United States Department of Labor
Employees' Compensation Appeals Board

A.T., Appellant	)	
and	)	**Docket No. 25-0272**
	)	**Issued: March 17, 2025**
DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, HOMELAND SECURITY INVESTIGATIONS, Long Beach, CA, Employer	)	

Appearances:
Stephanie N. Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 29, 2025, appellant, through counsel, filed a timely appeal from a November 12, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 30 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On May 4, 2012, appellant, then a 40-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on May 3, 2012 he was wounded by multiple gunshots when serving a search warrant while in the performance of duty.[2] He stopped work on the date of injury. On May 8, 2012, OWCP accepted the claim for a distal femur fracture. It subsequently expanded the acceptance of the claim to include closed fractures of the right distal femur and femoral condyle, trunk contusion, open would of right thigh with tendon involvement, pathological fracture of the neck of the right femur, open fracture of the right femur, nonunion of fracture, and late effect of right tendon injury (right pectoralis major tendon tear).

Appellant underwent emergency surgery, on May 3, 2012, including incision and debridement of right buttock and thigh gunshot wounds and incision and debridement of an open right femur fracture. The following day, May 4, 2012, he underwent open reduction and internal fixation of the right femur. Due to nonunion of the femur fracture, appellant underwent several additional surgeries including: aspiration of right iliac crest bone marrow stem cells on September 13, 2013; complex hardware removal of the right femur and retrograde reamed intermedullary interlocking nailing of the nonunion in the distal one-third of the femur on February 17, 2014; and bone graft of the left femur to apply to the nonunion of the right femur on October 1, 2014.[3]

Appellant returned to full-time modified-duty work, effective January 5, 2015.

On March 14, 2016, appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated November 3, 2016, OWCP granted appellant a schedule award for six percent permanent impairment of the right lower extremity. The award ran for 17.28 weeks from August 22 through December 20, 2016.

On November 29, 2016, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 20, 2017.

By decision dated September 1, 2017, an OWCP hearing representative set aside the November 3, 2016 decision and remanded the case for further development.

[2] In a medical report dated June 14, 2012, Dr. Donald A. Wiss, a Board-certified orthopedic surgeon, noted that appellant was shot with a "machine gun" in his right thigh, and that he also sustained an injury to his chest wall during resuscitation.

[3] Appellant also underwent repair of the ruptured right pectoralis major muscle on May 21, 2012.

After conducting further development,[4] by decision dated December 5, 2017, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right lower extremity, for a total of seven percent permanent impairment of the right lower extremity.

On May 25, 2021, appellant filed a Form CA-7 claim for an increased schedule award.

In support thereof, appellant submitted an April 12, 2021 permanent impairment evaluation report by Dr. John W. Ellis, Board-certified in family medicine and an occupational medicine specialist, who noted the history of appellant's injury and his subsequent medical treatment. Dr. Ellis performed a physical examination of the right hip and lower extremity, which revealed decreased range of motion (ROM) in all planes of the hip, atrophy of 10 centimeters of the right thigh compared with the left, tenderness to palpation over the medial and lateral joint lines of the right knee, and reduced strength in the right hip flexors, hamstrings, and quadriceps. Utilizing the diagnosis-based impairment (DBI) methodology of the A.M.A., *Guides*,[5] Table 16-3 (Knee Regional Grid), page 510, he found that appellant's class of diagnosis (CDX) for femoral shaft fracture with nonunion, resulted in a Class 4 impairment. Dr. Ellis determined a grade modifier for functional history (GMFH) of 2, a grade modifier for physical examination (GMPE) of 4, and no grade modifier for clinical studies (GMCS). He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) or (2-4) + (4-4) = -2, which correlated with grade A, or 52 percent permanent impairment of the right lower extremity due to the fracture and nonunion. Dr. Ellis also applied the ROM rating method and found 37 percent permanent impairment of the right lower extremity due to the right hip. He noted that the A.M.A., *Guides* under Table 2-1, page 20, indicated that if there was more than one method to rate a particular impairment or condition, the method producing the higher rating must be used. Dr. Ellis found that the DBI method produced the higher impairment rating and concluded that appellant had 52 percent permanent impairment of the right lower extremity.

