United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 23-1047**
	)	**Issued: March 14, 2024**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, ISLE ROYALE NATIONAL PARK, Houghton, MI, Employer	)	

Appearances:
Appellant, pro se
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 August 2, 2023 appellant filed a timely appeal from a May 24, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 nine percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 25, 2019 appellant, then a 46-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2019 he sustained a right knee injury when he was descending a dimly-lit stairwell and missed the last step, causing him to slip and fall while in the performance of duty.

Appellant underwent surgery for right knee patellar tendon repair on November 23, 2019 and second revision right knee patellar tendon reconstruction on September 16, 2021.

OWCP accepted the claim on March 9, 2020 for strain of muscle(s) and tendon(s) of the right lower leg. It later updated the acceptance of the claim to include right knee pain and spontaneous rupture of the extensor tendons of the right lower leg.[2]

On June 28, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On January 31, 2023 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion medical examination and determination as to whether appellant sustained permanent impairment and to assign a date of maximum medical improvement (MMI). It requested that Dr. Schwartz apply the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

On February 17, 2023 OWCP received a February 1, 2023 report from Dr. Victor K. Lin, a Board-certified physiatrist, who evaluated appellant for the purposes of a lower extremity permanent impairment rating. Dr. Lin noted that appellant's examination revealed moderate loss of range of motion (ROM) of each knee. In a February 14, 2023 impairment rating, he utilized the diagnosis-based impairment (DBI) rating method of the sixth edition of the A.M.A., *Guides*, for the class of diagnosis (CDX) of patellar condition in each knee resulting in a Class 1 impairment, and found that appellant had eight percent permanent impairment of each lower extremity under this method. Alternatively utilizing the range of motion (ROM) methodology, Dr. Lin determined that appellant sustained 20 percent permanent impairment of each lower extremity.

In a March 22, 2023 report, Dr. Schwartz indicated that he reviewed the medical evidence of record and provided findings on physical examination, including ROM measurements for the right knee. He provided a permanent impairment rating of appellant's right lower extremity utilizing the sixth edition of the A.M.A., *Guides*. Dr. Schwartz utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 509, the CDX,

[2] The record reflects that under OWCP File No. xxxxxx627, on February 7, 2020 appellant was leaving the employing establishment visitor center after installing a computer and slipped on ice while in the performance of duty, injuring his left leg when he was still recovering from right patellar surgery performed on November 23, 2019. Appellant underwent left patellar tendon repair on February 11, 2020.

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

derived from appellant's right patellar tendon rupture, resulted in a Class 1 impairment (moderate motion deficits and/or significant weakness) with a default value of 10 percent. He assigned a grade modifier for functional history (GMFH) of 2 based on antalgic gait, and a grade modifier for physical examination (GMPE) of 2 based on visible quadriceps loss and weakness. Dr. Schwartz assigned a grade modifier for clinical studies (GMCS) of 2 based on moderate pathology. He utilized the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (2 – 1) + (2 – 1) + (2 – 1) = +3, which resulted in a grade E or 13 percent permanent impairment of the right lower extremity. Dr. Schwartz determined that appellant had reached MMI as of March 22, 2023, the date of his examination.

On May 3, 2023 OWCP requested that Dr. Herbert White, Jr., a physician Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA), review the case to determine the permanent impairment of appellant's right lower extremity and to provide a date of MMI.

In reports dated May 6 and 15, 2023, Dr. White utilized the DBI rating method to find that, under Table 16-3, the CDX, appellant's right-sided tendon rupture, resulted in a Class 1 impairment under mild motion deficit with a default value of seven percent. He assigned a GMFH of 2 based on antalgic gait; a GMPE of 2 based on tenderness; and a GMCS of 2 based on moderate pathology. Dr. White utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) + (2 - 1) = +3, which resulted in a grade E or nine percent permanent impairment of the right lower extremity. He noted that the ROM impairment method was not applicable in accordance with section 16.7, page 543 of the A.M.A., *Guides*.

Dr. White further expressed his disagreement with Dr. Schwartz' assignment of Class 1, tier 3, for moderate motion deficit. He asserted that Class 1, tier 2, for mild motion deficit was the appropriate classification for rating appellant's impairment, noting that Dr. Schwartz' physical examination findings were unreliable and inconsistent when compared to Dr. Lin's evaluation and therefore, should be excluded from the grading process. Dr. White concluded that using the DBI rating method, appellant sustained nine percent permanent impairment of the right lower extremity and reached MMI on March 22, 2023, the date of Dr. Schwartz's examination.

By decision dated May 24, 2023, OWCP granted appellant a schedule award for nine percent permanent impairment to the right leg. The award ran for 25.92 weeks from March 22 through September 19, 2023 and was based on the rating reports of Dr. White, the DMA, which evaluated the examination findings of Dr. Schwartz, OWCP's referral physician.

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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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]

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 knees, reference is made to Table 16-3 (Knee Regional Grid).[8] Under each table, after the CDX is determined and a default grade value is identified, the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] 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.[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 GMFH, GMPE, and GMCS. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and ROM. ROM is primarily used as a physical examination adjustment factor.[11] The A.M.A., *Guides*, however, also explains that some of the diagnosis-based grids refer to the ROM 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]

[6] For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); 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] *Supra* note 3 at 509-11.

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

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

[11] *Id.* at 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).

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

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

In a report dated March 22, 2023, Dr. Schwartz utilized the sixth edition of the A.M.A., *Guides* and determined that appellant had 13 percent permanent impairment of the right lower extremity. OWCP referred his report to Dr. White, the DMA, who in reports dated May 6 and 15, 2023, evaluated the March 22, 2023 examination findings of Dr. Schwartz to calculate nine percent permanent impairment of the right lower extremity.

Pursuant to the A.M.A., *Guides* there are three tiers of Class 1 impairments for appellant's right knee condition, and such placement depends on whether he merely had palpatory and/or radiographic findings (default impairment value of two percent), mild motion deficits, (default impairment value of seven percent) or moderate motion deficits and/or significant weakness (default impairment value of 10 percent).[14] Dr. Schwartz determined that appellant's Class 1 impairment amounted to moderate motion deficits while Dr. White asserted that his Class 1 impairment should be evaluated under mild motion deficits.

The Board finds Dr. Schwartz was unclear with regard to his motion deficit findings.

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[15] It has an obligation to see that justice is done.[16]

Once OWCP undertook development of the evidence by referring appellant to Dr. Schwartz, it had an obligation to obtain a proper evaluation that sufficiently addresses the issues in this case.[17] OWCP's procedures provide that when OWCP refers the schedule award

[13] *See D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[14] *Supra* note 3 at 509.

[15] *See e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71.

[16] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

[17] *Id.*; *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, *id.*

claim for a second opinion examination, and this report does not contain a full discussion of how the impairment rating was calculated, clarification should be sought.[18]

The case must therefore be remanded for further development.[19]

On remand, OWCP shall refer appellant, along with an updated SOAF and a series of questions to a new second opinion physician for an opinion on the nature and extent of his right lower extremity impairment. 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.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2023 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 14, 2024
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

[18] *J.W.*, Docket No. 22-0223 (issued August 23, 2022).

[19] *K.W.*, Docket No. 22-0320 (issued July 28, 2022).