the evidence was insufficient to conduct a merit review.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The record reflects that appellant has a separate claim under OWCP File No. xxxxxx080. That claim was accepted for a right knee MCL sprain and traumatic osteoarthritis. Appellant received a schedule award for 26 percent permanent impairment of the right lower extremity on July 15, 2010.

In a June 15, 2017 report, Dr. Justin W. Kung, Board-certified in diagnostic radiology, noted that he reviewed the bilateral hip radiographs taken on September 12, 2016. He found that the frontal pelvic radiograph revealed that the right femoroacetabular compartment joint space interval measured 2.0 millimeters, and the left femoroacetabular compartment joint space measured 2.0 millimeters. Dr. Kung noted that there were small acetabular spaces and overall moderate degenerative changes in both femoroacetabular compartments.

On July 9, 2020 counsel for appellant filed a claim for compensation (Form CA-7) for an additional schedule award. He submitted a March 1, 2019 report from Dr. George P. Whitelaw, Board-certified in orthopedic surgery.

In his March 1, 2019 report, Dr. Whitelaw provided a permanent impairment rating of appellant's left lower extremity using the sixth edition of the A.M.A., *Guides*.[5] He noted appellant's history of injury and treatment, which included five arthroscopic surgeries to the left knee and a total left knee replacement. Dr. Whitelaw reviewed appellant's hip x-rays and the findings provided by Dr. Kung. He used a goniometer and provided three measurements for range of motion (ROM) for the knees and hips. Dr. Whitelaw referred to Table16-23, page 549, for Knee Motion Impairments, and found right knee flexion of 15 to 100 degrees and left knee flexion of 10 to 100 degrees. Regarding the hips, he referred to Table 16-24, page 549, for Hip Motion Impairments, and found flexion of 90 degrees and full extension with 8 degrees of internal rotation bilaterally and 20 degrees of external rotation. Dr. Whitelaw referred to Table 16-6, page 516, for Functional History Adjustment, and found a moderate impairment. He referred to Table 16-7, page 517, for Physical Examination Adjustment, and noted tenderness on the right knee over the medial joint line, both knees and hips were stable, no significant alignment deformity, and no limb length discrepancy or muscle atrophy. Dr. Whitelaw diagnosed bilateral knee and bilateral hip arthritis.

Dr. Whitelaw referred to Table 16-4, pages 512-15, the Hip Regional Grid, and found a Class 2, Default Grade C, for a 20 percent lower extremity impairment with no Net Modifier Adjustment for each hip. He referred to Table 16-3, pages 509-11, the Knee Regional Grid, for the left total knee replacement, and opined that appellant had 37 percent left lower extremity impairment based on a mild motion impairment with no Net Modifier Adjustment. Dr. Whitelaw referred to the Combined Values Chart, pages 604-06, for the 20 percent left hip impairment and the 37 percent left knee impairment, and opined that appellant had a combined 50 percent left lower extremity impairment.[6]

On July 14, 2020 OWCP provided a copy of Dr. Whitelaw's report, a statement of accepted facts (SOAF), and the medical records to Dr. James W. Butler, an orthopedic surgery specialist and district medical adviser (DMA) and requested that the DMA provide an impairment evaluation. The July 14, 2020 SOAF noted that appellant's claim was initially accepted for a left knee contusion, and acceptance was later expanded to include a left knee strain, left knee medial meniscus tear, and traumatic osteoarthritis of the left knee.

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

[6] Dr. Whitelaw also provided a rating for the right lower extremity.

In a July 28, 2020 report, Dr. Butler provided an impairment rating using the sixth edition of the A.M.A., *Guides*. He referred to Table 16-3, pages 509-11, the Knee Regional Grid, and explained that the left knee total arthroplasty, with mild motion deficits as shown by the ROM measurements, was assigned a Class 3 impairment with "[f]air result (fair position, mild instability and/or mild motion deficit" for class of diagnosis (CDX) of total knee replacement. The DMA assigned a functional history grade modifier (GMFH) of 2 for moderate deficit and explained that the physical examination grade modifier (GMPE) and clinical studies grade modifier (GMCS) were not applicable because they were used to determine the CDX. The DMA determined that appellant had a Net Adjustment of -1 (GMFH of 2 minus CDX of 3) for a final rating of Class 3, Grade B, or 34 percent permanent impairment of the left lower extremity.

The DMA also rated the left hip. He referred to Table 16-4, pages 512-515, the Hip Regional Grid, and noted that a CDX of arthritis with a two-millimeter cartilage interval placed appellant in a Class 2 impairment. Dr. Butler noted that the physical examination showed mild range of motion deficits for a GMPE of 1, and that the GMFH and GMCS were not applicable because they were used to determine the CDX. The DMA calculated a Net Adjustment of -1 (GMPE of 1 minus CDX of 2) for a final rating of Class 2, Grade B, or 18 percent permanent impairment of the left lower extremity impairment for the left hip.

The DMA referred to the Combined Values Chart at pages 604-06 and explained that the 18 percent rating for the left hip and 34 percent rating for the left knee resulted in a combined rating of 46 percent impairment of the left lower extremity. He noted that as appellant had previously received schedule awards totaling 27 percent permanent impairment of the left lower extremity, that percentage should be subtracted, resulting in a schedule award for an additional 19 percent permanent impairment of the left lower extremity.[7] The DMA concluded that appellant reached maximum medical improvement (MMI) on March 1, 2019.

