United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
	)	
and	)	**Docket No. 21-0141**
	)	**Issued: January 27, 2023**
U.S. POSTAL SERVICE, SPRINGDALE POST OFFICE, Stamford, CT, Employer	)	

Appearances:
John L. DeGeneres, Jr., Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2020 appellant, through counsel, filed a timely appeal from an October 22, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[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] The Board notes that a June 23, 2020 decision is also within the Board's jurisdiction. Counsel has only sought appeal from the October 22, 2020 decision. Thus, the June 23, 2020 decision is not properly before the Board and will not be addressed in this decision. *See* 20 C.F.R. § 501.3.

Pursuant to the 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.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

FACTUAL HISTORY

On May 24, 2012 appellant, then a 64-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a permanent acceleration of left hip osteoarthritis due to the factors of his federal employment, which required such activities as walking, standing, bending, and lifting. He noted that he first became aware of his claimed condition and its relation to his federal employment on March 8, 2012. Appellant did not stop work at the time he filed his claim. OWCP accepted the claim for permanent aggravation of preexisting bilateral osteoarthritis of the hips and paid wage-loss compensation for periods of disability.

In a March 26, 2012 report, Dr. Byron Hartunian, a Board-certified orthopedic surgeon, determined that appellant had 67 percent permanent impairment of his left lower extremity under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] He utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-4 (Hip Regional Grid -- Lower Extremity Impairments), page 514, the class of diagnosis (CDX) for appellant's total left hip replacement resulted in a class 4 impairment.

On November 21, 2012 appellant filed a claim for compensation (Form CA-7) for a schedule award.[6]

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[3] 5 U.S.C. § 8101 *et seq.*

[4] Appellant, through counsel, submitted a timely request for 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 the oral argument request, counsel asserted that oral argument should be granted to provide an opportunity for a dialog, which fully addresses the issues presented. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence. As such, the arguments on appeal can be adequately 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. Therefore, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

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

[6] By decision dated September 30, 2013, OWCP granted appellant a schedule award for 50 percent permanent impairment of the right lower extremity. Appellant's right lower extremity impairment is not the subject of the present appeal.

On January 22, 2013 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP district medical adviser (DMA), determined that, under the DBI rating method of the sixth edition of the A.M.A., *Guides*, appellant had 31 percent permanent impairment of his left lower extremity due to a left hip condition that fell under a CDX of class 3.

OWCP determined that there was a conflict in the medical opinion evidence regarding appellant's left lower extremity impairment between Dr. Hartunian and Dr. Slutsky, and it referred appellant for an impartial medical examination with Dr. Andrew Bazos, a Board-certified orthopedic surgeon. In a May 13, 2014 report and July 30, 2014 supplemental report, Dr. Bazos determined that, under the DBI rating method of the sixth edition of the A.M.A., *Guides*, appellant had 20 percent permanent impairment of his left lower extremity due to a left hip condition that fell under a CDX of class 3.

In a January 30, 2015 report and March 15, 2015 supplemental report, Dr. David Krohn, a Board-certified orthopedic surgeon serving as a DMA, found that, under the DBI rating method, appellant had 40 percent permanent impairment of his left lower extremity due to a left hip condition that fell under a CDX of class 4.

By decision dated June 22, 2015, OWCP granted appellant a schedule award for 40 percent permanent impairment of his left lower extremity. The award ran for 115.2 weeks from December 11, 2014 through February 24, 2017.

On July 20, 2015 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated November 30, 2015, OWCP's hearing representative set aside the June 22, 2015 decision, finding that a supplemental report from Dr. Bazos was required.

OWCP then engaged in extensive development of the medical evidence, which included an unsuccessful attempt to obtain an adequate supplemental report from Dr. Bazos and referral of appellant to another impartial medical examiner (IME), Dr. Dennis Rodin, a Board-certified orthopedic surgeon. After Dr. Rodin produced an October 5, 2017 report finding 31 percent permanent impairment of the left lower extremity, OWCP responded with a series of questions to clarify his opinion, including why he measured passive motion instead of active motion, why he used certain grade modifiers and his rationale for his calculation based on applicable data. No response was received from Dr. Rodin. After OWCP issued a February 1, 2019 decision remanding the case for further development regarding appellant's left lower extremity impairment, OWCP referred appellant for an impartial medical examination with Dr. Barry Kleeman, a Board-certified orthopedic surgeon regarding appellant's left lower extremity permanent impairment.

