

**United States Department of Labor
Employees' Compensation Appeals Board**

P.D., Appellant)	
)	
and)	Docket No. 18-1289
)	Issued: January 2, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Poland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 13, 2018 appellant, through counsel, filed a timely appeal from an April 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met his burden of proof to establish more than seven percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 11, 2009 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2009 he injured his left knee when he slipped and fell while in the performance of duty. He stopped work on December 9, 2009. OWCP accepted the claim for left knee strain and left quadriceps tendon rupture. On February 2, 2010 appellant underwent surgical repair of the left quadriceps tendon rupture, which OWCP authorized. As of April 10, 2010, he was able to return to work in a part-time limited-duty capacity. Appellant was released to resume regular, full-time employment effective April 4, 2011.

By decision dated August 29, 2012, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ The schedule award covered a 23.04-week period from August 2, 2010 through January 10, 2011. It based the award on the April 5, 2012 second opinion evaluation by Dr. Manhal A. Ghanma, an orthopedic surgeon, who rated appellant based on his left quadriceps rupture.⁵

On November 20, 2015 appellant filed a claim for an increased schedule award (Form CA-7). In support of the claim, he submitted a November 16, 2015 impairment rating from Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine. Dr. Watkins Campbell reviewed the medical evidence of record and discussed appellant's difficulties performing activities of daily living. On physical examination, she reported 4-/5 weakness on left knee extension, 4/5 weakness on left knee flexion, medial and lateral left patellar asymmetrical laxity, a positive Trendelenburg test, and asymmetrical peripatellar swelling on the left. Dr. Watkins Campbell measured the right thigh as 57 centimeters and the left thigh as 53 centimeters and the right calf as 43 centimeters and the left calf as 44 centimeters. Citing Table 16-3 on page 509 of the A.M.A., *Guides*, she identified the diagnosis as a class 1 complete rupture of a tendon with moderate motion deficits and/or significant weakness. Dr. Watkins

³ Docket No. 18-0442 (issued July 11, 2018).

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Table 16-3, Knee Regional Grid, A.M.A., *Guides* 509 (6th ed. 2009).

Campbell applied grade modifiers and application of the net adjustment formula yielded a grade E, or 13 percent permanent impairment of the left lower extremity.

An OWCP medical adviser reviewed the record on February 28, 2016. Using Table 16-3 on page 509, he identified the diagnosis as a ruptured tendon with mild motion deficits, which yielded a default value of seven percent. The medical adviser applied a grade modifier of two for functional history due to appellant's Trendelenburg gait, a grade modifier of four for physical examination due to his thigh atrophy, and a grade modifier of one for clinical studies due to mild pathology. He calculated a net adjustment of +4, and found a left lower extremity permanent impairment rating of nine percent. The medical adviser found that maximum medical improvement occurred on April 6, 2011, when appellant returned to full-duty activity. He disagreed with Dr. Watkins Campbell's finding that appellant had significant weakness or moderate motion deficits as the strength measurements of the knee were 4 to 4-/5 and his impairment due to reduced motion was mild.

On March 7, 2016 OWCP provided Dr. Watkins Campbell a copy of its medical adviser's report to review. In a supplemental report dated March 30, 2016, Dr. Watkins Campbell again opined that appellant had 13 percent impairment of the left lower extremity. On April 20, 2016 OWCP's medical adviser reviewed Dr. Watkins Campbell's March 30, 2016 report and confirmed that his opinion was unchanged.

OWCP determined that a conflict existed between OWCP's medical adviser and Dr. Watkins Campbell regarding the extent of appellant's permanent impairment. It referred him to Dr. Dennis A. Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 16, 2017 impairment evaluation, Dr. Glazer discussed appellant's history of injury and current complaints of patellar knee pain. On examination, he measured full flexion of 110 degrees, no effusion or pivot shift, and one inch of thigh atrophy on the left. Dr. Glazer found quadriceps weakness of 4+/5 on the left. Referencing Table 16-3 of the A.M.A., *Guides*, he identified the diagnosis as a class 1 ruptured tendon with full range of motion and 4+/5 quadriceps strength, which yielded a default impairment of seven percent. Dr. Glazer applied a grade modifier of one for functional history due to appellant's normal gait and history, a grade modifier of one for physical examination findings of thigh atrophy of one inch, and determined that a grade modifier for clinical studies was not applicable as it confirmed the diagnosis. Applying the net adjustment formula yielded no change from the default value of seven percent.⁶

An OWCP medical adviser reviewed the evidence on June 16, 2017 and concurred with Dr. Glazer's findings.

