United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 25-0212**
	)	**Issued: May 1, 2025**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Misty Wenger, 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 6, 2025 appellant, through his representative, filed a timely appeal from a July 11, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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*.

[3] The Board notes that OWCP received additional evidence following the July 11, 2024 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 21 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On September 9, 2020 appellant, then a 60-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed end-stage osteoarthritis, medially, bone on bone of the right knee due to factors of his federal employment. He noted that he had a prior work-related tear of the right medial meniscus, for which he underwent OWCP-approved right knee surgery and Synvisc injections.[4] Appellant explained that daily job-related stress and strain on the knees resulted in chronic pain and the need for additional treatment. He noted that he first became aware of his condition on August 19, 2006, and realized its relation to his federal employment on May 11, 2020. Appellant did not stop work. On October 22, 2020 OWCP accepted the claim for osteoarthritis of the right knee.

In an April 3, 2023 report, Dr. Mark A. Seldes, a treating physician Board-certified in family practice, utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] to provide a permanent impairment rating. He noted that appellant continued to have severe right knee pain and limited range of motion (ROM), including daily pain "7/10" when ambulating, that appellant used a knee brace on the right knee as well as a cane for any prolonged ambulation, and that a February 22, 2023 x-ray showed a cartilage interval measurement of the medial compartment of 0 millimeters and cartilage interval of the lateral compartment of 9.5 millimeters. Dr. Seldes examined the right knee and found tenderness over the lateral and medial joint line and overlying the patella, moderate swelling, 9 degrees of varus deformity, and moderate crepitus on flexion and extension.

Dr. Seldes calculated appellant's permanent impairment using the diagnosis-based impairment (DBI) method and referred to the A.M.A., *Guides*, Table 16-3, Knee Regional Grid, at page 511. He noted that the x-ray with cartilage interval measurement of the medial compartment of 0 millimeters corresponded to a Class 4 diagnosis with a grade C severity and impairment rating of 50 percent. Dr. Seldes assigned a grade modifier for functional history (GMFH) of 2 and explained that appellant used a cane and a knee brace to ambulate. He assigned a grade modifier for physical examination (GMPE) of 2 and explained that appellant had a moderate limited ROM deficit on examination. Dr. Seldes explained that a grade modifier for

[4] OWCP assigned the present claim OWCP File No. xxxxxx325. Under OWCP File No. xxxxxx556, it accepted appellant's traumatic injury claim for tear of medial meniscus of the right knee, and right chondromalacia patellae. Under OWCP File No. xxxxxx343, OWCP accepted appellant's occupational disease claim for left knee osteoarthritis and paid him a schedule award for 50 percent impairment of the left lower extremity. It has administratively combined OWCP File Nos. xxxxxx556, xxxxxx343, and xxxxxx325, with OWCP File No. xxxxxx325 serving as the master file."

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

clinical studies (GMCS) was not applicable and calculated a grade B severity, which equaled 50 percent permanent impairment of the left lower extremity using the DBI method.

Dr. Seldes also calculated appellant's permanent impairment using the ROM method and provided ROM measurements for the right knee joint of 95 degrees of flexion, and 7 degrees of extension. He noted that the ROM measurement for each motion was conducted three times as required by the A.M.A., *Guides.* Dr. Seldes referred to the A.M.A., *Guides,* Table 16-23, Knee Motion Impairment, at page 549, and noted that flexion of 95 degrees corresponded to 10 percent lower extremity impairment and extension of 7 degrees corresponded to 10 percent lower extremity impairment. He added the flexion and extension results and calculated that appellant had a total of 20 percent right lower extremity impairment using the ROM method. Dr. Seldes explained that under the A.M.A., *Guides,* the method with the highest rating was used and he assessed that appellant had 50 percent right lower extremity permanent impairment according to the DBI method. He opined that the date of maximum medical improvement (MMI) was April 3, 2023.

On May 17, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On September 13, 2023 OWCP referred Dr. Seldes' April 3, 2023 report and the case record to Dr. Herbert White, Jr., Board-certified in occupational medicine and serving as an OWCP district medical adviser (DMA), for review and evaluation of appellant's right lower extremity permanent impairment pursuant to the A.M.A., *Guides*.

In a September 22, 2023 report, Dr. White referred to the sixth edition of the A.M.A., *Guides* and explained that the DBI method could not be used to rate the impairment because appellant had a flexion deformity of the right knee. The DMA referred to page 518 of the A.M.A., *Guides* which noted the following: "Impairments of individuals with knee flexion contractures should not be estimated using x-rays because measurements are unreliable." Dr. White explained that the ROM method must be used to rate the impairment. The DMA referred to the A.M.A., *Guides,* Table 16-23, Knee Motion Impairments, at page 549, and explained that appellant's flexion of 95 degrees corresponded to 10 percent impairment, and appellant's flexion contracture of 7 degrees also corresponded to 10 percent impairment, resulting in a total impairment of 20 percent. Dr. White noted a grade modifier for ROM of 2, according to the A.M.A., *Guides*, Table 16-25, Range of Motion ICF Classification, at page 550; and a GMFH of 3, according to Table 16-6, Functional History Adjustment -- Lower Extremities, at page 516. The DMA referred to Table 16-17, Functional History Net Modifier, at page 545, and subtracted the grade modifier for ROM of 2 from the GMFH of 3, which resulted in a functional history net modifier of 1. Dr. White calculated that the ROM impairment of 20 percent plus the modifier of 1 percent resulted in 21 percent right lower extremity impairment. The DMA noted that Dr. Seldes provided a ROM method impairment rating of 20 percent because he did not apply the modifier adjustment. Dr. White also noted that Dr. Seldes provided an impairment rating of 50 percent using the DBI method; however, this rating was not permissible under the A.M.A., *Guides* because appellant had knee flexion contractures.

