

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

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L.W., Appellant)	
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and)	
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DEPARTMENT OF VETERANS AFFAIRS,)	Docket No. 22-1207
CORPORAL MICHAEL J. CRESCENZ VA)	Issued: April 10, 2023
MEDICAL CENTER, Philadelphia, PA,)	
Employer)	
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Appearances: *Case Submitted on the Record*
Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On August 18, 2022 appellant, through counsel, filed a timely appeal from a March 8, 2022 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish greater than 31 percent permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

On October 22, 2008 appellant, then a 44-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2008 she sustained right knee, scapula, and upper back injuries while providing care to a patient. OWCP initially accepted the claim for cervical and thoracic sprains. It subsequently expanded the acceptance of the claim to include aggravation of right lower leg localized secondary osteoarthritis and right knee primary osteoarthritis.³

On January 14, 2013 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated March 4, 2013, OWCP denied appellant's claim for a schedule award, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted employment injury.

On August 22, 2013 appellant, through counsel, requested reconsideration. In support thereof, she submitted a June 11, 2013 permanent impairment rating by Dr. David Weiss, an osteopathic physician Board-certified in orthopedic surgery. Dr. Weiss advised that appellant reached maximum medical improvement (MMI) on June 11, 2013. He noted his review of appellant's medical records and described right knee and lower back examination findings. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and Table 16-3, page 511, Knee Regional Grid, Dr. Weiss determined that appellant had Class 3 impairment for the class of diagnosis (CDX) of primary right knee osteoarthritis, with a default rating of 30 percent. He found a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 2, and that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Weiss applied the net adjustment formula and concluded that appellant had 26 percent permanent impairment of the right lower extremity. Next, he applied the standards of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) and identified the CDX as right S1 nerve root sensory with a Class 1 default value of two percent for moderate sensory loss. Dr. Weiss assigned a GMFH of 3 for a pain disability questionnaire of 114 and a GMCS of 1 for magnetic resonance imaging (MRI) scan findings. He applied the net adjustment formula and concluded that appellant had three percent permanent impairment of the right lower

³ OWCP assigned the present claim OWCP File No. xxxxxx324. On October 20, 2010 appellant filed a Form CA-1 alleging that on August 31, 2010 she injured her left lower back and sciatic nerve while twisting in the performance of her federal duties as a telemetry technician. OWCP assigned this claim OWCP File No. xxxxxx332. By decision dated February 10, 2012, OWCP accepted the claim for L4-5 herniated lumbar discs.

⁴ A.M.A., *Guides* (6th ed.).

extremity due to her accepted lumbar spine conditions. Dr. Weiss then combined the two impairment ratings to find a combined rating of 28 percent permanent impairment of the right lower extremity.

In a report dated November 8, 2013, Dr. Morley Slutsky, a physician Board-certified in occupational medicine and serving as an OWCP district medical adviser (DMA), reviewed the medical evidence including the impairment rating from Dr. Weiss. Using Table 16-3, page 511, the DMA determined that appellant had a Class 3 right knee permanent impairment, with a default rating of 30 percent for the CDX of right knee primary knee joint arthritis. The DMA assigned a GMFH of 1, and a GMPE of 1. A GMCS was not assigned as it was inapplicable. Applying the net adjustment formula, the DMA concluded that appellant had a final grade A or 26 percent permanent impairment of the right lower extremity. The DMA found no lower extremity permanent impairment due to her accepted lumbar spine conditions, pursuant to *The Guides Newsletter*, as Dr. Weiss' examination findings did not reflect appellant's best efforts or findings by other physicians of record.

By decision dated December 18, 2013, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right lower extremity. The period of the award ran for 74.88 weeks, from August 23, 2013 to January 29, 2015.

On February 17, 2016 appellant underwent OWCP-authorized total right knee replacement surgery.

In a report dated November 14, 2017, Dr. Weiss noted his review of appellant's medical records and described her right knee physical examination findings. Utilizing Table 16-3, page 511 of the A.M.A., *Guides*, he assigned a Class 3 impairment for the CDX of total knee replacement with mild range of motion deficit for a default value of 37 percent. Dr. Weiss found a GMFH of 3, a GMPE of 3, and a GMCS of 3. He applied the net adjustment formula and concluded that appellant had 37 percent permanent impairment of the right lower extremity. Next, Dr. Weiss applied the standards of *The Guides Newsletter* to rate appellant's accepted lumbar spine conditions. He identified the CDX for the right L5 nerve root as a Class 1 impairment, with a default value of three percent for moderate sensory loss. Dr. Weiss assigned a GMFH of 2 and a GMCS of 1 for MRI scan findings. He applied the net adjustment formula and concluded that appellant had three percent permanent impairment of the right lower extremity for right L5 nerve root sensory deficit. Next, Dr. Weiss found a Class 1 impairment with a default value of two percent for right S1 nerve root impairment with moderate sensory deficit. He assigned a GMFH of 2 and a GMCS of 1 for MRI scan findings. Dr. Weiss applied the net adjustment formula and concluded that appellant had two percent permanent impairment of the right lower extremity for right S1 nerve root sensory deficit. He then combined the three permanent impairment ratings to find a total of 42 percent permanent impairment of the right lower extremity. Dr. Weiss identified November 14, 2017 as the date of MMI.

