United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 19-1448**
	)	**Issued: August 21, 2020**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Holtsville, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 24, 2019 appellant filed a timely appeal from a May 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the May 30, 2019 decision, OWCP received additional evidence and appellant submitted additional evidence on appeal. 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 25 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

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

On August 22, 2005 appellant, then a 51-year-old tax examiner technician, filed a notice of traumatic injury (Form CA-1) alleging that on August 18, 2005 he was injured when a chair moved from under him while he was in the performance of duty. OWCP accepted the claim for cervical sprain, cervicalgia, cervicobrachial syndrome, right knee sprain, lumbago, lumbar sprain, and aggravation of knee osteoarthritis of the right and left knees. Appellant underwent a right total knee replacement on August 17, 2011.

On August 16, 2013 appellant filed a schedule award claim (Form CA-7). OWCP denied the claim by decision dated March 4, 2014.

On March 7, 2014 appellant requested a review of the written record with OWCP's Branch of Hearings and Review. In a September 17, 2014 decision, an OWCP hearing representative affirmed the March 4, 2014 decision, finding that, as the medical evidence of record established that appellant had not reached maximum medical improvement, he had not established permanent impairment of the right lower extremity.

On January 29, 2015 appellant filed separate schedule award claim (Form CA-7). OWCP denied that claim by decision dated April 10, 2015.

On August 14, 2015 OWCP referred appellant to Dr. Hormozan Aprin, a Board-certified orthopedic surgeon, for an impairment evaluation of his right lower extremity. In a September 10, 2015 report, Dr. Aprin found that appellant had 25 percent permanent impairment of the right lower extremity. On September 22, 2015 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as district medical adviser (DMA) concurred with this assessment. By decision dated October 19, 2015, OWCP granted appellant a schedule award for 25 percent permanent impairment of the right lower extremity.

On October 23, 2015, appellant requested a review of the written record by an OWCP hearing representative. By decision dated March 15, 2016, an OWCP hearing representative affirmed the October 19, 2015 schedule award decision. Appellant requested reconsideration on June 23, 2016. In a merit decision dated February 17, 2017, OWCP found that appellant was not entitled to an additional schedule award for his right lower extremity. On February 28, 2017

[3] Docket No. 08-0401 (issued January 8, 2009); Docket No. 09-1275 (issued January 6, 2010); Docket No. 12-0588 (issued August 23, 2012); Docket No. 17-0788 (issued March 14, 2018).

appellant filed a timely appeal with the Board. By decision dated March 14, 2018, the Board affirmed the February 17, 2017 decision, finding that appellant had not met his burden of proof to establish more than 25 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.[4]

Medical evidence received subsequent to OWCP's February 17, 2017 decision included treatment notes from Dr. Bradley D. Gerber, an attending Board-certified orthopedic surgeon, dated April 13, 2017 to May 24, 2018, in which he noted seeing appellant in follow up after a right total knee replacement. In his report dated April 13, 2017, Dr. Gerber provided examination findings and advised that appellant had a Class 3 right lower extremity impairment due to a fair right total knee replacement and, after applying adjustments for physical examination, functional history, and clinical studies, he had a grade A impairment of 31 percent. He continued to provide this same assessment in his subsequent progress reports.

On June 12, 2018 appellant filed a claim for an increased schedule award (Form CA-7). He referenced the Board's March 14, 2018 decision and submitted an April 17, 2018 report from Dr. Michael DiGiovanna, an osteopathic physician specializing in family medicine.

In the April 17, 2018 report, Dr. DiGiovanna indicated that the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] was used in his evaluation. He advised that appellant was being managed for worsening of his severe post-traumatic osteoarthritis of the right knee, that he also had primary osteoarthritis of the left knee, that he had extreme difficulty with ambulation, that he could not climb, kneel, bend, stoop, or squat, that walking and standing were very difficult, and that sitting for long periods could make the pain worse once ambulation was necessary. Dr. DiGiovanna opined that appellant's condition was expected to worsen over time, and that he had 80 percent permanent impairment of the right lower extremity. He also provided an April 14, 2018 State of New York Workers' Compensation Board Doctor's Report of (MMI)/Permanent Impairment (NY Impairment form) in which he noted that maximum medical improvement had been reached on April 1, 2013 and repeated that appellant had 80 percent permanent impairment of the right lower extremity.

Appellant also resubmitted an upper extremity permanent impairment worksheet signed by Dr. Gerber on July 29, 2016 that had been reviewed by the Board in its March 14, 2018 decision.

On July 10, 2018 OWCP asked Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA to review the medical record, including Dr. DiGiovanna's report, and provide an opinion regarding appellant's right lower extremity permanent impairment.

In a July 13, 2018 report, Dr. Katz noted his review of the record, including Dr. DiGiovanna's April 14, 2017 report. The DMA opined that, based on his review of the records, using Table 16-3 of the A.M.A., *Guides*, for a total knee replacement with good result, appellant's class of diagnosis (CDX) was a Class 2 right lower extremity impairment with a default value of

[4] *Supra* note 3.

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

25 percent. He assigned a grade modifier for functional history (GMFH) of 3 and a grade modifier for physical examination (GMPE) of 2. The DMA noted that a grade modifier for clinical studies (GMCS) would not be assigned. He concluded that the net adjustment formula yielded a net adjustment of +1 from the default value, which under Table 16-3 yielded 25 percent permanent impairment. The DMA indicated that he relied on August 22, 2017 examination findings of Dr. Gerber, who noted flexion of 110 degrees, full extension, no laxity, and satisfactory position of implants which, Dr. Katz indicated, did not support a Class 3 impairment. He determined that MMI was reached on August 22, 2017, the date of the examination on which his impairment was based. Dr. Katz opined that Dr. DiGiovanna's report could not be accepted as probative because he did not provide specific examination findings upon which he used to find a Class 3 impairment, and that Dr. Giovanna's permanent impairment rating was not an available choice under Table 16-3, noting that the default value for a total knee replacement was 37 percent. The DMA concluded that, since appellant had previously received a schedule award for 25 percent permanent impairment of the right lower extremity, he was not entitled to an increased award.

