United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
	)	
and	)	**Docket No. 17-0834**
	)	**Issued: August 11, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINSITRATION MEDICAL CENTER, Orlando, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 6, 2017 appellant, through counsel, filed a timely appeal from a January 23, 2017 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.

[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.*

ISSUE

The issue is whether appellant has more than one percent permanent impairment of her left lower extremity for which she previously received a schedule award.

FACTUAL HISTORY

The case has previously been before the Board.[3] The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that appellant sustained a left knee contusion and left knee derangement when she tripped on a chair in the performance of duty on October 13, 2006. Appellant underwent an authorized left knee arthroscopic surgery on February 9, 2007. She received leave buy-back compensation from February 9 to 23, 2007.

On May 21, 2007 appellant filed a claim for a schedule award (Form CA-7). On October 30, 2007 OWCP denied appellant's schedule award claim as no evidence had been submitted in support of the claim. On November 5, 2007 appellant requested a telephone hearing before an OWCP hearing representative. By decision dated June 12, 2008, OWCP's hearing representative affirmed the denial of the schedule award claim, finding that the record was devoid of evidence establishing permanent impairment.

By decision dated April 3, 2009, the Board affirmed the June 12, 2008 OWCP decision denying a schedule award for the left lower extremity.[4] The Board noted that the medical evidence of record did not contain a probative medical opinion as to an employment-related permanent impairment.

Appellant submitted a May 12, 2010 report from Dr. Robert Murrah, a Board-certified orthopedic surgeon. Dr. Murrah noted that a magnetic resonance imaging (MRI) scan had shown some chondromalacia patella, with no tear of the meniscus.

In an August 10, 2010 report, Dr. Murrah provided results on examination and diagnosed chronic left knee pain and swelling following the October 13, 2006 injury, and chondromalacia patella. He opined that appellant had reached maximum medical improvement and had five percent whole body permanent impairment. In an October 26, 2010 report, Dr. Murrah wrote that he had assigned appellant 11 percent left lower extremity permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) (2009).

By report dated April 13, 2012, an OWCP medical adviser, Dr. Howard Hogshead, a Board-certified orthopedic surgeon, opined that appellant had one percent left lower extremity permanent impairment. He applied Table 16-3 of the A.M.A., *Guides*, to determine a diagnosis-based impairment (DBI) rating for the knee.

[3] Docket No. 13-0894 (issued July 8, 2013); Docket No. 08-2054 (issued April 3, 2009).

[4] Docket No. 08-2054 (issued April 3, 2009).

In a decision dated July 10, 2012, OWCP issued a schedule award for one percent left lower extremity permanent impairment. The period of the award was 2.88 weeks from August 10, 2010. An OWCP hearing representative affirmed the schedule award determination in a February 5, 2013 decision. Appellant appealed to the Board.

The Board subsequently set aside the February 5, 2013 decision.[5] The Board found that OWCP's medical adviser had not fully explained how Table 16-3 had been applied with respect to the net adjustment for the diagnosed condition. It was noted that the medical adviser had found clinical studies not applicable, although Dr. Murrah had referred to MRI scan results.

OWCP referred the case to another OWCP medical adviser, Dr. James Dyer, a Board-certified orthopedic surgeon. By report dated July 25, 2013, Dr. Dyer opined that the left lower extremity permanent impairment under Table 16-3 was one percent. In an August 8, 2013 report, he opined that there was no tear of the meniscus and no basis for an additional permanent impairment.

By decision dated August 14, 2013, OWCP found that appellant was not entitled to an additional schedule award. It found the medical evidence of record did not establish more than one percent left lower extremity permanent impairment.

Appellant, through counsel, on September 3, 2013 requested an oral hearing before an OWCP hearing representative. A hearing was held on February 13, 2014. Counsel argued that the case should be referred for a second opinion examination.

By decision dated April 7, 2014, the hearing representative affirmed the August 14, 2013 OWCP decision. He found the weight of the evidence was represented by OWCP's medical adviser, Dr. Dyer.

On December 16, 2015 appellant submitted a report dated February 13, 2015 from Dr. Samy Bishai, an orthopedic surgeon. Dr. Bishai provided results on examination, including left knee range of motion (ROM). He opined that appellant had 20 percent left lower extremity permanent impairment under Table 16-23 of the A.M.A., *Guides*, for loss of knee ROM.

In a report dated June 4, 2015, Dr. Murrah provided a history and results on examination. He reported full ROM of the left knee. The record also contains a report from Dr. Murrah dated December 10, 2015, reporting full ROM of the left knee.