By decision dated January 5, 2021, OWCP granted appellant a schedule award for 46 percent permanent impairment of the left lower extremity, less the 27 percent paid on previous schedule awards. The period of the award ran from March 1, 2019 to March 18, 2020 for a total of 54.72 weeks. OWCP indicated that the schedule award was based on the medical findings and report of Dr. Whitelaw dated March 1, 2019, and the July 28, 2020 report of the DMA.

On May 21, 2021 counsel for appellant requested reconsideration. He noted the DMA's methodology resulted in a 34 percent impairment rating for the left knee and argued that Dr. Whitelaw's higher rating of 37 percent should be utilized. Counsel argued that Dr. Whitelaw's methodology was in conformity with the A.M.A., *Guides* and was consistently utilized by numerous DMA physicians.

On August 18, 2021 OWCP requested clarification from the DMA. It noted that Dr. Whitelaw did not use the GMFH which resulted in an impairment rating of 37 percent of the left knee. OWCP requested that the DMA explain his rationale for applying the GMFH, which

[7] The DMA also noted that this was a correct assessment if the left hip was considered a part of this claim and this rating. If not, then the 34 percent impairment of the left knee alone, minus the 27 percent impairment previously paid would be the final permanent impairment rating of the left lower extremity.

resulted in his lower rating of 34 percent of the left knee. It noted that Dr. Whitelaw excluded the use of the GMFH because it differed by 2 or more grades from the GMPE.

In a September 29, 2021 supplemental report, Dr. Butler noted that according to page 516 of the A.M.A., *Guides* "if the grade modifier for functional history differs by 2 or more grades from that defined by physical examination or clinical studies, the functional history should be assumed to be unreliable." However, he explained that in this case, the only nonkey grade modifier was functional history. The DMA noted that the Class 3 impairment rating for a total knee replacement with fair result was based on the physical examination and clinical studies, and therefore they were excluded from use as nonkey grade modifiers. He explained that the GMFH of 2 resulted in a Net Adjustment of -1 (GMFH 2 minus CDX 3). Dr. Butler reiterated that his 46 percent impairment rating for the left lower extremity and the reasons for it, as stated in his July 28, 2020 report, remained unchanged.

By decision dated October 12, 2021, OWCP denied modification of the January 5, 2021 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[8] and its implementing regulations[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[11]

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 part of the leg for the present case, reference is made to Table 16-3, the Knee Regional Grid, beginning on page 509.[12] After the 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

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id*. *See J.M.*, Docket No. 21-0787 (issued June 21, 2022); *see also M.F.*, Docket Nos. 21-0759 & 21-1037 (issued May 4, 2022); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[11] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. 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).

[12] *See* A.M.A., *Guides* 509-11.

formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[13] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[14]

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.[15]

ANALYSIS

The Board finds that appellant has not established greater than 46 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

Dr. Whitelaw provided a permanent impairment rating of 37 percent for the left knee. He did not apply the GMFH to the left knee rating which resulted in the 37 percent rating for the left knee. Dr. Whitelaw excluded the use of GMFH because it differed by more than 2 grades from the GMPE and the GMCS. However, the DMA, Dr. Butler, explained that Dr. Whitelaw should not have excluded the use of GMFH because the physical examination and clinical studies were used to define the CDX, and were therefore to be excluded as grade modifiers. Therefore, GMFH was retained as the modifier to obtain the final rating. Pursuant to Table 16-3 of Knee Regional Grid, at page 511 of the A.M.A., *Guides*, appellant's total left knee replacement with both clinical findings and physical examination findings placed appellant in a Class 3 for a severe problem. The findings which must be present to be placed in a Class 3, are listed as a "[f]air result (fair position, mild instability and/or mild motion deficit)." These findings are made based upon clinical studies and physical examination findings. The DMA therefore properly explained that the GMCS and GMPE were to be excluded as they were used to define class, and only the GMFH was used to finalize the rating. Accordingly, Dr. Whitelaw's 37 percent impairment rating of the left knee does not comport with the A.M.A., *Guides*.[16]

In assessing the left hip, the DMA referred to Table 16-4, pages 512-15, the Hip Regional Grid, and noted that a CDX of arthritis with a two-millimeter cartilage interval placed appellant in a Class 2 impairment. He noted that the physical examination showed mild range of motion deficits for a GMPE of 1, and that the GMFH and GMCS were not applicable because they were used to determine the CDX. The DMA calculated a Net Adjustment of -1 (GMPE of 1 minus CDX of 2) for a final rating of Class 2, Grade B, or 18 percent permanent impairment of the left lower extremity impairment for the left hip. He referred to the Combined Values Chart at pages

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

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

[15] *Supra* note 11 at Chapter 2.808.6f (March 2017).

[16] *See C.W.*, Docket No. 19-1590 (issued September 24, 2020); *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

604-06, and explained that the 18 percent impairment rating for the left hip and 34 percent impairment rating for the left knee resulted in a combined rating of 46 percent impairment of the left lower extremity. In his September 29, 2021 supplemental report, the DMA indicated that his 46 percent impairment rating of the left lower extremity, and the reasons for it, remained unchanged from his prior report of July 28, 2020.

The Board finds that the DMA properly applied the standards of the A.M.A., *Guides* to the physical examination findings and report of Dr. Whitelaw to find that appellant had 46 percent permanent impairment of the left lower extremity. The DMA accurately summarized the relevant medical evidence, including findings on examination, and reached conclusions regarding appellant's condition that comported with those findings. Thus, appellant has not established greater than 46 percent permanent impairment of his left lower extremity for which he previously received schedule award compensation.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 46 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2023
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