United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 18-1298**
	)	**Issued: April 12, 2019**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, CA, 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 June 19, 2018 appellant, through counsel, filed a timely appeal from an April 27, 2018 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]

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[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 following the April 27, 2018 decision, OWCP received additional evidence. 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 more than nine percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On June 24, 2011 appellant, then a 43-year-old file clerk, filed a traumatic injury claim (Form CA-1) alleging that, on June 22, 2011, he sustained a left upper thigh injury as a result of loading a trailer when his shoe gripped on the trailer floor and he felt a pull in his upper thigh while in the performance of duty. He stopped work on June 23, 2011. OWCP initially accepted the claim for left hip and thigh sprain as well as left-sided pain in joint, pelvic region and thigh. It later expanded the accepted conditions to include anterior labral tear of the left hip based on a March 19, 2012 second opinion report from Dr. Alice Martinson, a Board-certified orthopedic surgeon. Appellant underwent OWCP-authorized left hip surgeries on November 15, 2012 and January 8, 2014. He returned to full-time modified-duty work effective January 5, 2017.

In a February 1, 2017 report based on his examination of January 17, 2017, Dr. Sanjay J. Chauhan, a Board-certified neurologist, provided a rating of permanent impairment and advised that appellant's lower extremity functional scale of 16/80 was suggestive of at least a moderate degree of difficulty overall due to his hip condition. Based upon the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] for the diagnosis of trochanteric bursitis he found a class 1 default value of seven percent and assigned grade modifiers of 2 for functional history (GMFH), 2 for clinical studies (GMCS), and 2 for physical examination (GMPE) resulting in nine percent left lower extremity permanent impairment. For the diagnosis of labral tear, applying the same grade modifiers Dr. Chauhan found three percent left lower extremity permanent impairment. For the diagnoses of tenosynovitis and left hip chromic strain, which he noted were "lumped together" on page 514, Table 16-4, he found a class 1 diagnosis of five percent, which using the same grade modifiers resulted in seven percent left lower extremity permanent impairment. The combined values of the ratings were 20 percent permanent impairment of the left lower extremity.

On April 13, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated April 25, 2017, OWCP advised appellant that it was referring the schedule award determination and report of Dr. Chauhan to its district medical adviser (DMA) for review of his calculations. It requested that he provide a detailed narrative medical report based on a recent examination that included a date of maximum medical improvement (MMI). Appellant was afforded 30 days to respond.

On April 27, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical evidence of record and found that Dr. Chauhan's impairment evaluation could not be accepted as probative for the purpose of recommending a schedule award because he used Table 16-4 for three separate diagnoses. He explained that, according to page 497 of the sixth edition of the A.M.A., *Guides*, "If a patient has two significant diagnoses, for instance,

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

ankle instability and posterior tibial tendinitis, the examiner should use the diagnosis with the highest causally-related impairment rating for the impairment calculation."

Dr. Katz found that appellant's most impairing diagnosis was chronic trochanteric bursitis. He noted that the lesser impairments of labral tear and tenosynovitis were duplicative and, therefore, not considered. Dr. Katz concurred with Dr. Chauhan's calculation that appellant had a class 1 diagnosis for chronic trochanteric bursitis and a GMFH of 2 due to his functional scale score of 16/80, representing moderate degree of difficulty. He also concurred with Dr. Chauhan's finding of a GMPE of 2 due to appellant's range of motion (ROM) deficit, motor strength deficit, status postsurgery, and antalgic gait, and a GMCS of 2 due to appellant's abnormal clinical studies suggestive of a moderate problem. Dr. Katz concluded that appellant had nine percent permanent impairment of the left lower extremity based on Dr. Chauhan's February 1, 2017 report and opined that appellant reached MMI on January 17, 2017, the date of Dr. Chauhan's examination upon which the report was based.

In a supplemental report dated April 28, 2017, Dr. Chauhan indicated that appellant had reached MMI as of February 18, 2015 and again opined that appellant had 20 percent permanent impairment of the left lower extremity for his accepted diagnosis of left hip sprain, trochanteric bursitis of left hip, left hip tenosynovitis, and left hip internal derangement. He noted no preexisting permanent impairment.

In an additional supplemental report dated July 1, 2017, Dr. Chauhan revisited his impairment calculation and referred to Chapter 16.7, page 543, which states that "[ROM] determination is [an] essential component of [lower extremity] LE impairment rating with strong historical precedent." He provided ROM measurements of the left lower extremity and opined that appellant had 30 percent permanent impairment for his left hip dysfunction.

