

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

_____)	
J.S., Appellant)	
)	
and)	Docket No. 21-1390
)	Issued: September 1, 2023
U.S. POSTAL SERVICE, COVINGTON)	
STATION, Kent, WA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On September 22, 2021 appellant, through counsel, filed a timely appeal from an August 6, 2021 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 to consider the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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 an 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.*

FACTUAL HISTORY

On December 10, 2016 appellant, then a 51-year-old casual carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2016 she slipped and fell on a patch of ice, injuring her knees while in the performance of duty. She stopped work on December 11, 2016. OWCP accepted the claim for bilateral knee sprains, low back strain, and right shoulder strain. It later expanded the acceptance of the claim to include temporary aggravation of bilateral knee osteoarthritis. OWCP paid appellant wage-loss compensation on the supplemental rolls as of January 25, 2017 and on the periodic rolls as of July 22, 2017. By decision dated September 12, 2019, it terminated her medical benefits and wage-loss compensation effective October 30, 2018. By decision dated March 10, 2020, a representative of OWCP's Branch of Hearings and Review affirmed OWCP's September 12, 2019 decision.

On July 4, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a July 13, 2020 development letter, OWCP requested that appellant submit an impairment calculation addressing whether she had reached maximum medical improvement (MMI) and provide an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.³ It indicated that, to date, no medical evidence had been received in support of her claim for a schedule award. OWCP advised that, if appellant's physician was unable or unwilling to provide the required report, to notify OWCP in writing and if appellant's case met the essential elements for a schedule award claim, she would be scheduled to be seen by a second opinion specialist. It afforded her 30 days to submit the necessary medical evidence.

In an August 28, 2020 report, Dr. Ralph D'Auria, a Board-certified physiatrist, noted that he examined appellant due to low back pain, right shoulder pain, and bilateral knee pain. He described her history of injury on December 10, 2016 and reviewed her medical history. Dr. D'Auria listed appellant's accepted conditions as sprain of the right knee, sprain of the left knee, strain of the lower back, strain of the right shoulder, and primary osteoarthritis of both knees. He found that she had reached MMI as the date of his examination. Dr. D'Auria found limited range of motion (ROM) of appellant's right shoulder after three trials to be from 80 to 100 degrees of abduction, 50 degrees of adduction, 100 to 110 degrees of flexion, 50 degrees of extension, 20 to 30 degrees of internal rotation, and 35 to 40 degrees of external rotation. He found right shoulder weakness on resisted external rotation of 4/5 and a positive Hawkins' test.

Dr. D'Auria reviewed bilateral knee x-rays dated August 18, 2020 and reported advanced degenerative changes in the medial compartment of both knees with no visible cartilage interval and decreased patella-femoral space, right more than then left. He applied the A.M.A., *Guides* to his findings and determined, using the diagnosis-based impairment (DBI) method, that the diagnosis of bilateral knee osteoarthritis using Table 16-3, page 511 was appropriate. Dr. D'Auria found that the class of diagnosis (CDX) was 4 as appellant had no cartilage interval with a default impairment rating of 50 percent. He found a grade modifier for functional history (GMFH) of 2, due to an antalgic limp with routine use of a single gait aid under Table 16-6, page 516; a grade

³ A.M.A., *Guides* 6th ed (2009).

modifier for physical examination (GMPE) of 2 due to moderate palpatory findings in accordance under Table 16-7, page 517; and a grade modifier for clinical studies (GMCS) of 4 as x-rays showed no cartilage interval under Table 16-8, page 519. Dr. D'Auria utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) to reach -4 and reduced the default rating to grade A, which equaled 50 percent permanent impairment of the bilateral lower extremities.