On February 2, 2018 appellant filed a Form CA-7 for an additional schedule award.

On April 20, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second

opinion examination in order to determine whether appellant had additional right lower extremity permanent impairment in accordance with the A.M.A., *Guides*.

In a May 25, 2018 report, Dr. Draper reviewed the SOAF. He reported that appellant had full right knee extension and flexion. Dr. Draper found no instability, negative posterior drawer sign, negative Lachman's sign, and negative anterior drawer sign. He also found that appellant had reached MMI. Dr. Draper rated appellant's permanent impairment based on the diagnosis-based impairment (DBI) methodology, utilizing Table 16-3, page 511 of the A.M.A., *Guides* for the CDX of total knee replacement. He found that appellant had a fair result, Class 3 impairment, because of mild instability and mild motion deficits. Dr. Draper found that the default grade was 37 percent impairment and applied the net adjustment formula, with a GMFH of 2, a GMPE of 2, and a GMCS of 2, to reach a net adjustment of -3, resulting in 31 percent permanent impairment of the right lower extremity. Regarding appellant's accepted lumbar conditions, he found no ratable impairment for the accepted spinal conditions as appellant had no motor or sensory deficits.

In a report dated August 2, 2018, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the medical evidence of record including the reports from Dr. Draper and Dr. Weiss. He concurred with Dr. Draper's permanent impairment rating noting that Dr. Draper found no motor or sensory deficits of the right lower extremity due to her lumbar spine injury. Dr. Katz related that Dr. Draper had properly found that appellant had 31 percent right lower extremity permanent impairment. He found the date of MMI to be May 25, 2018, the date of Dr. Draper's report.

OWCP, by decision dated March 29, 2019, granted appellant a schedule award for an additional five percent permanent impairment of the right lower extremity. The period of the award ran for 14.4 weeks from May 25 through September 2, 2018 and was based on the opinions of Dr. Draper and the DMA.

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

Following a preliminary review, by decision dated June 25, 2019, OWCP's hearing representative set aside the March 29, 2019 schedule award determination, finding that there was an unresolved conflict in medical opinion between Dr. Weiss, for appellant, and Dr. Draper, an OWCP second opinion physician regarding the issue of additional right lower extremity permanent impairment. Thus, the hearing representative remanded the case for referral to an impartial medical examiner (IME) to resolve the conflict in the medical opinion evidence. The hearing representative also instructed OWCP to administratively combine the present claim with OWCP File No. xxxxxx332.

On October 4, 2019 OWCP referred appellant, together with a SOAF, medical record, and list of questions, to Dr. Andrew Collier, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence on the issue of additional right lower extremity permanent impairment.

In a report dated November 8, 2019, Dr. Collier noted that he had reviewed the SOAF, reviewed the medical reports, and performed a physical examination. He reported that appellant

had undergone a total right knee replacement surgery on February 17, 2016 and returned to full-duty work in July 2016. Dr. Collier measured appellant's right knee range of motion (ROM) 0 to 90 degrees using Table 16-23, page 549, resulting in 10 percent permanent impairment. He identified the CDX, total knee replacement, according to Table 16-3 on page 511 as a Class 3 impairment, which yielded a default value of 37 percent. Dr. Collier applied a GMFH of 1 for mild range of motion deficit. For the GMCS, he reported no studies, resulting in a grade modifier of 0. Using the net adjustment formula, Dr. Collier calculated 31 percent permanent impairment of the right lower extremity. Regarding appellant's accepted lumbar spine conditions, he found no evidence of radiculopathy or neuropathy noting that she had a normal neurological and sensory examination, resulting in no additional permanent impairment rating.

By decision dated December 26, 2019, OWCP denied appellant's request for an additional schedule award.