On February 6, 2022, Dr. White, serving as an OWCP DMA, reviewed a statement of accepted facts (SOAF) and the medical record, including Dr. Ellis' April 12, 2021 permanent impairment evaluation report. He applied the A.M.A., *Guides*, to Dr. Ellis' physical examination findings. Dr. White indicated that a CDX of 4 was not appropriate, as appellant had undergone surgery to stabilize the nonunion. He found that the diagnosis was properly categorized as a CDX of 1 for a femoral shaft fracture with abnormal examination findings and less than 10 degrees of angulation. Dr. White applied a GMFH of 2 for an antalgic gait and a GMPE of 2 for moderate tenderness. He found that Dr. Ellis' thigh circumference measurements were inconsistent and unreliable when compared with the November 1, 2017 examination by Dr. Bernhard, and, therefore, must be excluded. Dr. White opined that the sixth edition of the A.M.A., *Guides*, did not allow for use of the ROM rating method for appellant's injuries. He also opined that he had

[4] On November 1, 2017, appellant underwent a second opinion evaluation and impairment rating evaluation under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) by Dr. Mark Bernhard, a Board-certified physiatrist, which was reviewed by Dr. Herbert White, Jr., a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), on November 22, 2017.

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

nine percent permanent impairment of the right lower extremity, which included the prior awards totaling seven percent permanent impairment of the right lower extremity.

By decision dated March 15, 2022, OWCP granted appellant a schedule award for an additional two percent permanent impairment of the right lower extremity, for a total of nine percent permanent impairment of the right lower extremity. The award ran for 5.76 weeks from April 12 through May 22, 2021.

On April 13, 2022, appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision date June 13, 2022 OWCP's hearing representative set aside the March 15, 2022 decision, noting that Dr. Ellis' report supported that there had been a change in appellant's physical examination findings and a potential increase in impairment. The hearing representative remanded the case for OWCP to refer appellant, a SOAF, and the medical record, for an updated second opinion examination and impairment rating evaluation.

On July 1, 2022, OWCP referred appellant, the case record, and SOAF to Dr. Arash A. Dini, a Board-certified orthopedic surgeon, for a second opinion examination and rating of appellant's right lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.

In an August 18, 2022 report, Dr. Dini reviewed the SOAF and appellant's medical record. He related his physical examination findings, including reduced ROM in the right hip in all planes, reduced strength with flexion and extension of the right hip, pain with palpation of the right femur, and reduced motor strength in the right knee flexors and extensors, but no evidence of atrophy of the thigh. Dr. Dini diagnosed nonunion of fracture, fracture of femur, and open wound of the right femur, and opined that appellant had reached maximum medical improvement (MMI). Utilizing the standards of the A.M.A., *Guides*, he applied the DBI rating method and found that appellant had 52 percent permanent impairment of the right lower extremity due to his right femur conditions. Dr. Dini also utilized the ROM impairment rating method at Tables 16-24, page 549, and 16-6, page 516, and found 35 percent right lower extremity permanent impairment. He explained that as the DBI rating method yielded the higher rating over the ROM method, appellant was entitled to a schedule award for 52 percent permanent impairment of the right lower extremity due to his right hip and femur conditions.

In an October 15, 2022 report, Dr. White, serving as OWCP's DMA, reviewed Dr. Dini's August 18, 2022 report. Utilizing the standards of the A.M.A., *Guides*, he applied the DBI rating method and found that appellant had nine percent permanent impairment of the right lower extremity due to his right femur conditions. Dr. White indicated that he disagreed with Dr. Dini's rating, as x-rays dated October 31, 2013 revealed a long plate along almost the entire length of the femur with stable fracture lines, alignment, and hardware. He also reiterated that the A.M.A., *Guides* did not allow for use of the ROM rating method. Dr. White opined that appellant had nine percent permanent impairment of the right lower extremity due to his right femur conditions. He further opined that he had reached MMI on August 18, 2022, the date of Dr. Dini's examination.

On November 7, 2022, OWCP provided a copy of Dr. White's October 25, 2022 report to Dr. Dini for his review and comment.

In a supplemental report dated November 30, 2022, Dr. Dini recommended an updated x-ray of the femur to accurately diagnose the status of appellant's fracture.

A March 23, 2023 x-ray of appellant's right hip revealed no evidence of acute fracture or dislocation; intact joint spaces with anatomic alignment; normal articular surfaces; and the presence of a right femoral intermedullary rod. An x-ray of his right femur of even date revealed previous surgical fixation of the distal right femur, heterogeneous cortical thickening surrounding the hardware, and no lucency to suggest loosening of hardware.

