

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

C.F., widow of S.F., Appellant)	
)	
and)	Docket No. 20-0430
)	Issued: March 6, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS AND BORDER PROTECTION,)	
Los Angeles, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
JANICE B. ASKIN, Judge

JURISDICTION

On December 16, 2019 appellant, through counsel, filed a timely appeal from a September 25, 2019 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 that the employee sustained permanent impairment of the left lower extremity, warranting a schedule award.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 9, 2003 the employee, then a 46-year-old agricultural quarantine inspector, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a left knee injury when he slipped and fell on the gangway as he boarded a vessel while in the performance of duty. The employee stopped work on the date of injury. By decision dated June 19, 2003, OWCP accepted the claim for left medial meniscus tear.

On July 9, 2003 Dr. Frank Giacobetti, a Board-certified orthopedic surgeon, performed an OWCP-authorized arthroscopic partial left medial meniscectomy, chondroplasty of the femoral condyle and medial tibial plateau, and arthroscopic synovectomy. Following a series of physical therapy treatments, the employee returned to full-duty work on August 29, 2003.⁴

The employee again stopped work on April 9, 2006 due to left knee pain. By decision dated May 25, 2006, OWCP accepted a recurrence of the accepted left knee medial meniscus tear. It paid the employee wage-loss compensation on the supplemental rolls effective April 10 through June 10, 2006 and on the periodic compensation rolls effective June 11, 2006.

On June 14, 2006 Dr. Giacobetti performed an OWCP-authorized left knee arthroscopy with partial medial meniscus resection, synovectomy, and chondroplasty of the medial femoral condyle and medial tibial plateau.⁵

In an April 7, 2018 report, Dr. Andres A. De La Llana, an internist, opined that the employee had attained maximum medical improvement (MMI) on April 11, 2017.

On June 6, 2018 the employee filed a claim for compensation (Form CA-7) for a schedule award.

³ Docket No. 17-0733 (issued October 16, 2017).

⁴ OWCP subsequently accepted, under OWCP File No. xxxxxx638, that on April 13, 2004 the employee sustained a cervical and lumbar strain when he was struck by a falling 50-pound sack of pumpkin seeds. The employee was released to full-duty work effective May 14, 2004. Additionally, under OWCP File No. xxxxxx755, OWCP accepted that on January 20, 2006, he sustained thoracic and lumbar sprains in a work-related motor vehicle accident. The employee returned to full-duty work on February 17, 2006. OWCP has administratively combined appellant's claims, with the present claim, OWCP File No. xxxxxx449, serving as the master file.

⁵ The employing establishment separated the employee from federal service effective August 25, 2006, for reasons unrelated to the accepted employment injuries.

In a development letter dated October 18, 2018, OWCP requested that the employee submit a detailed medical report from his physician addressing the employee's permanent impairment due to his accepted April 9, 2003 left knee injury in accordance the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ It afforded him 30 days to submit the necessary information in support of his schedule award claim.

In an October 31, 2018 report, Dr. Mesfin Seyoum, a family medicine specialist, recounted a history of injury and treatment, and reviewed medical records. He noted that although Dr. Kourosh K. Shamlou and Dr. Christopher Ninh, Board-certified orthopedic surgeons, had recommended total left knee arthroplasty, that the employee had declined the procedure. Dr. Seyoum related the employee's complaints of chronic left knee pain and difficulty with activities of daily living. The employee completed a pain disability questionnaire (PDQ) with a score of 107, indicating a severe related impairment. He also completed a lower limb questionnaire, which indicated moderate-to-severe impairment. The employee ambulated with a cane. On examination, Dr. Seyoum observed mild swelling of the left knee with peripatellar tenderness, left knee flexion limited to 70 to 100 degrees due to pain, decreased sensation in the left knee when compared to the right knee, left quadriceps and hamstring weakness, and a one centimeter reduction in muscle mass in the left lower extremity at 10 and 20 centimeters below the knee joint line when compared to the right lower extremity. He diagnosed a left knee medial meniscus tear, left knee osteoarthritis, and status-post left knee surgeries. Dr. Seyoum opined that the employee's left lower extremity conditions were caused by the April 9, 2003 employment injury. He found that the employee had attained MMI.

