United States Department of Labor
Employees' Compensation Appeals Board

N.M., Appellant	)	
and	)	**Docket No. 19-1925**
	)	**Issued: June 3, 2020**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, FEDERAL AIR MARSHAL SERVICE, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 17, 2019 appellant, through counsel, filed a timely appeal from a June 25, 2019 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 met his burden of proof to establish more than three percent permanent impairment of his left lower extremity for which he previously received schedule award compensation.

FACTUAL HISTORY

On July 23, 2008 appellant, then a 44-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2008 he felt a sharp pain in his left knee during a fitness assessment run while in the performance of duty. On September 8, 2008 OWCP accepted the claim for left knee strain and left medial meniscus tear (posterior horn).

On September 22, 2008 appellant underwent a partial left medial meniscectomy and chondroplasty of the medial femoral condyle, which was performed by Dr. David Cowin, a Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation on the supplemental rolls from September 19 to October 21, 2008.

On January 22, 2016 appellant filed a claim for a schedule award (Form CA-7).

In an October 31, 2008 report, Dr. Cowin provided appellant's physical examination findings regarding the left knee indicating that appellant was stable to varus and valgus stress at 0 and 30 degrees, with strength findings of 5/5, sensation intact, negative Lachman's test, and negative anterior and posterior drawer testing. He also found range of motion (ROM) to full at 0 to 140 degrees and no real joint line tenderness. Dr. Cowin advised that appellant was post partial meniscectomy and chondroplasty.

In a February 5, 2016 report, Dr. Jovito Estaris, Board-certified in occupational medicine and a district medical adviser (DMA), reviewed Dr. Cowin's October 31, 2008 report and used his examination findings to calculate appellant's left lower extremity permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides)*.[3] He related that appellant's diagnosis was derangement of posterior horn of medial meniscal and he concluded that appellant had one percent permanent impairment of the left lower extremity post partial meniscectomy and chondroplasty, according to Table 16-3 of the A.M.A. *Guides*.[4] Dr. Estaris also found that appellant had reached maximum medical improvement (MMI) on October 31, 2008.

By decision dated March 1, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity. The award covered a 2.88 week period from November 1 to 21, 2008.

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

[4] *Id*. at 509.

On November 9, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

In an August 26, 2016 report, Dr. Samy F. Bishai, an orthopedic surgeon, referred to Table 16-23 of the A.M.A., *Guides* to assess appellant's permanent impairment of the left knee due to loss of ROM of the knee joint.[5] He determined that appellant had -9 degrees of extension lag due to flexion contracture, which corresponded to 10 percent lower extremity impairment, and flexion of 100 degrees, which also corresponded to 10 percent lower extremity impairment. Dr. Bishai explained that he added the values for loss of extension and loss of flexion "since we are dealing with one joint," and opined that appellant had 20 percent permanent impairment of the left lower extremity. He noted that he had used the stand alone ROM method to calculate appellant's impairment rating since appellant's primary disability was loss of ROM and the use of the diagnosis-based impairment (DBI) method would not provide fair compensation for the loss of ROM. Dr. Bishai concluded that appellant had reached MMI on August 24, 2016.

On November 20, 2017 OWCP forwarded Dr. Bishai's report to Dr. Arthur S. Harris, an orthopedic surgeon and the DMA, for review and determination of appellant's entitlement to an additional schedule award.

In a November 21, 2017 report, DMA Dr. Harris noted that Dr. Bishai found that appellant had 20 percent left lower extremity permanent impairment based upon the ROM method. He explained that the A.M.A., *Guides* does not allow an impairment rating due to loss of ROM because the applicable diagnosis did not contain an asterisk (*) in the DBI grid; therefore, the ROM method was not applicable. Dr. Harris used the DBI method and referred to Table 16-3 of the A.M.A., *Guides* because appellant underwent a partial medial meniscectomy.[6] He determined that appellant had three percent permanent impairment of the left lower extremity, the maximum allowable rating for a partial medial or lateral meniscectomy.

In a development letter dated November 27, 2017, OWCP advised appellant that the DMA had found Dr. Bishai's report to be deficient. Appellant was provided a copy of the DMA's report and was afforded 30 days to submit additional evidence in response to the DMA's report.