On January 2, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated April 3, 2020, an OWCP hearing representative set aside the December 26, 2019 decision, finding that Dr. Collier failed to properly resolve the conflict regarding appellant's right lower extremity permanent impairment with respect to sensory and motor deficits for the lumbar nerve. Thus, the hearing representative remanded the case for further development. The hearing representative again instructed OWCP to administratively combine the present claim with OWCP File No. xxxxxx332.⁵

On February 17, 2021 OWCP referred appellant, together with an updated SOAF, the medical record, and series of questions, to Dr. Collier for clarification.

In a supplemental report dated March 17, 2021, Dr. Collier reviewed the updated SOAF and performed a physical examination related to appellant's accepted lumbar spine conditions. He reported that appellant had intact motor, sensory, and deep tendon reflexes of the right lower extremity and a normal sensory examination. Dr. Collier reiterated that appellant had 31 percent permanent impairment of the right knee due to her total knee replacement. He also reiterated that appellant had no evidence of radiculopathy or neuropathy, and therefore she had no permanent impairment due to motor or sensory loss of the lower extremity.

In an August 26, 2021 supplemental report, Dr. Collier again reported no lumbar neurological findings, noting that she had a normal sensory, motor, and deep tendon reflex examination. In addition, he found no evidence of any L5 or S1 distribution radiculopathy.

By decision dated October 28, 2021, OWCP denied appellant's request for an additional schedule award.

⁵ OWCP subsequently administratively combined the files, with OWCP File No. xxxxxx324 serving as the master file.

On November 3, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 2, 2022.

By decision dated March 8, 2022, OWCP's hearing representative affirmed the October 28, 2021 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁸ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹ 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.¹⁰

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 509.¹¹ 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 formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹²

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹³ Furthermore, the

⁶ *Supra* note 2 at § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *W.C.*, Docket No. 20-0691 (issued July 19, 2022); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

¹⁰ *W.C.*, *supra* note 8; *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹¹ *Supra* note 5 at 509-11.

¹² *Id.* at 515-22.

¹³ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

back is specifically excluded from the definition of an organ under FECA.¹⁴ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.¹⁵

Section 8123(a) of FECA 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 who shall make an examination.¹⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁷ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 31 percent permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

OWCP found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Weiss, who found 42 percent permanent impairment of her right lower extremity, and its second opinion physician, Dr. Draper, who found 31 percent permanent impairment of the right lower extremity impairment. It properly referred her case to Dr. Collier, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in the medical opinion.¹⁹

In his November 8, 2019 report, Dr. Collier identified the CDX of total knee replacement as a Class 3 impairment pursuant to Table 16-3 on page 511 of the A.M.A., *Guides*, which yielded a default value of 37 percent. He applied a GMFH of 0 for normal gait, a GMPE of 1 for mild range of motion deficit, and a GMCS of 0. Using the net adjustment formula, Dr. Collier calculated 31 percent permanent impairment of the right lower extremity, for appellant's right knee

¹⁴ See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹⁵ *Supra* note 9 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁶ 5 U.S.C. § 8123(a). See *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

¹⁷ See *M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

¹⁸ *M.E.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁹ *H.M.*, Docket No. 21-0046 (issued June 1, 2021); *W.C.*, Docket No. 19-1740 (issued June 4, 2020).

replacement. Regarding appellant's accepted lumbar spine peripheral nerve impairments, he found no evidence of radiculopathy or neuropathy noting that she had a normal neurological and sensory examination, resulting in no additional permanent impairment rating.

In a March 21, 2021 supplemental report, Dr. Collier again related appellant's physical examination findings and concluded she had no evidence of radiculopathy or neuropathy. Thus, he found no impairment due to normal neurological and sensory examination. Dr. Collier reiterated his opinion that appellant had 31 percent permanent impairment of the right lower extremity based on a diagnosis of total knee replacement.

The Board finds that OWCP properly accorded the special weight of the evidence to the well-reasoned reports of Dr. Collier. Dr. Collier accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions as to permanent impairment which comport with his physical findings.²⁰ He explained his impairment rating and cited to the appropriate tables and pages of the A.M.A., *Guides* and *The Guides Newsletter*. As his report is detailed, well-rationalized, and based on the proper factual background, Dr. Collier's opinion is entitled to the special weight accorded to an IME.²¹ The Board thus finds that the evidence establishes that appellant has no more than 31 percent permanent impairment of the right lower extremity.²²

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 31 percent permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

²⁰ See *M.T.*, Docket No. 21-0169 (issued October 14, 2021).

²¹ *Id.*

²² See *M.T.*, *supra* note 20; *P.P.*, Docket No. 22-1228 (issued February 5, 2021).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2023
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