

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

_____)	
L.P., Appellant)	
)	
and)	Docket No. 23-0570
)	Issued: September 13, 2023
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION,)	
Sacramento, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 15, 2023 appellant filed a timely appeal from a March 10, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 7, 2021 appellant, then a 43-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained an injury to his left knee when sprinting during a physical fitness test while in the performance of duty. He did not initially stop work. OWCP accepted the claim for left knee tear of medial meniscus. On October 25, 2021 appellant underwent left knee arthroscopy with partial meniscectomy.² He stopped work on October 25, 2021, returned to full-time modified duty on January 3, 2022, and returned to full-time full duty on April 25, 2022.

A May 11, 2021 magnetic resonance imaging (MRI) scan of the left knee read by Dr. Robert Clapp, Board-certified in occupational medicine, revealed a complex tear of the body of the medial meniscus, including a radial component to the tear, intact discoid lateral meniscus, mild age determinate medial collateral ligament sprain, cystic changes within the popliteus muscle that can represent sequela of intrasubstance partial tearing, localized chondromalacia within the inferior midline trochlea, small joint effusion, and a small Baker's cyst.

A June 22, 2021 x-ray of the left knee read by Dr. Anthony Lee Yu, a Board-certified orthopedic surgeon, revealed no acute fracture or dislocation, no significant joint effusion, joint space narrowing of less than 50 percent in the medial compartment, and mild arthritis.

In a June 16, 2022 report, Dr. Clapp examined appellant for the left knee and noted that appellant denied having pain, swelling, locking, or instability, and had healed surgical scars and no erythema, edema, or ecchymosis. He found that appellant had range of motion (ROM) of 0 to 130 degrees, no tenderness to palpation, negative Lachman, negative varus/valgus, negative posterior drawer, negative McMurray's, negative patellar apprehension, a full squat, and a normal gait. Dr. Clapp assessed a history of left knee arthroscopy as the primary encounter diagnosis, and internal derangement of the left knee. He noted that appellant was then tolerating full duty and was asymptomatic. Dr. Clapp opined that appellant was at maximum medical improvement (MMI), but would require further medical treatment. He concluded that appellant should be assigned to another medical provider for assignment of permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

On June 22, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On October 3, 2022 OWCP referred appellant along with the medical record and a statement of accepted facts, for a second opinion evaluation of his permanent impairment, date of MMI, and medical status.

² The record reflects that appellant has a prior claim under OWCP No. xxxxxx375 that OWCP accepted for other tear of medial meniscus of the right knee and for which he underwent a right knee partial medial meniscectomy in August 2018.

³ A.M.A., *Guides* (6th ed. 2009).

In a January 9, 2023 report, Dr. Charles Xeller, a Board-certified orthopedic surgeon, serving as OWCP's second opinion physician, noted appellant's history of injury, medical course, and current physical examination findings. He utilized the A.M.A., *Guides* to provide a left lower extremity impairment rating for appellant's left knee condition. Dr. Xeller rated appellant's permanent impairment under the diagnosis-based impairment (DBI) rating method and explained that the ROM method was not applicable as appellant had full ROM of 0 to 140 degrees in both knees. Referencing Table 16-3 (Knee Regional Grid), page 509, the class of diagnosis (CDX) for the diagnosis of partial medial meniscectomy of the left knee resulted in a Class 1 impairment with a default value of C or two percent permanent impairment. Dr. Xeller assigned a grade modifier for functional history (GMFH) of 1, due to mild ache when running and sometime use of pain medication, and avoidance of impact activity such as running and jumping. He noted that he assigned a grade modifier for physical examination (GMPE) of 0 due to a normal examination, except for medial joint line tenderness, and noted that a grade modifier for clinical studies (GMCS) was not applicable, as the MRI scan and surgery report were used to assign the CDX. Dr. Xeller indicated that the final grade was B or two percent left lower extremity permanent impairment. He also indicated that the date of MMI would be six months from the April 25, 2022 surgery.

On January 18, 2023 OWCP referred Dr. Xeller's January 9, 2023 report and the case record to Dr. Michael Minev, an internist serving as an OWCP district medical adviser (DMA), for review and evaluation of appellant's left lower extremity permanent impairment pursuant to the A.M.A., *Guides*.

In an undated report received on January 27, 2023, the DMA noted that appellant's left lower extremity impairment rating was calculated utilizing the DBI method and that the ROM method was not applicable, as appellant's left knee ROM was 0 to 130 degrees on June 16, 2022 which the DMA indicated was the date of MMI. Dr. Minev explained that Dr. Clapp's June 16, 2022 report indicated that appellant had healed surgical scars, no erythema or ecchymosis, no tenderness to palpation, negative Lachman's sign, negative varus/valgus, negative posterior drawer sign, negative McMurray's sign, negative patellar apprehension, full squat, and normal gait. In addition, the DMA noted that Dr. Clapp related that appellant was tolerating full duty and was asymptomatic on June 16, 2022. Dr. Minev noted that the June 16, 2022 date of MMI that he selected differed from the date of Dr. Xeller who indicated that the MMI date would be six months from the date of surgery on April 25, 2022.

