United States Department of Labor
Employees' Compensation Appeals Board

C.P., Appellant	)	
and	)	**Docket No. 21-1363**
	)	**Issued: May 3, 2022**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Boston, MA, Employer	)	

Appearances:
Daniel Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 16, 2021 appellant, through her representative, filed a timely appeal from a July 2, 2021 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]

[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 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 her burden of proof to establish greater than 31 percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On January 23, 2015 appellant, then a 60-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left knee when she attempted to load a heavy cage full of letter trays onto a truck while in the performance of duty. She stopped work on that date. By decision dated April 29, 2015, OWCP accepted appellant's claim for left knee sprain. It subsequently expanded the acceptance of her claim on July 10, 2015 to include permanent aggravation of preexisting left knee osteoarthritis. OWCP paid appellant wage-loss compensation on the supplemental rolls effective March 11, 2015 and on the periodic rolls, effective June 28, 2015.

The record reflects that appellant underwent OWCP-approved left total knee replacement surgery on October 7, 2016 performed by Dr. Ira K. Evans, a Board-certified orthopedic surgeon. The operative report noted a preoperative diagnosis of left knee end-stage tricompartmental osteoarthritis.

On June 16, 2018 appellant returned to full-time modified-duty work.

On February 4, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

Appellant submitted a January 14, 2020 impairment evaluation report from Dr. Suzanne Miller, a Board-certified orthopedic surgeon. Dr. Miller reviewed appellant's medical records and noted that appellant underwent total left knee replacement surgery in October 2016. On physical examination, she observed an antalgic gait. Dr. Miller reported that appellant had left knee range of motion (ROM) from 0 to 83 degrees and was quite painful. She referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[4] and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the class of diagnosis (CDX) for a total knee prosthesis resulted in a default value of 37 percent based on mild motion deficit. Dr. Miller reported that grade modifiers provided zero adjustment. She opined that appellant reached maximum medical improvement (MMI) on that date.

On February 27, 2020 OWCP forwarded Dr. Miller's report, the medical record, and statement of accepted facts (SOAF) to Dr. Herbert White, Jr., a Board-certified preventive and occupational medicine physician, to serve as a district medical adviser (DMA). In a March 12, 2020 report, Dr. White reviewed the SOAF and medical record. He opined that, under the DBI rating method, Table 16-3 (Knee Regional Grid), page 511, appellant was a class 3 for a CDX of total knee replacement due to fair result and mild motion deficit. Dr. White assigned a grade modifier for functional history (GMFH) of 1 due to an antalgic gait and a grade modifier for physical examination (GMPE) of 1 due to mild motion deficits. He found that a grade modifier

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

for clinical studies (GMCS) was excluded since that there were no clinical studies to review. Dr. White applied the net adjustment formula, (GMFH – CDX) + (GMPE – CDX), (1 – 3) + (1 – 3) = -4, which resulted in a of 31 percent permanent impairment of the left lower extremity. He also determined that, under the ROM method, Table 16-23, page 549, appellant had 10 percent permanent impairment of the left lower extremity. Dr. White reported that, since the DBI rating method resulted in the higher impairment rating of 31 percent, the DBI rating method should be used. He noted a date of MMI of January 14, 2020.

In a March 25, 2020 letter, Dr. Miller indicated that she had reviewed Dr. White's March 12, 2020 report and noted her disagreement with Dr. White's assessment of a GMFH of 1. She explained that appellant had a GMFH of 2 based on the American Academy of Orthopedic Surgery (AAOS) Lower Limb Questionnaire, which showed a moderate deficit. Dr. Miller also reported that a GMPE should not be used since mild motion deficit was the basis for the class 3 selection.

In an April 10, 2020 report, Dr. White noted his disagreement with Dr. Miller's assignment of a GMFH of 2. He indicated that Dr. Miller did not indicate that she performed an AAOS Lower Limb Questionnaire and the results were not in her report. Dr. White also asserted that a GMPE of 1 was applicable due to findings of pain on ROM. He explained that, while mild motion deficit was used for class placement, other physical findings could be used to rate GMPE.

