United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 22-0618**
	)	**Issued: December 22, 2023**
U.S. POSTAL SERVICE, BUSSE PROCESSING & DISTRIBUTION CENTER, Elk Grove, IL, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 20, 2022 appellant filed a timely appeal from a March 9, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the March 9, 2022 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*.

FACTUAL HISTORY

On August 3, 2017 appellant, then a 48-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a right knee condition due to factors of her federal employment which included walking, standing on her feet eight hours per day, five days per week, lifting, pulling, twisting, and dumping of mail. She noted that she first became aware of her claimed condition on May 3, 2017, and realized its relation to her factors of federal employment on June 19, 2017. Appellant stopped work on August 3, 2017. OWCP initially accepted the claim for peripheral tear of medial meniscus, right knee. It subsequently expanded the acceptance of the claim to include chondromalacia patella, right knee; patellofemoral disorders, right knee; and aggravation of chondromalacia patellae, left knee. OWCP paid appellant wage-loss compensation for disability from work on the supplemental rolls, commencing October 26, 2017.

Appellant underwent several OWCP-authorized surgeries. On October 26, 2017 she underwent right knee arthroscopy with partial medial meniscectomy; chondroplasty of the trochlea patella and medial femoral condyle; lateral retinacula release; and arthroscopic debridement of lateral patellar spur. On January 25, 2019 appellant underwent left knee arthroscopy with abrasion chondroplasty of the medial femoral condyle; and abrasion chondroplasty of the patellofemoral joint, and lateral retinacular release. On May 20, 2019 she underwent posterior lateral arthrodesis at C4-5 and C5-6 with instrumentation and allograft.

On May 31, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated October 16, 2019, OWCP granted appellant a schedule award for three percent permanent impairment of the left lower extremity. The award ran for 8.64 weeks from May 17 through July 16, 2019, and was based on the April 29, 2019 report of Dr. Eduard H. Sladek, a Board-certified orthopedic surgeon, and the September 20, 2019 report of Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA).

On November 9, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received additional medical evidence, including a November 14, 2019 narrative report wherein Dr. Neil Allen, a Board-certified neurologist, noted the history of appellant's work-related injury and her medical treatment, and set forth findings from an October 29, 2019 physical examination. Dr. Allen opined that she had reached maximum medical improvement (MMI) on April 29, 2019 per Dr. Sladek. With regard to the right lower extremity, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] he opined that appellant had 3 percent permanent impairment of the right lower extremity based on the diagnosis-based impairment (DBI) methodology for "meniscal tear; partial medial meniscectomy" and 20 percent permanent impairment based on the range of motion (ROM) impairment methodology, which represented the greater impairment. Under Table 16-23, Knee Motion Impairments, Dr. Allen related that 109 degrees flexion equaled 10 percent lower extremity impairment, and negative 8 degrees extension equaled 10 percent lower extremity impairment, for a total of 20 percent right lower extremity impairment. Under Table 16-17, he noted that 20 percent lower extremity impairment was consistent with a grade modifier for

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

functional history (GMFH) of 2. Under Table 16-6, Dr. Allen noted that appellant's GMFH adjustment was 1. He thus opined that she had a total of 20 percent right lower extremity permanent impairment. While Dr. Allen noted that appellant had three percent permanent impairment of the right lower extremity under the DBI methodology, he did not provide an explanation of his rating utilizing the A.M.A., *Guides*.

With regard to the left lower extremity, Dr. Allen opined that appellant had 9 percent permanent impairment based on DBI methodology for "knee sprain/strain; mild motion deficits" and 10 percent total permanent impairment based on ROM methodology. He opined that the ROM methodology represented the greater impairment value. Under Table 16-23, Dr. Allen found that 109 degrees flexion represented 10 percent lower extremity impairment and negative 8 degrees extension represented 10 percent lower extremity impairment, for a total 20 percent left lower extremity impairment. Under Table 16-17, he found that the 20 percent lower extremity impairment was consistent with a net GMFH of 2 and, under Table 16-6, appellant had a GMFH of 1. Dr. Allen thus opined that appellant had a total of 10 percent left lower extremity permanent impairment. He concluded that she had nine percent permanent impairment under the DBI methodology, but did not provide an explanation of his rating utilizing the A.M.A., *Guides*.

Following a preliminary review, by decision dated February 7, 2020, OWCP's hearing representative vacated the October 16, 2019 decision and remanded the case to OWCP for further development. The hearing representative directed OWCP to refer Dr. Allen's November 14, 2019 report to its DMA to determine the degree of permanent impairment for the left and right lower extremities under the A.M.A., *Guides* and to issue a *de novo* decision on the issue of schedule award entitlement.

OWCP issued a February 13, 2020 statement of accepted facts (SOAF) and requested that its DMA provide an opinion on permanent impairment of appellant's lower extremities based on the sixth edition of the A.M.A., *Guides*.