The DMA referred to the sixth edition of the A.M.A., *Guides* at Table 16-3 (Knee Regional Grid), page 509, noted that appellant's left knee findings were consistent with a CDX for meniscal injury with partial medial meniscectomy, which resulted in a Class 1 impairment with a default impairment rating of two percent. Dr. Minev explained that the default impairment rating must be adjusted based on the grade modifiers and assigned a GMFH of 0, based on absence of a gait abnormality or need for assistive devices; a GMPE of 0, based on absence of examination findings such as tenderness, swelling, mass, crepitance, abnormal alignment/ROM, or muscle atrophy; and a GMCS of 0, based on the absence of significant imaging abnormalities. The DMA noted that he selected these grade modifiers according to the findings in Dr. Clapp's June 16, 2022 report, which he indicated was the date of MMI, as noted. Dr. Minev applied the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (0 - 1) + (0 - 1) + (0 - 1) = -3$, and determined that the net adjustment of -3 for a Class 1 meniscal injury yielded a final impairment rating of grade A, or 1 percent permanent impairment of appellant's left lower extremity.

The DMA noted that his impairment rating of one percent differed from Dr. Xeller's impairment rating of two percent. Dr. Minev explained that Dr. Xeller assigned a GMFH of 2 based on appellant's reported mild aches with running and jumping and occasional use of pain medication. The DMA indicated that he disagreed with Dr. Xeller's assignment of 2 for GMFH because appellant did not relate these symptoms to Dr. Clapp, according to the June 16, 2022 examination report.

By decision dated March 10, 2023, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The period of the award ran for 2.88 weeks from June 16 to July 6, 2022.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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 to 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 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

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health*.⁹ In evaluating lower extremity impairment, the sixth edition requires identifying the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*; see *A.D.*, Docket No. 20-0553 (issued April 19, 2021); see also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

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

⁸ See *D.C.*, Docket No. 20-1655 (issued August 9, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009) 3.

¹⁰ *Id.* at 494-531.

¹¹ See *M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹²

In some instances, a DMA's opinion can constitute the weight of the medical evidence.¹³ This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A., *Guides*.¹⁴ In this instance, a detailed opinion by a DMA may constitute the weight of the medical evidence, as long as he or she explains his or her opinion, shows values and computation of impairment based on the A.M.A., *Guides*, and considers each of the reported findings of impairment.¹⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than one percent permanent impairment of the left lower extremity for which he previously received a schedule award.

In a January 9, 2023 report, Dr. Xeller the second opinion physician, opined that appellant had two percent permanent impairment of his left lower extremity. He explained that he used the DBI method to assign appellant's meniscal injury a Class 1 impairment with a default value of C, for two percent permanent impairment, according to the A.M.A., *Guides* at Table 16-3 on page 509. Dr. Xeller selected a GMFH of 1 due to appellant's mild pain while running and jumping, with the occasional use of medication for pain. He assigned a GMCS of 0 and a GMPE of 0. Dr. Xeller determined that the final grade was B for two percent left lower extremity impairment. The Board finds that, while he concluded that appellant had two percent permanent impairment, after application of the net adjustment formula, his findings only support one percent permanent impairment. Application of the net adjustment formula would yield $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (0 - 1) + (0 - 1) = -2$. The net adjustment formula would place appellant's meniscal injury, with partial medial meniscectomy, in grade A, not grade B, under Table 16-3 of the A.M.A., *Guides*, for one percent permanent impairment rating. Dr. Xeller failed to properly explain how he calculated his impairment rating according to the A.M.A., *Guides* and he indicated that the date of MMI was an unspecified date six months after appellant's surgery on April 25, 2022 without reference to any examination findings or report of that MMI date. As noted, in schedule award cases where an opinion on the percentage of permanent impairment from an examining physician, is not based on the A.M.A., *Guides*, the opinion of the DMA will constitute the weight of the medical evidence, as long as the DMA explains his or her opinion,

¹² See *L.P.*, Docket No. 21-0282 (issued November 21, 2022); *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *B.B.*, Docket No. 18-0782 (issued January 11, 2019); *supra* note 8 at Chapter 2.808.6f (March 2017).

¹³ See *J.G.*, Docket No. 21-0434 (issued August 16, 2022); *M.G.*, Docket No. 20-0078 (issued December 22, 2020); *R.R.*, Docket No. 19-1314 (issued January 3, 2020); *J.H.*, Docket No. 18-1207 (issued June 20, 2019); *M.P.*, Docket No. 14-1602 (issued January 13, 2015); *supra* note 7 at Chapter 2.810.8j (September 2010).

¹⁴ *Id.*

¹⁵ *Id.*

shows values and computation of impairment based on the A.M.A., *Guides*, and considers each of the reported findings of impairment.¹⁶

In a January 27, 2023 report, the DMA, Dr. Minev, determined that appellant had one percent permanent impairment of his left lower extremity. Dr. Minev explained that he based his opinion on the findings from the June 16, 2022 examination report of Dr. Clapp. The DMA noted that this was the date of MMI based on the examination findings by Dr. Clapp on that date. Dr. Minev concurred with Dr. Xeller's selection of a Class 1 impairment for appellant's left knee meniscal injury, with a default value of C or two percent permanent impairment. The DMA also concurred with Dr. Xeller's assignment of a GMPE of 0 and GMCS of 0. However, Dr. Minev disagreed with Dr. Xeller's assignment of a GMFH of 1 and assigned a GMFH of 1 based on the June 16, 2022 examination report of Dr. Clapp. The DMA provided his calculation of the net adjustment formula of $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (0 - 1) + (0 - 1) + (0 - 1) = -3$, and noted that the net adjustment of -3 for a Class 1 meniscal injury yielded a final grade A impairment rating, or one percent permanent impairment of the left lower extremity.

As appellant has not established greater than one percent permanent impairment of the left lower extremity, for which he previously received a schedule award, the Board finds that he has not met his burden of proof.

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 his burden of proof to establish greater than one percent permanent impairment of the left lower extremity for which he previously received a schedule award.

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board