On April 17, 2023, OWCP received a supplemental report from Dr. Dini. He reviewed the March 23, 2023 x-rays of the right hip and femur and indicated that the studies "showed old healed fracture deformity and postsurgical changes without loosening of hardware." Utilizing the standards of the A.M.A., *Guides*, Dr. Dini applied the DBI rating method and found that appellant had nine percent permanent impairment of the right lower extremity due to his right femur conditions. Under Table 16-3, page 510, he found a Class 1 impairment for femoral shaft fracture with abnormal examination findings and less than 10 degrees of angulation. Dr. Dini assigned a GMFH of 1 for normal gait with difficulty standing and walking and a GMPE of 3 for tenderness to palpation over the right lateral femur and moderate range of motion deficits of the right hip and motor weakness about the knee and hip. He indicated that GMCS was not applicable as it was used for diagnostic placement. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (3 - 1) + (N/A) = 2, which resulted in a grade C or nine percent permanent impairment. Dr. Dini noted that appellant's significant loss of motion in the right hip did not coincide with his subjective pain complaints and, therefore, he had no permanent impairment using the ROM method.

In a May 2, 2023 amended report, Dr. White reviewed the November 30, 2022 and April 17, 2023 supplemental reports of Dr. Dini and the March 23, 2023 x-rays. He applied the A.M.A., *Guides*, and reiterated that appellant had nine percent right lower extremity impairment utilizing the DBI rating method.

In a June 22, 2023 narrative report, Dr. Ellis reviewed the August 18, 2022 and May 31, 2023 reports of Dr. Dini and the March 23, 2023 x-rays. He opined that appellant's impairment should be rated using the ROM method, noting that appellant had a severe injury that resulted in loss of motion qualifying for a Class 3 or 4 impairment. Dr. Ellis indicated that he "recommend[ed] a permanent partial impairment of 35 [percent] for the right lower extremity using the [ROM] method."

On July 26, 2023, OWCP declared a conflict in medical opinion between Dr. Ellis, appellant's treating physician, and Dr. White, OWCP's DMA, regarding whether appellant's work-related injury resulted in additional permanent impairment.[6]

[6] Although OWCP indicated that there was a conflict in the medical opinion evidence between Dr. Dini and Dr. Ellis regarding whether appellant had additional permanent impairment, it is clear from the record that the conflict was between Dr. Ellis, appellant's physician, and Dr. White, OWCP's DMA.

On July 27, 2023, OWCP referred appellant to Dr. Nasser Heyrani, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 14, 2023, Dr. Heyrani, serving as the impartial medical examiner (IME), reviewed appellant's history regarding the May 3, 2012 employment injury and subsequent surgeries. On physical examination of the right hip, he documented pain with palpation of the right lateral thigh and femur. Dr. Heyrani also found that appellant lacked 10 degrees of extension, 30 degrees of abduction, and 20 degrees of external rotation compared to the left hip, and that flexion was to 90 degrees. He observed multiple healed surgical incisions throughout the right lower extremity, right lateral thigh, and left hip, and his examination of the right knee was within normal limits. Dr. Heyrani also noted that appellant's right thigh circumference was one centimeter larger than his left thigh circumference and that March 20, 2023 x-rays of the right hip and femur revealed no evidence of fracture nonunion. He concurred that he reached MMI on August 18, 2022, the date of Dr. Dini's evaluation, noting that their examination findings were very similar. Dr. Heyrani opined that appellant sustained a very severe injury to his right lower extremity and posterior buttocks requiring multiple surgical interventions over several years, including staged reconstruction with removal of lateral locking plate and retrograde intramedullary nailing using contralateral stem cells from the left femur. Referring to the sixth edition of the A.M.A., *Guides*, he noted that Table 16-3 indicated a CDX of Class 1 impairment due to femoral shaft fracture with abnormal examination findings and less than 10 degrees of angulation. Dr. Heyrani found a GMFH of 2 for periodic use of a cane with prolonged ambulation and weight-bearing and a GMPE of 1 for scarring, tenderness, loss of ROM, and less than 10 degrees angulation. He noted that under Table 16-8, GMCS was not applicable as the x-ray angulation was used in the diagnostic impairment definition. Applying the net adjustment formula, Dr. Heyrani found that appellant had eight percent permanent impairment of the right lower extremity. Referencing Table 16-24, page 549, he found that flexion of 90 degrees equaled 5 percent lower extremity impairment; extension of 20 degrees equaled 10 percent lower extremity impairment; abduction of 10 degrees equaled 10 percent lower extremity impairment; and external rotation of 30 degrees equaled 5 percent lower extremity impairment for a total right lower extremity impairment of 30 percent.