In an October 16, 2023 report, Dr. Seldes disagreed with the DMA. He argued that the DBI method could be used to rate appellant's impairment. Dr. Seldes noted that the A.M.A., *Guides* at page 518 indicate x-rays should not be used to rate the impairment of individuals with

knee flexion contractures because the measurements are unreliable; however, he argued that appellant had a standing x-ray and was able to straighten his knee enough to get an accurate rating from the radiologist. He noted that appellant had a cartilage interval of the medial compartment in his right knee of 0 millimeters as read by the Board-certified radiologist and argued that the DMA was not a Board-certified radiologist and was not allowed to make a comment regarding the radiological findings. Dr. Seldes referred to the A.M.A., *Guides*, Table 16-3, Knee Regional Grid Lower Extremity Impairments, at page 511, and noted that primary right knee joint osteoarthritis with no cartilage interval was a Class 4 impairment of 50 percent. He indicated that he stood by his original evaluation that appellant had 50 percent permanent impairment of the right knee for his severe right knee osteoarthritis using the DBI method.

On November 9, 2023 OWCP referred Dr. Seldes' report and the case record to the DMA for clarification.

In a November 14, 2023 report, Dr. White noted that Dr. Seldes argued that the DBI method could be used to rate appellant's impairment, even though appellant had a flexion deformity, because appellant was able to straighten his leg sufficiently for an x-ray. However, the DMA explained that the A.M.A., *Guides*, page 518, indicated that the flexion deformity prevents the rating of the arthritis impairment using the DBI method. Dr. White noted that the argument that he was not a Board-certified radiologist was irrelevant as he did not question the cartilage interval found by the radiologist, he was simply following page 518 of the A.M.A., *Guides* which precluded the use of the DBI method in the case of a flexion deformity. The DMA reiterated his calculation of an impairment rating of 21 percent for the right lower extremity using the ROM method.

In a December 13, 2023 report, Dr. Seldes noted that the DMA indicated that appellant's impairment could not be rated using the DBI method because page 518 of the A.M.A., *Guides* states that x-ray measurements of the knee are unreliable where there is flexion contracture. However, he argued that appellant also had a magnetic resonance imaging (MRI) scan of the right knee, that the MRI was a much more reliable diagnostic tool than x-rays, and therefore he stood by his impairment rating of 50 percent using the DBI method.

On February 22, 2024 OWCP referred Dr. Seldes' December 13, 2023 report to Dr. White, the DMA, and requested clarification.

In a report dated March 1, 2024, Dr. White, the DMA reiterated his calculation of 21 percent impairment of the right lower extremity using the ROM method. He explained that Dr. Seldes did not obtain three motion measurements on December 13, 2023, as required by the A.M.A., *Guides*, so the new measurements could not be used to rate impairment. Therefore, the DMA utilized Dr. Seldes' evaluation of April 3, 2023 to rate appellant's impairment. With regard to Dr. Seldes' argument that the DBI method could be used to rate appellant's impairment based on an MRI scan, the DMA noted that page 518 of the A.M.A., *Guides* addresses a situation in which a patient has undergone a variety of special tests, including imaging studies, and provides that, "The impairment estimates in a person with arthritis of the lower extremity are based on standard x rays taken with the individual standing, if possible." Since page 518 of the A.M.A., *Guides* further provides that x-ray measurements are unreliable in the case of a flexion contracture, the DMA reiterated his opinion that the DBI method could not be used to rate appellant's impairment.

By decision dated July 11, 2024, OWCP granted appellant a schedule award for 21 percent permanent impairment of the right lower extremity. The period of the award ran for 60.48 weeks from June 1, 2024 through July 29, 2025.

LEGAL PRECEDENT

The schedule award provisions of FECA[6] and its implementing regulations[7] 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.[8] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9] 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.[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 DBI method, where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination, and clinical studies. 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 explain 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 DBI sections of the chapter are applicable for impairment rating of a condition.[12]

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[10] *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).

[11] A.M.A., *Guides* (6th ed. 2009) 497, section 16.2.

[12] *Id.* at 543; *see E.C.*, Docket No. 24-0686 (issued December 19, 2024); *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 percentage of permanent impairment using the A.M.A., *Guides*.[13]

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.[14] 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 impartial medical examiner (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.[15]

ANALYSIS

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

Appellant provided several reports from Dr. Seldes. He calculated appellant's right lower extremity permanent impairment rating at 50 percent using the DBI method and 20 percent using the ROM method. The DMA, Dr. White, calculated a permanent impairment rating of 21 percent using the ROM method and indicated that the DBI was inappropriately utilized by Dr. Seldes.

Thus, the Board finds that a conflict exists in the medical opinion evidence between Dr. Seldes and the DMA, Dr. White, with regard to the extent of any additional/increased permanent impairment due to the accepted condition of right knee osteoarthritis. This conflict in medical opinion necessitates referral to an IME for resolution of the conflict in accordance with 5 U.S.C. § 8123(a).[16]

On remand, OWCP shall refer appellant, together with an updated SOAF, the medical record, and a series of questions to a specialist in the appropriate field of medicine for a reasoned opinion resolving the conflict.[17] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

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[13] *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 9 at Chapter 2.808.6f (March 2017).

[14] 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).

[15] 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).

[16] 5 U.S.C. § 8123(a). *See also S.L.*, Docket No. 24-0522 (issued June 17, 2024); *S.G.*, Docket No. 24-0529 (issued June 12, 2024).

[17] *See S.W.*, Docket No. 22-0917 (issued October 26, 2022); *K.D.*, Docket No. 19-0281 (issued June 30, 2020).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2024 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: May 1, 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