In a report dated February 25, 2020, Dr. Harris, OWCP's DMA, related that appellant's diagnosed conditions did not meet the criteria to be calculated by the ROM method. He concluded that, utilizing the DBI methodology under the A.M.A., *Guides*, she had four percent permanent impairment of the right lower extremity for patella chondromalacia with osteochondral defect with a Class 1, grade D impairment, per Table 16-3, page 511. Dr. Harris also related that appellant had three percent permanent impairment of the left lower extremity, under the DBI methodology for patella chondromalacia with osteochondral defect with a Class 1, grade C impairment.

In a supplemental report, responding to OWCP's request for further review, in a report dated August 31, 2020, Dr. Harris responded "N/A [not applicable]" to questions regarding use of the ROM methodology to rate appellant's permanent impairment, and the date of MMI. In a comment, he noted that OWCP's memorandum of March 18, 2020 stated that she had previously been granted a schedule award for three percent permanent impairment of the left lower extremity, and a February 18, 2020 memorandum related that she had previously been granted a schedule award for eight percent permanent impairment of the right lower extremity, and three percent permanent impairment of the left lower extremity. Dr. Harris concluded that there was no increase in the degree of appellant's permanent impairments.

On November 16, 2020 OWCP requested that Dr. Harris provide a supplemental report. Dr. Harris was asked to confirm that appellant's right lower extremity permanent impairment was

four percent, the date of MMI, and to review and address the impairment rating provided by Dr. Allen in his report dated October 29, 2019.

In a report dated November 18, 2020, Dr. Harris responded "N/A" to the questions regarding date of MMI, and review of Dr. Allen's report. He commented that appellant's right lower extremity permanent impairment had increased to a total of four percent permanent impairment, and that her left lower extremity impairment had increased to a total of three percent permanent impairment, which represented an increase of three percent.

By decision dated December 14, 2020, OWCP granted appellant a schedule award for four percent permanent impairment of the right lower extremity. The award ran for 11.52 weeks from October 29, 2019 through January 17, 2020 and was based upon the opinion of Dr. Harris, serving as the DMA.

On December 20, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. New medical evidence, including a January 5, 2021 report from Dr. Allen and a June 22, 2020 progress report from Dr. Sladek were received. Dr. Allen opined that the ROM impairment methodology represented the more accurate rating of appellant's lower limb permanent impairment. He related that the A.M.A., *Guides* stated on page 543 that, "In very rare cases, severe injuries may result in a passive [ROM] losses qualifying for [C]lass 3 or 4 impairment." Therefore, Dr. Allen concluded that the ROM method reflected a more accurate impairment than the DBI method.

In his June 22, 2020 report, Dr. Sladek diagnosed left knee chondromalacia and opined that appellant could return to work with her normal restrictions.

A hearing was held on April 7, 2021.

By decision dated June 10, 2021, OWCP's hearing representative set aside OWCP's December 14, 2020 decision and remanded the case for further development. The hearing representative requested that OWCP seek clarification from Dr. Allen as to who examined appellant for her permanent impairment rating. OWCP was then directed to provide the DMA with such clarification, to be followed by a *de novo* decision.

In a June 22, 2021 report, Dr. Allen verified that appellant's permanent impairment examination was actually completed by Dr. Ashley Daliege, a chiropractor. He related that he had reviewed and supervised appellant's "medical records, patient history of illness, aggravating factors and relieving factors and results of the impairment examination."

OWCP issued an updated SOAF dated January 6, 2022 and referred appellant's medical record, along with a series of questions, to Dr. Harris, OWCP's DMA.

In a February 17, 2022 report, using the DBI methodology for patella chondromalacia with osteochondral defect under Table 16-3, page 511 of the A.M.A., *Guides*, Dr. Harris again found that appellant had four percent permanent impairment of the right lower extremity and three percent permanent impairment of the left lower extremity, for which she had previously received schedule award compensation. He indicated that section 16.7, page 543 of the A.M.A., *Guides* allowed for the ROM methodology to be used as a standalone rating where there are either no diagnosed-based sections applicable or, in very rare cases, where a severe injury results in a passive ROM loss, qualifying for Class 3 or 4 impairment or for amputation ratings. Dr. Harris advised

that the DBI methodology allowed for appropriate impairment ratings of appellant's diagnosed conditions and that her diagnosed conditions did not meet any of the criteria discussed to allow for an impairment calculation under the ROM methodology. He explained that Dr. Allen had erroneously calculated appellant's impairment based on the ROM methodology in his October 29, 2019 impairment evaluation. Dr. Harris indicated that her diagnosed conditions did not meet any of the criteria discussed under section 16.7 page 543 of the A.M.A., *Guides* to allow for impairment to be calculated under the ROM methodology as there was an appropriate rating under the DBI methodology. He further explained that, regarding the right lower extremity, appellant's diagnosis of patella chondromalacia with osteochondral defect condition was a Class 1, grade D impairment. Dr. Harris further explained that, while Dr. Allen indicated that the ROM impairment methodology produced a higher rating than that, of the DBI impairment methodology, the ROM impairment methodology was not consistent with the A.M.A., *Guides* as she only had a Class 1 impairment of the bilateral lower extremities and, thus, her impairment cannot be calculated under ROM impairment methodology.