By decision dated January 22, 2024, OWCP granted appellant a schedule award for an additional 21 percent permanent impairment of his right lower extremity (for a total of 30 percent), based on the opinion of Dr. Heyrani. The award ran for 60.48 weeks from September 18, 2022 through November 15, 2023.

On February 20, 2024, appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated March 27, 2024, OWCP's hearing representative set aside the January 22, 2024 decision and remanded the case to OWCP to obtain clarification from Dr. Heyrani as to whether appellant's current 30 percent permanent impairment of the right lower extremity included the prior award of nine percent, or whether it should be considered in addition to the prior award.

In a supplemental report dated June 7, 2024, Dr. Heyrani related that appellant had a total impairment of 30 percent of the right lower extremity, which included, and was not in addition to, the prior award of nine percent.

By *de novo* decision dated July 29, 2024, OWCP granted appellant a schedule award for an additional 21 percent permanent impairment of his right lower extremity (for a total of 30 percent), based on the opinion of Dr. Heyrani. The award ran for 60.48 weeks from September 18, 2022 through November 15, 2023.

On August 27, 2024, appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.[7]

By decision dated November 12, 2024, OWCP's hearing representative affirmed the July 29, 2024 decision.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[8]

The schedule award provisions of FECA[9] and its implementing regulations[10] 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. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

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, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[12] After the CDX is determined from the Knee 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).[13] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment

[7] On November 5, 2024, OWCP expanded the acceptance of appellant's claim to include open fracture type I or II of shaft of right femur.

[8] *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] 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 3.700.2 and Exhibit 1 (January 2010).

[12] A.M.A., *Guides* (6th ed. 2009) 509-11, section 16.2.

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

rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[14]

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 extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[15]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[16] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 30 percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

OWCP properly determined that a conflict existed in the medical opinion evidence between Dr. Ellis and Dr. White regarding whether appellant's accepted May 3, 2021 employment injury resulted in additional permanent impairment. In order to resolve the conflict, it properly referred him to Dr. Heyrani for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

In his September 18, 2023 report, Dr. Heyrani reviewed the SOAF and medical record, and related appellant's physical examination findings, including pain with palpation of the right lateral thigh and femur, loss of ROM in the right hip with extension, abduction, external rotation, and flexion, and multiple healed surgical incisions throughout the right lower extremity, right lateral thigh, and left hip. He referenced Table 16-3, page 510, Knee Regional Grid, he found that appellant had an eight percent permanent impairment of the right lower extremity based on his diagnosis of femoral shaft fracture with abnormal examination findings and less than 10 degrees angulation. Dr. Heyrani also found that, under Table 16-24, page 549, of the A.M.A, *Guides*, flexion of 90 degrees equaled 5 percent lower extremity impairment; extension of 20 degrees equaled 10 percent lower extremity impairment; abduction of 10 degrees equaled 10 percent lower

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

[15] *Supra* note 11 at Chapter 2.808.6f (March 2017).

[16] 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

[17] 20 C.F.R. § 10.321. *See also J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

extremity impairment; and external rotation of 30 degrees equaled 5 percent lower extremity impairment for a total right lower extremity impairment of 30 percent. Dr. Heyrani opined that he had reached MMI on August 18, 2022. In a supplemental report dated June 7, 2024, he clarified that appellant's rating of 30 percent permanent impairment of the right lower extremity included, and was not in addition to, the prior award of 9 percent.

Dr. Heyrani's September 18, 2023 and June 7, 2024 reports established that he conducted a thorough physical examination and properly applied the A.M.A., *Guides* to his examination findings. As his report is detailed, well rationalized, and based on a proper factual background, Dr. Heyrani's opinion represents the special weight of the medical evidence. Consequently, the Board finds that appellant 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 30 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2025
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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