In a September 25, 2019 report, Dr. Kleeman discussed appellant's factual and medical history, noting that appellant reported he experienced soreness in both hips when he ambulated but did not ambulate with assistive devices. He reported the findings of his physical examination, noting that appellant had an antalgic gait and had chronic swelling in his lower extremities. Range of motion testing of the hips revealed restricted range of motion of the left hip. Dr. Kleeman indicated that there was no evidence of any muscle atrophy in appellant's lower extremities and that appellant had normal 5/5 strength testing of his hip flexors, extensors, abductors and adductors. Appellant exhibited mild discomfort and stiffness with range of motion of both hips.

Dr. Kleeman referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-4 (Hip Regional Grid -- Lower Extremity Impairments), page 515, the CDX for appellant's total left hip replacement (fair result with mild motion loss) resulted in a class 3 impairment with a default value of 37 percent. He assigned a grade modifier for functional history (GMFH) of 2 due to antalgic gait, and a grade modifier for physical examination (GMPE) of 0. Dr. Kleeman indicated that the "GMPE is 0, as this cannot be used when the [range of motion] is used to determine the rating impairment." He found that a grade modifier for clinical studies (GMCS) was not applicable. Dr. Kleeman utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (2 - 3) + (0 - 3) = -4, which resulted in a grade A or 31 percent permanent impairment of the left lower extremity. He found that appellant reached maximum medical improvement (MMI) in May 2005.

By decision dated October 29, 2019, OWCP granted appellant a schedule award for 31 percent permanent impairment of the left lower extremity.

On July 29, 2020 appellant, through counsel, requested reconsideration of the October 29, 2019 decision.

By decision dated October 22, 2020, OWCP denied modification of its October 29, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing federal regulations[8] 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 and the Board has concurred in such adoption.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is the primary method of calculation for the lower limb and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.*; *see V.J.,* Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

regional pain syndrome, amputation, and range of motion. Range of motion is primarily used as a physical examination adjustment factor.[11] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the range of motion 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]

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 hip, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.[13] After the CDX is determined from the Hip 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).[14] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[15]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[16] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[17] In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP properly determined that there was a conflict in the medical opinion evidence regarding appellant's left lower extremity impairment. In order to resolve the conflict, OWCP

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

[12] *Id.* at 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[13] *Id.* at 512-15.

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

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

[16] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[17] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[18] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

properly referred appellant to Dr. Kleeman, the IME, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

In his September 25, 2019 report, Dr. Kleeman referred to the sixth edition of the A.M.A., *Guides* and utilized the DBI rating method to find that, under Table 16-4, page 515, the CDX for appellant's total left hip replacement (fair result with mild motion loss) resulted in a class 3 impairment with a default value of 37 percent. He assigned a GMFH of 2 due to antalgic gait and a GMPE of 0. Dr. Kleeman indicated that the "GMPE is 0, as this cannot be used when the [range of motion] is used to determine the rating impairment." He found that a GMCS was not applicable. Dr. Kleeman utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) = (2 - 3) + (0 - 3) = -4, which resulted in a grade A or 31 percent permanent impairment of the left lower extremity. He found that appellant reached MMI in May 2005.

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[19]

The Board finds that the September 25, 2019 report of Dr. Kleeman, the IME, requires clarification with respect to his choice of grade modifiers. Dr. Kleeman determined that appellant had a GMPE of 0, but he did not explain how the physical examination findings warranted a GMPE of 0. In addition, he noted, "GMPE is 0, as this cannot be used when the [range of motion] is used to determine the rating impairment." However, Dr. Kleeman failed to adequately explain why he did not exclude the use of a GMPE altogether in the net adjustment formula, rather than choosing a GMPE of 0 and employing it in the net adjustment formula calculation. Moreover, he failed to adequately explain why he excluded a GMCS from the net adjustment formula calculation.

Therefore, in order to resolve the continuing conflict in the medical opinion evidence regarding appellant's left lower extremity impairment, the case will be remanded to OWCP for referral of the case record, a statement of accepted facts, and, if necessary, appellant, to Dr. Kleeman for a supplemental report addressing the above-noted concerns. If Dr. Kleeman is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a new IME for a rationalized medical opinion on this issue.[20] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

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[19] *See J.K.*, Docket No. 21-0007 (issued July 30, 2021); *M.M.*, Docket No. 20-1524 (issued April 20, 2021); *April Ann Erickson*, 28 ECAB 336 (1977).

[20] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 27, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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