United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 21-1345**
	)	**Issued: February 21, 2023**
DEPARTMENT OF THE ARMY, DIRECTORATE OF EMERGENCY SERVICES, FORT HAMILTON, Brooklyn, NY, Employer	)	

Appearances:
Alan J. 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 September 9, 2021 appellant, through counsel, filed a timely appeal from a July 27, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] 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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On April 6, 2017 appellant, then a 45-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on March 29, 2017 he sustained a right knee sprain, right knee bruising, and left elbow pain when he fell onto his right knee apprehending a suspect while in the performance of duty. He stopped work on the date of injury. On May 11, 2017 OWCP accepted the claim for a right knee sprain and right knee contusion. By separate decision of even date, it denied the claim for an internal derangement of the right knee.

On June 30, 2017 OWCP expanded acceptance of appellant's claim to include a left biceps tendon tear. It paid him wage-loss compensation on the supplemental rolls for the period May 28 through August 20, 2017.[3]

Appellant returned to full-duty work on August 21, 2017.

On June 24, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated July 3, 2019, OWCP notified appellant of the additional medical evidence needed to establish his schedule award claim, including a statement from his attending physician indicating that the employment-related impairment had reached maximum medical improvement (MMI), and a description of the impairment in sufficient detail to visualize the character and degree of loss utilizing the appropriate portions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[4] It afforded him 30 days to respond. No response was received within the time allotted.

By decision dated September 19, 2019, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On September 20, 2019 OWCP received an August 26, 2019 report by Dr. Daniel M. Downs, a Board-certified orthopedic surgeon. Dr. Downs reviewed a history of injury and treatment and found that appellant had attained MMI. He noted that the appearance of appellant's left bicep had not returned to normal following surgery, and that appellant's right knee remained symptomatic after physical therapy. On examination of the right knee, Dr. Downs noted a positive patellofemoral grind test, good stability, full extension, and 120 degrees flexion measured with a goniometer. He opined that the May 11, 2017 magnetic resonance imaging (MRI) scan of the right knee indicated cartilaginous injury in the intercondylar notch of the femur. On examination of the

[3] OWCP authorized a transcutaneous electrical neurostimulator unit.

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

left upper extremity, Dr. Downs utilized a goniometer to measure 140 degrees elbow flexion, "extension lacking 25 degrees," 90 degrees pronation, and 75 degrees supination. He diagnosed a left distal bicep tendon rupture with repair, and a right knee sprain with chondromalacia in the intercondylar notch of the femur. Referring to Table 16-1 (The Lower Extremities- Definition of Impairment Classes), page 495 of the A.M.A., *Guides*, Dr. Downs assigned a Class 2 impairment for a moderate problem with cartilaginous injury to the articular surface. He noted an unspecified grade modifier of 1 with "vigorous or extensive use of the limb," resulting in 15 percent permanent impairment of the right lower extremity. Regarding the left upper extremity, Dr. Downs referenced Table 15-35 (The Upper Extremities – Range of Motion Grade Modifiers), page 477 of the A.M.A., *Guides* to find a grade modifier for functional history (GMFH) of 1 for limitation of elbow extension between 10 to 40 degrees. He also referred to Table 15-33 (Elbow/Forearm Range of Motion), page 474, to assess a grade modifier of 1 for limited extension. Dr. Downs combined "the lack of extension with the Grade Modifier with Table 15-35" to find a grade modifier of 2, resulting in 13 percent permanent impairment of the left upper extremity due to biceps tendon rupture.

On September 26, 2019 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated December 3, 2019, an OWCP hearing representative found that the case was not in posture for a hearing. The hearing representative remanded the case to OWCP to refer appellant, a statement of accepted facts (SOAF), and the medical record to an OWCP district medical adviser (DMA) to determine the appropriate percentage of permanent impairment based on the diagnosis-based impairment (DBI) and range of motion (ROM) methods, to be followed by a *de novo* decision.

On December 13, 2019 OWCP referred the medical record and a SOAF to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA. In a March 11, 2020 report, Dr. Katz reviewed the SOAF and the medical record, including Dr. Downs' report. He opined that the date of MMI was undetermined. Dr. Katz found that Dr. Downs did not reference the correct table in assessing permanent impairment of the right lower extremity, and that the single set of ROM measurements for the left upper extremity did not justify a 13 percent permanent impairment of the left upper extremity based on Table 15-33. He therefore opined that Dr. Downs' impairment rating was not probative for determining a schedule award in appellant's case. Dr. Katz recommended that OWCP refer appellant to an appropriate specialist for a second opinion examination and impairment evaluation.

On June 17, 2020 OWCP referred appellant, a SOAF, and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to establish appellant's permanent impairment for schedule award purposes.