By decision dated July 26, 2018, OWCP granted appellant a schedule award for an additional two percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from August 24 to October 3, 2016. OWCP explained that appellant was previously paid one percent; therefore, he was entitled to compensation for an additional two percent, for a total three percent permanent impairment of the left lower extremity.

On July 31, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on December 11, 2018. During the hearing, counsel noted that Dr. Bishai was no longer practicing and would not be able to update his report.

[5] *Id*. at 549.

[6] *Id*. at 509.

By decision dated February 8, 2019, OWCP's hearing representative affirmed the July 26, 2018 decision.

On March 4, 2019 appellant filed a claim for an increased schedule award (Form CA-7).

On March 28, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a February 7, 2019 report, Dr. Neil Allen, a Board-certified internist, related that appellant had undergone physical examination on January 23, 2019. He provided appellant's physical examination findings and opined that the DBI method would result in a finding of three percent permanent impairment of appellant's left knee due to his partial medial meniscectomy. However, Dr. Allen also related that appellant had 12 percent permanent impairment of the left lower extremity pursuant to the ROM methodology. He concluded that appellant was entitled to a schedule award based upon loss of ROM, as the ROM method produced a higher permanent impairment percentage. Dr. Allen provided ROM calculations for the left knee according to the A.M.A., *Guides*, Table 16-24.[7] He reported that appellant had reached MMI.

By decision dated June 25, 2019, OWCP denied modification of the February 8, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[8] and its implementing federal regulations[9] 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 which 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.[10] 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.[11]

[7] *Id*. at 549.

[8] *Supra* note 2.

[9] 20 C.F.R. § 10.404.

[10] 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 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[11] *See G.W.*, Docket No. 19-0430 (issued February 7, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).[13] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[14] Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids and the calculation of the modifier score.[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[16]

ANALYSIS

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

The record contains an August 26, 2016 report from Dr. Bishai, who opined that appellant had 20 percent permanent impairment of the left lower extremity based upon the ROM methodology. Dr. Bishai explained that he utilized the ROM method because it resulted in a higher and fairer impairment calculation. However, his rating was improper under the A.M.A., *Guides* which explains that while ROM is an alternative approach for calculating permanent impairment of the lower extremities, it is to be used primarily as a physical examination factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment.[17] As such, this report is of limited probative value.[18]

OWCP also received a February 7, 2019 report from Dr. Allen, who opined that appellant had 3 percent permanent impairment of the left lower extremity under the DBI method of rating permanent impairment, based upon the diagnosis of partial medial meniscectomy, or 12 percent permanent impairment based upon loss of ROM. As previously noted, the ROM method of rating

[12] A.M.A., *Guides* 494-531.

[13] *Id*.

[14] *Id.* at 521.

[15] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[16] *See supra* note 10 at Chapter 2.808.6(f) (March 2017).

[17] A.M.A., *Guides* 497; *see also M.P.*, Docket No. 18-1298 (issued April 12 2019).

[18] *D.M.*, Docket No. 16-1166 (issued October 25, 2016).

permanent impairment is not to be used if it is possible to otherwise define the impairment.[19] Dr. Allen's report would, therefore, only support a permanent impairment award for three percent permanent impairment of the left lower extremity based upon appellant's diagnosis.

In a November 21, 2017 report, DMA Dr. Harris explained that the A.M.A., *Guides* do not allow an impairment rating due to loss of ROM for the applicable diagnosis because the diagnosis did not contain an asterisk (*) in the DBI grid, and thus the ROM method was not applicable. He referred to Table 16-3 because appellant underwent a partial medial meniscectomy.[20] Dr. Harris determined that appellant had three percent left lower extremity permanent impairment using the DBI method, as three percent was the maximum rating for a partial medial meniscectomy under Table 16-3.

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Harris, the DMA, as he provided the only impairment rating that properly applied the sixth edition of the A.M.A., *Guides*.[21] The record does not contain any other medical evidence establishing greater than the three percent permanent impairment of the left lower extremity previously awarded. Accordingly, appellant has not met his burden of proof to establish entitlement to a schedule award for a percentage of impairment greater than that previously awarded.[22]

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 permanent impairment.

CONCLUSION

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

[19] *Id*.

[20] A.M.A., *Guides* 509.

[21] *See L.D.*, Docket No. 19-0797 (issued October 2, 2019).

[22] *See T.W.*, Docket No. 18-0765 (issued September 20, 2019).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board