On August 10, 2017 Dr. Katz reviewed the medical evidence and explained that the A.M.A., *Guides* provides on page 497 (Chapter 16) that "[ROM] is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment." He reiterated his opinion that the use of Table 16-4, the *Hip Regional Grid*, was the appropriate method for determination of impairment in appellant's case and the key diagnostic factors in that table took loss of ROM into consideration as a factor. Dr. Katz noted that in his prior report, Dr. Chauhan utilized Table 16-4 for "hip strain, moderate motion deficit," finding seven percent permanent impairment of the left lower extremity. The DMA concluded that his selection of the key diagnostic factor of trochanteric bursitis resulted in the higher impairment and was, therefore, utilized as it was beneficial to appellant to do so and consistent with the A.M.A., *Guides* methodology.

By decision dated August 16, 2017, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity, relying on the reports from Drs. Chauhan and Katz. The award covered 25.92 weeks for the period January 17 to July 17, 2017 (and a fraction of a day).

On August 23, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on February 13, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional

evidence. Following the hearing, appellant submitted a February 15, 2018 progress report from Dr. Chauhan that did not provide an opinion on the issue of permanent impairment.

By decision dated April 27, 2018, the hearing representative affirmed the prior schedule award decision, finding that Dr. Katz represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] 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 scheduled member shall be determined. For consistent results and to ensure equal justice, OWCP has adopted the A.M.A., *Guides* as the uniform standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.[7]

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).[8] In evaluating lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE, and GMCS.[9] 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.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than nine percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

In support of his schedule award claim, appellant submitted a February 1, 2017 report from Dr. Chauhan indicating that an impairment rating for his accepted diagnoses was calculated based on his examination of January 17, 2017. Dr. Chauhan opined that appellant had 9 percent permanent impairment based on his trochanteric bursitis condition, 3 percent permanent

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

[6] 20 C.F.R. § 10.404; *see also B.W.*, Docket No. 18-1415 (issued March 8, 2019); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] *See D.T.*, Docket No. 12-0503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[9] *Id.* at 494-531.

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

impairment based on his labral tear, and 7 percent permanent impairment based on his tenosynovitis and left hip chronic strain, which converted to a total of 20 percent permanent impairment of the left lower extremity.

In a supplemental report dated April 28, 2017, Dr. Chauhan revised his earlier findings and indicated that appellant had reached MMI as of February 18, 2015 and he had 20 percent permanent impairment of the left lower extremity. In a second supplemental report dated July 1, 2017, he revisited his impairment calculation using the ROM method and opined that appellant had 30 percent permanent impairment for his left hip dysfunction.

In accordance with its procedures, OWCP referred the evidence of record to a DMA, Dr. Katz, who reviewed the clinical findings of Dr. Chauhan and determined that appellant had nine percent permanent impairment of the left lower extremity based upon Dr. Chauhan's objective findings. He further determined that appellant's date of MMI was January 17, 2017, the date of Dr. Chauhan's examination upon which his impairment rating was based. Dr. Katz concurred with Dr. Chauhan that appellant's most impairing diagnosis was chronic trochanteric bursitis, which was a class 1 diagnosis. He also concurred with Dr. Chauhan's grade modifiers of 2 for functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).

Dr. Katz disagreed, however, that appellant's impairment rating should be based on the ROM method. He explained, in his August 10, 2017 report, that the A.M.A., *Guides* provide that loss of ROM is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment. Dr. Katz concluded that the use of Table 16-4, the *Hip Regional Grid*, was an appropriate method for determination of impairment in appellant's case and the key diagnostic factors in that table took into consideration appellant's loss of ROM as a factor. He explained that his selection of the key diagnostic factor of trochanteric bursitis resulted in the higher impairment and was, therefore, utilized as it was beneficial to appellant to do so and consistent with the A.M.A., *Guides* methodology.

The Board finds that Dr. Katz adequately explained how he arrived at his rating of permanent impairment by listing specific tables and pages in the A.M.A., *Guides*. The Board also finds that Dr. Katz properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant qualified for nine percent permanent impairment of the left lower extremity. Dr. Katz' opinion therefore represents the weight of the medical evidence and supports that appellant does not have a greater left lower extremity impairment than the nine percent previously awarded.

The Board finds that there is no current medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than nine percent permanent impairment of the left lower extremity. Accordingly, appellant has not established entitlement to a schedule award greater than that previously awarded.[11]

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[11] FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

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 met his burden of proof to establish more than nine percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2019
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