

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

_____)	
R.R., Appellant)	
)	
and)	Docket No. 20-1282
)	Issued: January 18, 2022
U.S. POSTAL SERVICE, MILLBURY POST OFFICE, Millbury, MA, Employer)	
_____)	

Appearances:
John L. DeGeneres, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2020 appellant, through counsel, filed a timely appeal from an April 9, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant submitted a timely oral argument request before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted regarding why a physical examination by the impartial medical examiner (IME) was unnecessary as the only conflict pertained to the application of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). The Board, in exercising its discretion, denies his request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established greater than 26 percent permanent impairment of the left lower extremity, for which he has received a schedule award.

FACTUAL HISTORY

On May 16, 2011 appellant, then a 60-year-old letter carrier, filed a traumatic injury (Form CA-1) alleging that on May 13, 2011 he felt severe left knee pain when he was ascending steps while in the performance of duty. He stopped work on May 14, 2011. OWCP accepted the claim for left knee sprain, partial left medial meniscus tear, and partial left lateral meniscus tear.⁴

On March 4, 2019 appellant filed a claim for compensation (Form CA7) for a schedule award.

In support of his claim, appellant submitted a February 20, 2019 report from Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon. Dr. Hartunian reviewed appellant's medical records and diagnosed primary left knee joint arthritis with one millimeter of cartilage interval at the medial femoral-tibial joint. On examination he found a four-degree varus left knee alignment, limited squatting, palpable effusion, severe tenderness along the medial joint, and no ligament laxity. Dr. Hartunian measured range of motion (ROM) of appellant's left knee and related 116 degrees flexion and 0 degrees extension. He reviewed the American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire completed by appellant indicating that he had a severe deficit. Referencing Table 16-3 on page "515" of the A.M.A., *Guides*,⁵ Dr. Hartunian identified the diagnostic criteria as a class 3 for a class of diagnosis (CDX) of primary knee joint arthritis as x-rays showed one millimeter of cartilage interval at the medial femoral-tibial joint. He found that a grade modifier for clinical studies (GMCS) was inapplicable as x-rays were used to identify the CDX. Next, Dr. Hartunian found a grade modifier for physical examination (GMPE) of three based on severe palpatory findings. He found a grade modifier for functional history (GMFH) of three based on the AAOS Lower Limb Questionnaire. Application of the net adjustment formula resulted in a net adjustment of zero, yielding a Class 3, Grade C, 30 percent permanent impairment of the left lower extremity. Dr. Hartunian determined that MMI was reached on June 26, 2017.

On March 14, 2019 OWCP routed Dr. Hartunian's report, a statement of accepted facts (SOAF), and the case record to Dr. Jovito Estaris, Board-certified in occupational medicine serving as a district medical adviser (DMA), for review and evaluation of appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. The DMA was also asked to provide a date of MMI.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant retired from the employing establishment effective May 29, 2016.

⁵ A.M.A., *Guides* (6th ed. 2009).

In a March 19, 2019 report, Dr. Estaris noted that he had reviewed the case file and determined that appellant reached MMI on June 26, 2017. He disagreed with Dr. Hartunian's left knee permanent impairment rating. Dr. Estaris related that appellant's diagnoses of left knee partial medial and lateral menisci tears with osteoarthritis was a Class 3 impairment with a default value of 30 percent in accordance with Table 16-3, page 511 of the sixth edition of the A.M.A., *Guides*. Utilizing Table 16-6, page 516, the DMA assigned a GMFH of 2, a GMPE of 2 under Table 16-7, page 517, and found a GMCS was not applicable for the x-ray which showed one millimeter cartilage was "used in proper placement in DBI grid." Utilizing the net adjustment formula, he found a net adjustment of -2, which warranted movement two places to the left from the default value of Grade C to A, totaling 26 percent left lower extremity permanent impairment. The DMA also used the ROM methodology and calculated, under Table 16-23, page 549 that 116 degrees of flexion and 0 degrees of extension each resulted in 0 percent permanent impairment of the left lower extremity. He found that the DBI method provided the higher impairment rating at 26 percent permanent impairment and should be used as the method of evaluation.

OWCP, in an April 16, 2019 letter, requested that Dr. Hartunian review the DMA's March 19, 2019 report and address the disagreement in the grade modifiers.

In a report dated April 22, 2019, Dr. Hartunian reviewed the DMA's recommendation and disagreed with the 26 percent impairment rating of the left knee. He asserted that the GMCS grade modifier was correct based on examination findings and explained the GMFH must be excluded as it was two or more than the GMCS.

On May 2, 2019 OWCP requested that the DMA review Dr. Hartunian's April 26, 2019 addendum report and provide an opinion on whether he properly applied the A.M.A., *Guides* to his findings.

In a report dated May 14, 2019, the DMA reviewed Dr. Hartunian's April 26, 2019 report and concluded that appellant had 28 percent left lower extremity permanent impairment. He again noted a CDX of 3, and utilizing Table 16-6, page 516, the DMA assigned, a GMPE of 2 under Table 16-7, page 517, and agreed that GMFH should not be included in the adjustment as it was 2 grades higher than GMCS. GMCS was not applicable as it was "used in proper placement in DBI grid." Utilizing the net adjustment formula, the DMA found a net adjustment of -1, which warranted movement one place to the left from the default value of grade C to B, totaling 28 percent left lower extremity permanent impairment.