For the left lower extremity, Dr. Seyoum referred to the sixth edition of the A.M.A., *Guides* and utilized the diagnosis-based impairment rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) for the left knee strain and medial meniscal tear resulted in a class 2 impairment due to bone-on-bone osteoarthritis. He assigned a grade modifier for functional history (GMFH) of 2 due to the employee's PDQ score and as he ambulated with a cane. Dr. Seyoum assigned a grade modifier for physical examination (GMPE) of 2 due to moderate palpatory findings and limited left knee flexion. He found that a grade modifier for clinical studies (GMCS) was not applicable as the clinical studies were used to establish the impairment class. Dr. Seyoum utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) = (2 - 2) + (2 - 2) = 0$, which resulted in 20 percent permanent impairment of the left lower extremity. He then utilized the ROM rating method, with three trials of left knee flexion, to find 20 percent permanent impairment of the left lower extremity according to Table 16-23, page 549 of the A.M.A., *Guides* (Knee Motion Impairments) for restricted flexion. Dr. Seyoum assigned a CDX of 2 for a moderate impairment. He assigned a GMFH of 2 as the employee routinely utilized a cane for ambulation. Dr. Seyoum utilized the net adjustment formula, $(2-2) = 0$, to find no net adjustment, equaling 20 percent permanent impairment of the left lower extremity.

⁶ A.M.A., *Guides* (6th ed. 2009).

On February 21, 2019 OWCP referred the medical record, including an updated statement of accepted facts (SOAF),⁷ to Dr. Jovito B. Estaris, a physician Board-certified in occupational medicine serving a district medical adviser (DMA), for an opinion on the employee's permanent impairment in accordance with the A.M.A., *Guides*.

In a February 27, 2019 report, Dr. Estaris reviewed the SOAF and the medical record. He opined that the 2003 and 2006 occupational left knee injuries aggravated a degenerative condition, which originated with the 1982 nonoccupational left knee surgery. Dr. Estaris noted that the degenerative process had continued through the years. He opined that the only condition causing the employee's left knee symptoms was "the preexisting nonindustrial degeneration of the left knee." Dr. Estaris noted that he concurred with Dr. Seyoum's impairment rating and method of calculation, and that he could provide an impairment rating if OWCP so requested. He did not indicate whether the employee had attained MMI. Dr. Estaris concluded that as the employee's condition was not work related there was no permanent impairment of the left lower extremity.

By decision dated March 28, 2019, OWCP denied the employee's schedule award claim. It found that the weight of the medical evidence, as represented by Dr. Estaris' opinion, established that the employee had no continuing employment-related residuals and, therefore, no compensable permanent impairment of his left lower extremity.

On April 2, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 17, 2019.⁸

By decision dated September 25, 2019, OWCP's hearing representative affirmed the March 28, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁹ and its implementing regulations¹⁰ 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

⁷ The February 21, 2019 SOAF listed the accepted conditions as temporary a ggravation of a degenerative tear of the posterior horn of the left medial meniscus and temporary a ggravation of preexisting osteoarthritis conditions of the left knee.

⁸ On April 12, 2019 OWCP noted that the appellant had called on that date to advise that the employee had passed away on February 6, 2019.

⁹ *Supra* note 2.

¹⁰ 20 C.F.R. § 10.404.

adoption.¹¹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.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 knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.¹³ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using 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

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.¹⁶

ANALYSIS

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

The February 21, 2019 SOAF sent to the DMA listed the accepted conditions as temporary aggravation of a degenerative tear of the posterior horn of the left medial meniscus, and temporary aggravation of preexisting osteoarthritis conditions of the left knee. OWCP, however, accepted a left knee medial meniscus tear, not a temporary aggravation. The SOAF provided to the DMA, Dr. Estaris was, therefore, inaccurate.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁷ OWCP's procedures dictate that, when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the

¹¹ See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); see also *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

¹³ See A.M.A., *Guides* 509-11 (6th ed. 2009).

¹⁴ *Id.* at 515-22.

¹⁵ *Id.* at 23-28.

¹⁶ *Supra* note 12 at Chapter 2.808.6(f) (March 2017).

¹⁷ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *M.B.*, Docket No. 19-0525 (issued March 20, 2020); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

probative value of the opinion is seriously diminished or negated altogether.¹⁸ OWCP did not provide the DMA with an accurate SOAF as it incorrectly listed appellant's accepted conditions. As such, the report from the DMA was not based on an accurate factual framework, they cannot represent the weight of the medical evidence.¹⁹

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.²⁰ Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²¹

Accordingly, the Board finds that this case must be remanded to OWCP. On remand, OWCP shall prepare a complete and accurate SOAF and request that the DMA submit a supplemental opinion regarding permanent impairment of the employee's left lower extremity. Following 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.

¹⁸ *R.W.*, Docket No. 19-1109 (issued January 2, 2020); *supra* note 12 at Chapter 3.600.3 (October 1990).

¹⁹ *M.B.*, *supra* note 17; *G.C.*, Docket No 18-0842 (issued December 20, 2018).

²⁰ *See T.C.*, Docket No. 19-0771 (issued March 17, 2021); *E.W.*, Docket No. 17-0707 (issued September 18, 2017).

²¹ *M.B.*, *supra* note 17; *D.S.*, Docket No. 19-0292 (issued June 21, 2019); *G.C.*, *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 6, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board