United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant	)	
and	)	**Docket No. 17-0334**
	)	**Issued: June 19, 2018**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 30, 2016 appellant, through counsel, filed a timely appeal from an August 12, 2016 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 established more than 16 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On September 6, 2002 appellant, a 33-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury that day, in the performance of duty, as a result of slipping in a small puddle of fluid while repositioning a hydraulic test stand.[3] He did not stop work. OWCP accepted the claim for left knee sprain. It authorized a surgical arthroscopy of the left knee with subtotal medial and lateral meniscectomies and chondroplasty of the patellofemoral articulation, which appellant underwent on November 6, 2002. OWCP further authorized postoperative physical therapy to the left knee and paid wage-loss compensation. Appellant returned to full-time, full-duty work without restrictions on January 9, 2003.

On January 26, 2004 appellant, through counsel, filed a claim for a schedule award (Form CA-7) for his left knee condition.

In a November 17, 2003 report, Dr. David Weiss, an osteopath and Board-certified orthopedic surgeon, diagnosed post-traumatic internal derangement to the left knee, tear of the medial and lateral meniscus to the left knee, post-traumatic chondromalacia patella to the left knee, status post arthroscopic surgery to the left knee with subtotal medial and lateral meniscectomy, and status post arthroscopic surgery to the left knee with chondroplasty of the patellofemoral articulation. Upon physical examination, he found well-healed portal arthroscopy scars and no gross effusion. Range of motion (ROM) was 140 degrees and patellar inhibition and apprehension signs were negative. Patellofemoral compression produced marked crepitus, but no pain. Valgus and varus stress tests produces firm end points and Drawer and Lachman signs were negative. Manual muscle testing of the gastrocnemius musculature was graded at 5/5 on the left and quadriceps testing was graded at 4+/5 on the left. Dr. Weiss found that appellant had reached maximum medical improvement (MMI) as of November 17, 2003. He determined that appellant had 15 percent permanent impairment of the left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] due to 12 percent permanent impairment due to his motor strength deficit of the left quadriceps (knee extension) and 3 percent permanent impairment due to his pain.

On November 18, 2004 an OWCP medical adviser reviewed Dr. Weiss' November 17, 2013 report and concurred that appellant had reached MMI as of November 17, 2003, but disagreed with his impairment rating. He found that Dr. Weiss improperly assigned three percent

[3] The present claim was adjudicated under OWCP File No. xxxxxx543. The record establishes that appellant also suffered an injury on January 21, 2004 when he slipped and fell on ice while moving a power unit. OWCP accepted the claim for lumbar sprain and lumbar radiculopathy under File No. xxxxxx428. Appellant stopped work on the date of injury and underwent a lumbar fusion at L4-5 on September 14, 2004. In a decision dated June 5, 2015, OWCP granted him a schedule award for three percent permanent impairment of the right leg secondary to sensory deficits based on a September 10, 2013 report from Dr. Weiss, a Board-certified orthopedic surgeon.

[4] A.M.A., *Guides* (5th ed. 2001).

permanent impairment for pain. The medical adviser assigned five percent permanent impairment for appellant's marked crepitus produced by patellofemoral compression. He concurred with Dr. Weiss' 12 percent impairment rating for appellant's 4+/5 motor strength deficit on the left quadriceps and zero percent rating for his ROM of 140 degrees. The medical adviser combined the total left lower extremity impairments using the Combined Values Chart on page 604 of the A.M.A., *Guides* yielding 16 percent permanent impairment of the left lower extremity.[5]

By decision dated December 23, 2004, OWCP granted appellant a schedule award for 16 percent permanent impairment of the left lower extremity. The award ran for 40.08 weeks for the period November 17, 2003 to October 4, 2004.