On June 4, 2019 OWCP declared a conflict in medical opinion between Dr. Hartunian and the DMA regarding the GMPE findings. It referred appellant to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination on August 26, 2019 to resolve the conflict in the case.

In a report dated August 26, 2019, Dr. Pennell reviewed appellant's history of injury. He related ROM findings of full extension and 120 degrees flexion. Dr. Pennell also noted no effusion, swelling edema, heat or redness, no cruciate or collateral ligaments laxity, and no crepitation on flexion or extension. He explained that the basis of the conflict between Dr. Hartunian and Dr. Estaris was application of the GMPE. Dr. Pennell reported that based on the diagnosis of primary joint arthritis with one millimeter cartilage interval by x-ray, resulted in a Class 3 impairment. He assigned a GMPE of 1 due to no joint effusion, crepitation, or tenderness, no ligament joint laxity, normal alignment, and mild loss of motion. Next, Dr. Pennell assigned a

grade modifier of 0 for GMFH based on no limitations on his daily living activities, stiffness with rest, and occasional need to take over-the-counter pain medication. He found GMCS grade modifier was not applicable as the x-ray interpretation was used in the diagnostic impairment rating. Using the net adjustment formula resulted in a Grade A or 26 percent left lower extremity permanent impairment.

In a February 19, 2020 addendum, Dr. Pennell explained that using Dr. Hartunian's examination findings would result in a GMPE 2. However, his physical examination of appellant resulted in physical findings different from those found by Dr. Hartunian, resulting in a GMPE of 1. Dr. Pennell opined that the GMPE of 1 was the correct grade modifier.

Dr. Pennell, in another supplemental report dated March 29, 2020 found the date of MMI to be August 26, 2019, the date of appellant's examination.

By decision dated April 9, 2020, OWCP granted appellant a schedule award for 26 percent permanent impairment of the left lower extremity. It indicated that the special weight of medical evidence rested with Dr. Pennell, serving as the IME, who indicated that appellant had no more than 26 percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁶ and its implementing federal regulation,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 of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁹

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 509.¹⁰ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹¹ Under Chapter 2.3, evaluators are

⁶ *Supra* note 3.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a); *see also* *T.C.*, Docket No. 20-1170 (issued January 29, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

¹¹ *Id.* at 515-22.

directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹²

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹³ For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁴ Where OWCP has referred the case to an IME 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.¹⁵

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 26 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

OWCP properly found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Hartunian, and the DMA, regarding the degree of appellant's GMPE. It referred the case record to Dr. Pennell pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion. In his August 26, 2019 report, the IME, Dr. Pennell, reviewed appellant's history of injury, the relevant medical evidence, and provided physical examination findings. He noted appellant's left knee joint osteoarthritis and May 13, 2011 employment injury. Dr. Pennell assigned a diagnostic criteria of Class 3 for CDX of primary joint arthritis with one millimeter cartilage interval by x-ray, he assigned a GMFH of 0 and a GMPE of 1, and found that a GMCS was not applicable. He utilized the net adjustment formula, which resulted in a Grade A or 26 percent permanent impairment of the left lower extremity. In a February 19, 2020 addendum, Dr. Pennell explained that he based his GMPE on his examination findings rather than the physical examination findings of Dr. Hartunian and in a March 29, 2020 addendum he found the date of MMI to be August 26, 2019.

Where OWCP has referred the case to an IME 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 In this case, the Board finds that Dr. Pennell accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition, which comported with his findings.¹⁷ Dr. Pennell noted that physical examination findings showed no effusion, swelling edema, heat or

¹² *Id.* at 23-28.

¹³ 5 U.S.C. § 8123(a); *M.C.*, Docket No. 20-1656 (issued June 2, 2021); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹⁴ *M.C., id.; C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹⁵ *M.C., id.; W.M.*, Docket No. 18-0957 (issued October 15, 2018).

¹⁶ *R.M.*, Docket No. 20-1268 (issued February 24, 2021); *E.M.*, Docket No. 19-1535 (issued August 27, 2020); *see also W.C.*, Docket No. 19-1740 (issued June 4, 2020).

¹⁷ *See R.M., id.; J.B.*, Docket No. 18-0116 (issued October 2, 2020); *see also P.D.*, Docket No. 18-1289 (issued January 2, 2019).

redness, no cruciate or collateral ligaments laxity, and no crepitation on flexion or extension, which resulted in a grade modifier of 1 for GMPE according to the sixth edition of the A.M.A., *Guides*. As his report is detailed, well rationalized, and based on a proper factual background, his opinion is entitled to the special weight accorded to an IME.¹⁸ Thus, the Board finds that the medical evidence of record fails to establish that appellant has more than 26 percent left lower extremity permanent impairment, for which he previously received a schedule award.

Appellant may request a schedule award or increased schedule award 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 greater than 26 percent permanent impairment of the left lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁸ *R.M., id.*; *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).