In a July 10, 2020 report, Dr. Askin discussed appellant's factual and medical history, reviewed the SOAF and the medical record, and reported the findings of his physical examination of appellant. He opined that appellant had attained MMI as of that date. Dr. Askin advised that appellant was status post left biceps tendon repair and had also fully recovered from a remote cervical discectomy and fusion. On examination, he observed that appellant was contracting his right biceps more so than his left biceps, but that, with appellant's arms relaxed, the biceps

circumference on the left was "36 cm" and "35 cm" on the right although appellant was right-hand dominant. Dr. Askin found no functional issues in the left forearm, noting a well-healed scar from the left biceps tendon repair with cosmetic dimpling. Finkelstein's test and percussion at Guyon's canal were negative bilaterally. On examination of the right lower extremity, Dr. Askin found no atrophy, discomfort at the right knee with active flexion against resistance, tenderness to palpation in the medial aspect, no overt laxity of the lateral collateral, medial collateral, anterior, or posterior cruciate ligaments, no overt effusion, no overt patellofemoral tracking abnormality, and full range of right knee motion. He opined that appellant had no objective findings consequential to the accepted right knee and left elbow injuries. Referring to Table 15-4 (Elbow Regional Grid: Upper Extremity Impairments), page 399 of the A.M.A., *Guides*, Dr. Askin found a Class 0 impairment for no residual findings after surgical treatment, indicating no permanent impairment of the left upper extremity. He also opined that appellant had no permanent impairment of the right lower extremity, as the musculature in the affected limb was of greater circumference than the unaffected limb, corresponding to normal status. Dr. Askin noted that, insofar as Dr. Downs had noted mild objective findings in his August 26, 2019 report, that appellant's condition had evidently improved during the prior 11 months.

On August 17, 2020 OWCP referred Dr. Askin's report, the medical record, and a series of questions to Dr. Katz for determination of the appropriate percentage of impairment.

In an August 21, 2020 report, Dr. Katz reviewed Dr. Askin's report. He opined that, according to Table 15-4, appellant had no permanent impairment of the left upper extremity as there were no objective findings on examination, equaling a Class 0 impairment with a default value of zero with no net adjustment. Regarding the right lower extremity, Dr. Katz referred to Table 16-3 (Knee Regional Grid), pages 509 to 511, to find a Class 0 impairment for a knee contusion with no significant abnormal objective findings at MMI, equaling a zero percent permanent impairment of the right lower extremity. He opined that these ratings were supported by Dr. Askin's clinical findings on examination. Dr. Katz noted that, as Dr. Askin had not observed any motion deficits on examination, there was no basis for a ROM impairment of either the left upper extremity or right lower extremity.

By decision dated January 22, 2021, OWCP denied appellant's schedule award claim, finding that he had not established permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On February 9, 2021 appellant, through counsel, requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing, held May 13, 2021, counsel contended that OWCP impermissibly allowed Dr. Katz, as DMA, to resolve a conflict of medical opinion between Dr. Downs, for appellant, and Dr. Askin, for the government, regarding the appropriate percentage of permanent impairment.

By decision dated July 27, 2021, an OWCP hearing representative affirmed the January 22, 2021 decision. The hearing representative found that Dr. Downs' opinion was of diminished probative value as he misapplied the A.M.A., *Guides*. Therefore, Dr. Katz properly accorded greater weight to Dr. Askin's impairment rating.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations 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.[5] 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.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7] 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.[8]

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.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In his August 26, 2019 report, Dr. Downs opined that appellant had attained MMI. He found a 15 percent permanent impairment of the right lower extremity based on Table 16-1, for a Class 2 DBI for a-moderate knee problem with damage to the articular surface, augmented by unspecified grade modifiers. Dr. Downs also found a 13 percent permanent impairment of the left upper extremity due to limited extension of the left elbow, again augmented by grade modifiers that were not fully explained.

Dr. Katz, in his March 11, 2020 report, recommended a second opinion referral as Dr. Downs had based his impairment rating on inappropriate portions of the A.M.A., *Guides* and had not provided clear rationale to support the offered percentages of permanent impairment. OWCP then obtained a July 10, 2020 report from Dr. Askin, who provided detailed findings on examination and explained that appellant had no objective abnormality or dysfunction of the left upper extremity or right lower extremity. Dr. Askin referred to Table 15-4 (the Elbow Regional

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5a (March 2017).

[8] *J.C.*, Docket No. 20-1071 (issued January 4, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] *Supra* note 7 at Chapter 2.808.6f (March 2017).

Grid), to determine a Class 0 impairment as there were no objective residual findings following surgical repair. Similarly, he found that appellant had a zero percent permanent impairment of the right lower extremity as there were no abnormal findings on examination or other evidence of impairment or dysfunction. Dr. Askin noted that the musculature of appellant's injured left upper extremity and right lower extremity exceeded that, of the unaffected limbs, indicating a complete recovery from the accepted employment injuries.

As Dr. Downs, the attending physician, misapplied the A.M.A., *Guides*, there is no conflict with Dr. Askin as Dr. Downs' report is of diminished probative value.[10] OWCP therefore properly accorded Dr. Askin's opinion, as reviewed by Dr. Katz, the weight of the medical evidence.[11]

As appellant has not submitted medical evidence in conformance with the A.M.A., *Guides* to support a permanent impairment of a scheduled member or function of the body, the Board finds that he has not met his burden of proof to establish his claim for a schedule award.[12]

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

[10] *See M.G.*, Docket No. 20-0078 (issued December 22, 2020).

[11] *Id*.

[12] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 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