In a July 28, 2014 letter, counsel requested an additional schedule award and submitted a September 10, 2013 report from Dr. Weiss who found, using the sixth edition of the A.M.A., *Guides*,[6] that a sensory examination revealed a perceived sensory deficit over the L5 and S1 dermatomes involving the bilateral lower extremities. Manual muscle strength testing of the gastrocnemius musculature was graded at 5/5 bilaterally. Hip flexors were graded at 5/5 bilaterally. Quadriceps were graded at 5/5 bilaterally. Examination of the left knee revealed well-healed portal arthroscopy scars, patellofemoral compression producing crepitus, and tenderness along the undersurface of the medial patellar facet. Dr. Weiss placed appellant in class 1 based on his diagnosis of sensory deficit left L5 nerve root with a default value of one percent permanent impairment. He assigned a grade modifier of 2 for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Weiss found that (2-1) + (n/a) + (2-1) resulted in a net grade modifier of 2, resulting in two percent permanent impairment of the left lower extremity. He placed appellant in class 1 based on his diagnosis of sensory deficit left S1 nerve root with a default value of one percent permanent impairment. Dr. Weiss assigned a grade modifier of 2 for functional history and clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he found that (2-1) + (n/a) + (2-1) resulted in a net grade modifier of 2, resulting in one percent permanent impairment of the left lower extremity. Dr. Weiss placed appellant in class 2 based on his diagnosis of left knee subtotal medial and lateral meniscectomy with a default value of 22 percent permanent impairment. He assigned a grade modifier of 2 for functional history, physical examination, and clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Weiss found that (2-2) + (2-2) + (2-2) resulted in a net grade modifier of zero, resulting in 22 percent permanent impairment of the left lower extremity. He concluded that appellant had a combined total of 25 percent permanent impairment of the left lower extremity.

On February 6, 2015 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the medical evidence of record and a statement of accepted facts (SOAF). He reviewed Dr. Weiss' September 10, 2013 report and found that he improperly utilized the A.M.A., *Guides* to determine appellant's impairment rating. Dr. Magliato concurred with Dr. Weiss' one percent impairment rating for appellant's sensory deficit left of the L5 nerve root and two percent impairment rating for his sensory deficit of the left S1 nerve root. However,

[5] Appendix A, pages 604-06 of the fifth edition of the A.M.A., *Guides* is entitled Combined Values Chart.

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

he disagreed with Dr. Weiss' rating for left knee subtotal medial and lateral meniscectomy. Dr. Magliato explained that the 22 percent impairment rating was incorrect because appellant did not undergo a total medial and lateral meniscectomy. As appellant underwent a partial medial and lateral meniscectomy, Dr. Magliato opined that he had 10 percent permanent impairment of the left lower extremity under Table 16-3, page 509, of the sixth edition of the A.M.A., *Guides*. Therefore, appellant had a total of 13 percent permanent impairment of the left lower extremity.

In a June 11, 2015 letter, OWCP advised appellant of the deficiencies of his claim for an additional schedule award and requested an addendum report from Dr. Weiss clarifying his impairment rating within 30 days. It did not receive additional evidence from Dr. Weiss.

By decision dated September 22, 2015, OWCP denied appellant's claim for an additional schedule award because the medical evidence of record failed to establish that he sustained more than 16 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

On September 30, 2015 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a September 24, 2015 addendum report, Dr. Weiss asserted that appellant, in fact, underwent a subtotal medial and lateral meniscectomy and opined that he should be rated according to class 2 left knee total medial and lateral meniscectomy, which better represented the surgical procedure performed. He reiterated his conclusion that appellant had 25 percent permanent impairment of the left lower extremity.

By decision dated December 7, 2015, an OWCP hearing representative set aside the prior decision and remanded the case for further development, finding that Dr. Weiss' September 24, 2015 report constituted new medical evidence warranting review by an OWCP medical adviser to determine whether appellant had an increased permanent impairment of the left lower extremity.

On December 16, 2015 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the medical evidence of record and Dr. Weiss' September 24, 2015 report. He determined that appellant had 13 percent permanent impairment of the left lower extremity resulting from the September 6, 2002 employment injury. Dr. Harris found that the date of MMI was September 10, 2013, the date of Dr. Weiss' examination. He concurred with Dr. Weiss' impairment ratings for residuals due to left L5 and S1 radiculopathy, but disagreed with his determination that appellant had 22 percent impairment due to his medial and lateral meniscectomy. Dr. Harris explained that subtotal medial and lateral meniscectomy was the equivalent of a partial medial and lateral meniscectomy, which resulted in 10 percent permanent impairment under the sixth edition of the A.M.A., *Guides*. Thus, he concluded that appellant had 13 percent permanent impairment of the left lower extremity.