With regard to permanent impairment of appellant's right shoulder, Dr. D'Auria found 12 percent permanent impairment due to loss of ROM in accordance with Figure 15-34, page 475 of the A.M.A., *Guides*. This included 100 degrees of abduction for 3 percent permanent impairment; 110 degrees of flexion for 3 percent permanent impairment; 30 degrees of internal rotation for 4 percent permanent impairment; and 40 degrees of external rotation for 2 percent permanent impairment, totaling 12 percent of the right upper extremity. Dr. D'Auria determined that the ROM methodology was greater than the DBI estimate of two percent permanent impairment due to shoulder strain/sprain based on Table 15-5, page 401. He also found three percent impairment of the whole person due to chronic low back pain.

On January 22, 2021 OWCP referred the case record, along with a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA), for an opinion regarding appellant's schedule award claim.

In a February 3, 2021 report, the DMA reviewed Dr. D'Auria's August 28, 2020 report and agreed with his application of the A.M.A., *Guides* and the percentages of impairment of the bilateral knees and right shoulder. However, he noted that FECA did not allow a schedule award for the spine or whole person.

On February 10, 2021 OWCP requested clarification from Dr. Katz. It noted that appellant's medical benefits and wage-loss compensation were terminated as there were no continuing employment-related residuals or disability, and because any continuing disability and medical residuals were due to preexisting conditions.

In a February 19, 2021 report, Dr. Katz recounted that appellant's accepted knee conditions were temporary aggravations that had resolved, leaving the preexistent advanced osteoarthritis of the knees at the preinjury level. He did not address her right upper extremity findings. Dr. Katz withdrew his findings of work-related permanent impairment.

By decision dated February 24, 2021, OWCP denied appellant's schedule award claim.

On March 2, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. An oral hearing was held on May 27, 2021.

By decision dated August 6, 2021, OWCP's hearing representative affirmed the February 24, 2021 decision.

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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants.

OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ 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.⁷

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁸ Under the sixth edition, the evaluator identifies CDX, which is then adjusted by a GMFH, GMPE, and GMCS.⁹ 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

Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.¹² Furthermore, the back is specifically excluded from the definition of organ under FECA.¹³

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

⁹ *Id.* at 494-531.

¹⁰ *Id.* at 411.

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

¹² 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.H.*, Docket No. 19-1788 (issued March 17, 2020); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹³ *See id.* at § 8101(19); *see also G.S.*, Docket No. 18-0827 (issued May 1, 2019); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

FECA Bulletin No. 17-06 provides guidance in applying ROM or DBI methodologies in rating permanent impairment of the upper extremities. Regarding the application of ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides:

“As the [A.M.A.,] *Guides* caution that, if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).

“Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the [A.M.A.,] Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used.*” (Emphasis in the original.)¹⁴

OWCP’s 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.¹⁵

ANALYSIS

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

On January 22, 2021 OWCP referred the case record, to the DMA, Dr. Katz, for an opinion regarding appellant’s schedule award claim.

In a February 3, 2021 report, the DMA reviewed Dr. D’Auria’s August 28, 2020 report and agreed with his findings of 50 percent permanent impairment of the bilateral lower extremities and 12 percent of the upper right extremity. However, he noted that FECA did not allow a schedule award for the spine or whole person.

On February 10, 2021 OWCP requested clarification from Dr. Katz. In a February 19, 2021 report, Dr. Katz recounted that appellant’s accepted knee conditions were temporary aggravations that had resolved, leaving the preexistent advanced osteoarthritis of the knees at the preinjury level. He did not address her right upper extremity findings. Dr. Katz withdrew his finding of permanent impairment. Dr. Katz, however, did not provide medical rationale explaining

¹⁴ FECA Bulletin No. 17-06 (issued May 8, 2017).

¹⁵ *See supra* note 6 at Chapter 2.808.6(f) (March 2017).

why his impairment ratings were no longer appropriate.¹⁶ As Dr. Katz' response was insufficiently rationalized, OWCP should have sought further clarification.

On remand, OWCP shall refer the case record to another DMA to determine appellant's permanent impairment in accordance with the A.M.A., *Guides*. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding appellant's schedule award claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2021 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: September 1, 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

¹⁶ *K.M.*, Docket No. 20-0601 (issued December 14, 2020); *J.B.* Docket No. 19-0527 (issued September 5, 2019).