By decision dated August 21, 2017, OWCP found that appellant had seven percent permanent impairment of the left lower extremity. It noted that he had previously received a

⁶ Appellant telephoned OWCP on May 25, 2017, noting that Dr. Glazer had referenced the name of another individual in his report. Dr. Glazer provided an addendum report on June 2, 2016 correcting the reference to another individual.

schedule award on August 29, 2012 for eight percent permanent impairment of the left lower extremity calculated under the sixth edition of the A.M.A., *Guides*.

Appellant, through counsel, timely requested a telephone hearing before an OWCP hearing representative with respect to August 21, 2017 schedule award determination.⁷ At the February 14, 2018 hearing, counsel contended that OWCP erred in finding that appellant had less than eight percent permanent impairment as it had not rescinded its prior determination. He further asserted that OWCP erred in using its medical adviser to create a conflict in medical opinion.

By decision dated April 30, 2018, an OWCP hearing representative affirmed the August 21, 2017 decision. She found that OWCP properly declared a conflict in medical opinion. The hearing representative determined that Dr. Glazer's report constituted the weight of the evidence and established that appellant had no more than seven percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁸ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁹ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁰

In determining the extent of permanent 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 509.¹¹ After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history (GMFH), grade modifier for

⁷ By decision dated November 15, 2017, OWCP determined that appellant received a \$2,268.80 overpayment of compensation for the period December 20, 2010 through January 10, 2011 as it overpaid him schedule award compensation. It found that he was without fault in creating the overpayment, but denied waiver of the overpayment, noting that he had not responded to its preliminary overpayment determination. In a decision dated July 11, 2018, the Board affirmed the November 15, 2017 overpayment decision. Docket No. 18-0442 (issued July 11, 2018).

⁸ For a total of 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

⁹ 20 C.F.R. § 10.404.

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

¹¹ See A.M.A., *Guides* 509-11.

physical examination (GMPE), and grade modifier for clinical studies (GMCS). The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹² Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of grade modifier scores.¹³

Section 8123(a) of FECA provides that if there is a 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 The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either the second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁵ Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁶

ANALYSIS

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

OWCP accepted appellant's traumatic injury claim for left knee strain and left quadriceps tendon rupture. It also authorized a February 2, 2010 surgical procedure to repair the left quadriceps tendon rupture. On August 29, 2012 OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity. In November 2015, appellant filed a claim for an additional schedule award (Form CA-7), and submitted Dr. Watkins Campbell's November 16, 2015 impairment rating. The district medical adviser disagreed with Dr. Watkins Campbell's 13 percent left lower extremity rating, finding only 9 percent permanent impairment.

OWCP properly found that a conflict existed between the district medical adviser and Dr. Watkins Campbell regarding the extent of appellant's permanent impairment, and consequently, referred him to Dr. Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination.¹⁷ Where OWCP has referred the case to an impartial medical examiner to

¹² *Id.* at 515-22.

¹³ *Id.* at 23-28.

¹⁴ 5 U.S.C. § 8123(a); *see T.M.*, Docket No. 18-0149 (issued September 5, 2018).

¹⁵ 20 C.F.R. § 10.321(b).

¹⁶ *See T.C.*, Docket No. 17-1741 (issued October 9, 2018).

¹⁷ *Supra* note 15.

resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁸

In an impairment evaluation dated March 16, 2017, Dr. Glazer measured full flexion to 110 degrees, no effusion, one inch of left thigh atrophy, and quadriceps weakness of 4+/5 of the left side. Using the knee regional grid set forth at Table 16-3 on page 509 of the A.M.A., *Guides*, he identified the diagnosis as a class 1 ruptured tendon with no loss of motion and 4+/5 strength of the quadriceps, which he found yielded a seven percent default impairment rating. Dr. Glazer applied a grade modifier of one for functional history based on appellant's normal gait, a grade modifier of one for physical examination findings due to one inch of thigh atrophy, and found that a grade modifier for clinical studies was not applicable as it confirmed the diagnosis. He utilized the net adjustment formula and found no change from the default value of seven percent.¹⁹ An OWCP medical adviser reviewed Dr. Glazer's report and determined that he had properly applied the A.M.A., *Guides*.

The Board finds that the well-reasoned report from Dr. Glazer is entitled to the special weight of the evidence.²⁰ The evidence of record does not establish more than seven percent permanent impairment of the left lower extremity.

Counsel asserts that OWCP erred in finding that he had less than the previously awarded eight percent impairment, noting that it had not followed its procedures for rescission.²¹ As noted above, appellant has not presented evidence to establish an increased impairment for schedule award purposes.

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

¹⁸ See *L.G.*, Docket No. 18-0065 (issued June 11, 2018).

¹⁹ Utilizing the net adjustment formula discussed above, (GMFH-CDX) + (GMPE-CDX), or (1-1) + (1-1) = 0, yielded a zero adjustment.

²⁰ *Supra* note 16.

²¹ As previously noted, appellant separately appealed the November 15, 2017 overpayment decision. *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 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