By decision dated March 9, 2022, OWCP determined that appellant had not met her burden of proof to establish greater than three percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity for which she previously received schedule award compensation.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI where impairment class is determined by the diagnosis and specific criteria as adjusted by the GMFH, grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS). It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and ROM. ROM is primarily used as a physical examination adjustment factor.[8]

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id. See also T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* (6th ed. 2009) 497, section 16.2.

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, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[9] After the class of diagnosis (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).[10] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

The A.M.A., *Guides*, however, also explain that some of the DBI grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[12] If ROM is used as a standalone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[13] Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[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 percentage 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 met her burden of proof to establish greater than three percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

In a November 14, 2019 report, Dr. Allen opined that appellant had 3 percent permanent impairment of the right lower extremity based on DBI methodology for "meniscal tear; partial medial meniscectomy" and 20 percent permanent impairment based on the ROM impairment methodology. With regard to the left lower extremity, he opined that she had 9 percent permanent

[9] *Id*. at 509-11.

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

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

[12] A.M.A., *Guides* 543; *see also J.W.*, Docket No. 22-0223 (issued August 23, 2022); *M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[13] *Id*. at 473.

[14] *Id*. at 474.

[15] *Supra* note 7 at Chapter 2.808.6f (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

impairment based on DBI methodology for "knee sprain/strain; mild motion deficits" and 10 percent total permanent impairment based on ROM methodology. While Dr. Allen noted that appellant had three percent permanent impairment of the right lower extremity under the DBI methodology, and nine percent permanent impairment of the left lower extremity under the DBI methodology, he did not provide an explanation of his rating utilizing the A.M.A., *Guides*. As he did not provide an impairment rating in accordance with the tables of the A.M.A., *Guides*, his opinion is of diminished probative value.[16]

OWCP thereafter issued an updated SOAF dated January 6, 2022 and referred appellant's medical record, including Dr. Allen's November 14, 2019, and January 5 and June 22, 2021 reports, along with a series of questions, to Dr. Harris, OWCP's DMA, in accordance with its procedures.[17] Dr. Harris, serving as the DMA, concluded that the medical evidence of record did not demonstrate a permanent, measurable, scheduled impairment greater than that already paid. He explained that, under section 16.7, page 543 of the A.M.A., *Guides*, that the ROM impairment methodology was not applicable as appellant's diagnosed condition did not meet any of the criteria, *i.e.*, there was an appropriate rating under the DBI methodology. Dr. Harris further explained that, while Dr. Allen opined that the ROM methodology should be used because appellant's permanent impairment was severe, Dr. Harris explained that her diagnosed conditions of patella chondromalacia with osteochondral defect condition only fell into a Class 1 impairment, not a Class 3 or 4 impairment.

In a report dated February 25, 2020, Dr. Harris properly concluded that, utilizing the DBI methodology under the A.M.A., *Guides*, appellant had four percent permanent impairment of the right lower extremity for patella chondromalacia with osteochondral defect with a Class 1, grade D impairment, per Table 16-3, page 511. He also related that she had three percent permanent impairment of the left lower extremity, under the DBI methodology for patella chondromalacia with osteochondral defect with a Class 1, grade C impairment. The Board finds that the DMA accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions which comported with his findings and the appropriate provisions of the A.M.A., *Guides*.[18] The DMA's report therefore constitutes the weight of the medical evidence.

As there is no current medical evidence of record, in conformance with the A.M.A., *Guides*, establishing a greater permanent impairment than the three percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity previously awarded, the Board finds that appellant has not met her burden of proof to establish entitlement to additional schedule award compensation.[19]

[16] *L.Y.*, Docket No. 20-0398 (issued February 9, 2021).

[17] OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified. *Supra* note 7 at Chapter 2.808.6f (March 2017). *See also P.W.*, Docket No. 19-1493 (issued August 12, 2020); *Frantz Ghassan*, 57 ECAB 349 (2006).

[18] *See K.P.*, Docket No. 23-0041 (issued November 20, 2023); *A.G.*, Docket No. 22-0582 (issued October 4, 2022); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

[19] *See A.R.*, Docket No. 21-0346 (issued August 17, 2022); *see K.H.*, Docket No. 20-1198 (issued February 8, 2021).

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 three percent permanent impairment of the left lower extremity and four percent permanent impairment of the right lower extremity, for which she previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 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