By decision dated March 15, 2016, OWCP denied appellant's claim for an additional schedule award, finding that he was previously paid a schedule award for 16 percent permanent impairment of the left lower extremity and the medical evidence of record failed to establish an increase in the impairment already compensated.

In a March 21, 2016 letter, counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. On July 8, 2016 he requested that his request for an oral hearing be converted to a review of the written record.

By decision dated August 12, 2016, an OWCP hearing representative affirmed the prior decision, relying upon Dr. Harris' December 16, 2015 report.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a mater which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[9]

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 (ICF).[10] Under the sixth edition, the evaluator identifies the impairment CDX condition, which is then adjusted by GMFH, GMPE, and GMCS.[11] 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.[12]

ANALYSIS

OWCP accepted that appellant sustained a left knee sprain at work on September 6, 2002. On January 26, 2004 appellant, through counsel, filed a claim for a schedule award. By decision dated December 23, 2004, OWCP granted appellant a schedule award for 16 percent permanent impairment of the left lower extremity.

[7] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[8] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (March 2017).

[10] A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[11] A.M.A., *Guides* (6th ed. 2009), pp. 494-531.

[12] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

In a July 28, 2014 letter, counsel requested an additional schedule award and submitted a September 10, 2013 report from Dr. Weiss who placed appellant in class 1 based on his diagnosis of sensory deficit left L5 nerve root with a default value of one percent permanent impairment. He assigned a grade modifier of 2 for functional history and clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Weiss found that (2-1) + (n/a) + (2-1) resulted in a net grade modifier of 2, resulting in two percent permanent impairment of the left lower extremity. He placed appellant in class 1 based on his diagnosis of sensory deficit left S1 nerve root with a default value of one percent permanent impairment. Dr. Weiss assigned a grade modifier of 2 for functional history and clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he found that (2-1) + (n/a) + (2-1) resulted in a net grade modifier of 2, resulting in one percent permanent impairment of the left lower extremity. Dr. Weiss placed appellant in class 2 based on his diagnosis of left knee subtotal medial and lateral meniscectomy with a default value of 22 percent permanent impairment. He assigned a grade modifier of 2 for functional history, physical examination, and clinical studies. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), Dr. Weiss found that (2-2) + (2-2) + (2-2) resulted in a net grade modifier of 0, resulting in 22 percent permanent impairment of the left lower extremity. He concluded that appellant had a combined total of 25 percent permanent impairment of the left lower extremity. In a September 24, 2015 addendum report, Dr. Weiss asserted that appellant underwent a subtotal medial and lateral meniscectomy and opined that he should be rated according to class 2 left knee total medial and lateral meniscectomy, which better represented the surgical procedure performed.

In accordance with its procedures, OWCP properly referred the evidence of record to its OWCP medical adviser, Dr. Harris, who reviewed the clinical findings of Dr. Weiss on September 10, 2013. Dr. Harris determined that appellant had 13 percent permanent impairment of the left lower extremity resulting from the September 6, 2002 employment injury. He found that the date of MMI was September 10, 2013, the date of Dr. Weiss' examination. Dr. Harris concurred with Dr. Weiss' impairment ratings for residuals due to left L5 and S1 radiculopathy, but disagreed with his determination that appellant had 22 percent permanent impairment due to his medial and lateral meniscectomy. He explained that subtotal medial and lateral meniscectomy was the equivalent of a partial medial and lateral meniscectomy, which resulted in 10 percent permanent impairment under the sixth edition of the A.M.A., *Guides*. Thus, Dr. Harris concluded that appellant had 13 percent permanent impairment of the left lower extremity.

The Board finds that OWCP's medical adviser applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Weiss' clinical findings. The medical adviser's calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Dr. Harris' report explained that Dr. Weiss' 22 percent impairment rating for the left lower extremity was erroneous because appellant did not undergo a total medial and lateral meniscectomy. Therefore, OWCP properly relied on the medical adviser's assessment of 13 percent permanent impairment of the left lower extremity.[13]

[13] *See M.T.*, Docket No. 11-1244 (issued January 3, 2012).

As appellant had previously received a schedule award for 16 percent permanent impairment of the left lower extremity and the medical evidence of record fails to establish an increase in the impairment already compensated, the Board finds that appellant failed to establish his claim for an additional schedule award.

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 16 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 2018
Washington, DC

Christopher J. Godfrey, 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