By letter dated July 17, 2018, OWCP asked Dr. DiGiovanna to provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*. It enclosed a copy of the DMA's July 13, 2018 report for review and comment.

In a treatment note dated August 16, 2018, Dr. Eric Keefer, a Board-certified orthopedic surgeon and associate of Dr. Gerber, advised that he would defer a long-term classification of appellant's injuries to Dr. Gerber. On September 27, 2018 Dr. Gerber reiterated his findings and conclusions.

On October 31, 2018 OWCP informed Dr. Gerber that his impairment evaluation of appellant's right lower extremity was insufficient and asked that he provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*. It enclosed a copy of the DMA's July 13, 2018 report for review and comment.

By letter dated November 8, 2018, OWCP again asked Dr. DiGiovanna to provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*. It noted that he had not responded to its July 17, 2018 letter, which it enclosed, and again enclosed a copy of the DMA's July 13, 2018 report for review and comment.

In correspondence dated December 14, 2018, OWCP informed appellant of the medical evidence needed to support his claim for increased right lower extremity impairment.

By decision dated January 30, 2019, OWCP denied appellant's claim for an increased schedule award.

On February 9, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a treatment note dated February 14, 2019, Dr. Gerber described physical examination findings and noted that appellant's right knee was doing well, status post the 2011 total knee replacement.

By decision dated May 30, 2019, an OWCP hearing representative affirmed the January 30, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[6] and its implementing federal 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter that rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[8] 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.[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, which is then adjusted by GMFH, GMPE and GMCS.[11] The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[12]

In determining 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, the relevant portion of the leg for the present case, reference is made to Table 16-3 Knee Regional Grid beginning on page 509.[13] After the CDX is determined from Table 16-3 (including identification of a default grade value, the adjustment formula is applied using the GMFH, GMPE, and GMCS. Evaluators are directed to provide reasons for their

[6] *Supra* note 1.

[7] 20 C.F.R. § 10.404.

[8] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5 (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[10] A.M.A., *Guides*, *supra* note 5 at 3, Section 1.3, The International Classification of Functioning, Disability, and Health (ICF): A Contemporary Model of Disablement.

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

[12] *Id*. at 515-22.

[13] *Id*. at 509-11.

impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

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*, with the DMA providing rationale for the percentage of impairment specified.[15]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 25 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its March 14, 2018 decision.[16] Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.[17]

The Board finds that OWCP properly relied on the July 13, 2018 opinion of the DMA, Dr. Katz, who reviewed the medical record including Dr. DiGiovanna's April 17, 2018 reports, and noted that appellant had undergone a right total knee replacement on August 17, 2011. The DMA opined that, based on his review of the records, and utilizing the physical examination findings from an August 22, 2017 report from Dr. Gerber who noted flexion of 110 degrees, full extension, no laxity, and satisfactory position of implants, under Table 16-3 of the A.M.A., *Guides*, for a total knee replacement with good result, appellant had a Class 2 right lower extremity impairment. He noted that a Class 2 impairment had a default value of 25 percent, assigned GMFH modifier of 3, GMPE of 2, and noted that GMCS was not applicable as it was utilized for class placement.[18] The DMA found a net adjustment of +1 from the default value, which, under Table 16-3 which yielded 25 percent permanent impairment. He properly opined that Dr. DiGiovanna's report could not be accepted as probative because he did not provide specific examination findings which he used to find a Class 3 impairment, and that Dr. Giovanna's impairment rating was not an available choice under Table 16-3.[19] The DMA determined that MMI was reached on August 22, 2017, the date of the examination on which his impairment was based. He concluded that, since

[14] *G.W.*, Docket No. 19-0430 (issued February 7, 2020)

[15] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.808.6(f); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[16] *Supra* note 3.

[17] *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

[18] *T.S.*, Docket No. 15-1022 (issued August 17, 2016).

[19] Table 16-3 indicates that the maximum value for a Class 2 impairment due to total knee replacement is 25 percent, and the maximum value for a Class 3 impairment is 43 percent. A.M.A., *Guides*, *supra* note 5 at 511.

appellant had previously received a schedule award for 25 percent permanent impairment of the right lower extremity, he was not entitled to an increased award.

As to Dr. Gerber's summary opinion that appellant had 31 percent right lower extremity permanent impairment due to his total knee replacement, he initially set forth this opinion in treatment notes dated November 10, 2016 and January 12, 2017, which were reviewed by the Board in its March 14, 2018 decision.[20] He did not specifically reference the A.M.A., *Guides* in any of his reports. Moreover, in a February 14, 2019 treatment note, Dr. Gerber noted that appellant's right knee was doing well, status post the 2011 total knee replacement.

Furthermore, neither Dr. DiGiovanna nor Dr. Gerber responded to OWCP's requests for impairment analysis in accordance with the sixth edition of the A.M.A., *Guides*.

The Board has long held that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment.[21] The record in this case does not contain a probative opinion supporting a right lower extremity impairment rating greater than the 25 percent previously awarded.

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

[20] *Supra* note 3.

[21] *I.F.*, Docket No. 08-2321 (issued May 21, 2009).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board