By decision dated December 23, 2020, OWCP granted appellant a schedule award for 31 percent permanent impairment of the left lower extremity. The award ran for 89.28 weeks from January 14, 2020 through September 29, 2021.

On April 19, 2021 appellant, through counsel, requested reconsideration. Counsel argued that GMPE and GMFH should be excluded from the net adjustment process because they were unreliable. He noted that Dr. White assigned a GMPE of 1 based on "pain in motion," but under Table 16-7, page 517, "pain in motion" was not a factor to be considered. Counsel also contended that, according to the A.M.A., *Guides*, if there are multiple components to a grade modifier, the evaluator should choose the grade modifier with the highest value associated with the diagnosis being rated. He asserted that since Dr. Miller assigned a GMFH of 2 based on a completed AAOS Lower Limb Questionnaire, the higher-grade modifier should be used. Counsel further explained that since the GMFH differed by 2 or more grades from physical examination or clinical studies, then they should be determined to be unreliable and excluded from the grading process. Lastly, he argued that, since Dr. Miller's calculations yielded the higher impairment rating, OWCP should have granted a schedule award based on the higher impairment rating of 37 percent permanent impairment of the left lower extremity.

By decision dated July 2, 2021, OWCP denied modification of the December 23, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[5] and its implementing regulations[6] 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.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[8]

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.[9] 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).[10] 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 modifier scores.[11]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[12]

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 an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[13] This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

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

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

[11] *Id*. at 23-28.

[12] *Supra* note 8 at Chapter 2.808.6(f) (March 2017).

[13] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

case.[14] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that this case is not in posture for decision.

In support of her schedule award claim, appellant submitted reports dated January 14 and March 25, 2020 from her treating physician, Dr. Miller, who determined that, under Table 16-3, page 511, of the A.M.A., *Guides*, appellant had a default value of 37 percent permanent impairment for a total knee prosthesis in a good position and mild motion deficit. Dr. Miller assigned a GMFH of 2 based on appellant's AAOS Lower Limb Questionnaire, which showed a moderate deficit. She reported that a GMPE was not applicable since it was the basis for the class selection and a GMCS was not applicable because studies were not available for review. Dr. Miller explained that, since the GMFH differed by 2 or more grades from physical examination or clinical studies, they should be excluded from the grading process. As appellant had no net adjustment, Dr. Miller concluded that she had a final impairment rating of 37 percent permanent impairment of the left lower extremity.

In reports dated March 12 and April 10, 2020, Dr. White, the DMA, found that appellant had 31 percent permanent impairment of the left lower extremity. He noted that she was a class 3 for a CDX of total knee replacement under Table 16-3 due to fair result and mild motion deficit. Dr. White assigned a GMFH of 1 due to antalgic gait and a GMPE of 1 due to mild motion deficits and pain on ROM. After applying the net adjustment formula, which resulted in -4, he calculated that appellant had 31 percent permanent impairment of the left lower extremity.

As Dr. Miller, appellant's attending physician, and Dr. White, an OWCP DMA, disagree regarding the nature and extent of appellant's left lower extremity permanent impairment, the Board finds that a conflict in medical opinion exists.[16] While both physicians properly utilized Table 16-3, Knee Regional Grid, of the A.M.A., *Guides* for the diagnosis of total knee replacement, they differed on the proper grade modifiers for functional history and physical examination. As noted above, if there is a disagreement between the employee's physician and an OWCP physician, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, who shall make an examination.[17] Because the reports of Dr. Miller and Dr. White are virtually of equal weight, appellant must be referred to an impartial medical examiner to resolve the existing conflict in the medical opinion evidence regarding the extent of the permanent impairment of her left lower extremity.[18]

[14] 20 C.F.R. § 10.321.

[15] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[16] *See L.E.*, Docket No. 20-1505 (issued June 7, 2021); *see also C.B.*, Docket No. 20-0258 (issued November 2, 2020).

[17] *Supra* note 13.

[18] *D.W.*, Docket No. 21-840 (issued November 30, 2021); *M.M.*, Docket No. 18-0235 (issued September 10, 2019).

On remand, OWCP shall refer appellant, along with the case record and SOAF, to an appropriate specialist for an impartial medical evaluation for a rating of permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding her additional schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 3, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board