The case was referred to an OWCP medical adviser, Dr. Jovito B. Estaris, Board-certified in occupational medicine. In a report dated February 27, 2016, Dr. Estaris found that appellant had one percent permanent impairment under Table 16-3. He reviewed Dr. Murrah's report and indicated the diagnosis was contusion, with a class 1 default impairment of one percent. Dr. Estaris applied grade modifier 1 for physical examination, functional history, and clinical studies, resulting in no adjustment from the default impairment.

[5] Docket No. 13-0894 (issued July 8, 2013).

By decision dated March 14, 2016, OWCP found that appellant was not entitled to additional left lower extremity permanent impairment. It found that the probative medical evidence did not establish more than one percent permanent impairment of the left lower extremity.

On March 31, 2016 counsel again requested a hearing before an OWCP hearing representative. A hearing was held on November 9, 2016. Counsel argued the medical evidence was sufficient to require further development.

By decision dated January 23, 2017, the hearing representative affirmed the March 14, 2016 OWCP decision. He found that OWCP's medical adviser properly utilized the findings of Dr. Murrah and the medical evidence did not establish more than one percent left lower extremity permanent impairment.

LEGAL PRECEDENT

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] Neither FECA,[7] nor its implementing regulations[8] specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[10]

With respect to knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The class of impairment (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH, Table 16-6), Physical Examination (GMPE, Table 16-7), and Clinical Studies (GMCS, Table 16-8). The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11]

[6] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[7] *Id*.

[8] 20 C.F.R. § 10.404.

[9] *A. George Lampo*, 45 ECAB 441 (1994).

[10] FECA Bulletin No. 09-03 (March 15, 2009).

[11] The net adjustment is up to +2 (grade E) or -2 (grade A).

ANALYSIS

OWCP accepted that appellant's left knee contusion and left knee derangement had occurred in the performance of duty on October 13, 2006. Appellant underwent left knee arthroscopic surgery on February 9, 2007. She received a schedule award for one percent permanent impairment of the left lower extremity. The issue is whether appellant has established greater permanent impairment for purposes of an increased schedule award.

The Board finds that appellant has not established more than one percent permanent impairment of the left lower extremity for which she previously received a schedule award.

Following the Board's last review of this schedule award claim, OWCP requested and received a July 25, 2013 report from Dr. Dyer, an OWCP medical adviser. Dr. Dyer explained that appellant did not have a tear of the meniscus and, therefore, had one percent permanent impairment pursuant to Table 16-3.

In support of her claim, appellant submitted a February 13, 2015 report from Dr. Bishai, opining that appellant had 20 percent left lower extremity permanent impairment.

The February 13, 2015 report, however, is of diminished probative value to the issue presented. Dr. Bishai applied Table 16-23, for knee motion impairment. He did not, however, discuss how the ROM measurements for knee flexion were made.[12] Moreover, as noted by OWCP's medical adviser, subsequent reports from appellant's attending physician, Dr. Murrah, reported full ROM of the left knee. Dr. Murrah reported full ROM in reports dated June 4 and December 10, 2015. It is unclear whether any reported limitation of knee ROM by Dr. Bishai were in accord with the A.M.A., *Guides*.

The Board has previously held that the diagnosis-based impairment (DBI) methodology is the primary method of lower extremity permanent impairment evaluation.[13] Dr. Bishai did not explain why use of the ROM method was appropriate in the present case. The ROM method is used to determine actual impairment values of the lower extremities only when it is not possible to otherwise define impairment.[14]

For these reasons, the Board finds Dr. Bishai's opinion is insufficient to establish the degree of left lower extremity permanent impairment in this case. OWCP's medical adviser did provide a rationalized medical opinion on this issue. In his February 27, 2016 report, Dr. Estaris indicated that he had applied Table 16-3, the DBI table, to the knee examination findings by Dr. Murrah. The medical adviser noted that the grade C (default) impairment for history of knee contusion or other soft tissue lesion was one percent.[15] Applying the net adjustment formula,[16]

[12] A.M.A., *Guides* 546, Figure 16-8 discusses measuring knee flexion.

[13] *Id.* at 497.

[14] *See P.M.*, Docket No. 16-0367 (issued March 27, 2017).

[15] A.M.A., *Guides* 509, Table 16-3.

[16] *Supra* note 9.

Dr. Estaris used grade modifier one for functional history, physical examination, and clinical studies. This results in no adjustment from the default impairment.

The Board finds that the weight of the evidence is represented by Dr. Estaris. Dr. Estaris properly explained how he applied Table 16-3 to determine the degree of appellant's left lower extremity permanent impairment. Based on the evidence of record, appellant has not established more than one percent left lower extremity permanent impairment.

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 impairment.

CONCLUSION

The Board finds that appellant has not established more than one percent permanent impairment of her left lower extremity for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 23, 2017 is affirmed.

Issued: August 11, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board