

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

_____)	
J.P., Appellant)	
)	
and)	Docket No. 22-1009
)	Issued: May 19, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Stoughton, MA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*John L. DeGeneres, Jr., Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 21, 2022 appellant, through his representative, filed a timely appeal from a February 22, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 an 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, through counsel, submitted a timely request for oral argument 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 his oral argument request, counsel asserted that oral argument should be granted so that the Board could address the proper application of the guidelines in determining an appellant's permanent impairment. The Board, in exercising its discretion, denies the request for oral argument because the arguments on appeal can be adequately 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.

Pursuant to the 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 met his burden of proof to establish more than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On May 20, 2010 appellant, then a 46-year-old transitional mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he broke his left leg when he fell on wet stairs while delivering mail in the performance of duty. He stopped work on May 20, 2010 and returned on September 27, 2010. OWCP accepted the claim for left supracondylar femur fracture, closed fracture of the left femur shaft, and left lower leg primary osteoarthritis. It paid appellant wage-loss compensation on the supplemental rolls from July 5 through September 24, 2010.

By decision dated February 10, 2016, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity. The period of the award ran for 25.92 weeks from December 18, 2014 through June 17, 2015.

Appellant underwent OWCP-authorized total left knee arthroplasty on April 9, 2018. OWCP paid him wage-loss compensation on the supplemental and periodic rolls from March 5 to July 27, 2018.

On March 20, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of his claim, appellant submitted a March 4, 2019 report from Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon. Dr. Hartunian noted that appellant had undergone bilateral total knee replacements. Regarding appellant's left knee, he noted appellant's work-related history of left distal femur fracture, with open reduction internal fixation, and that appellant had developed end-stage arthritis of the knee. On examination of appellant's left knee Dr. Hartunian found no tenderness and laxity.⁴ He reviewed the American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire completed by appellant indicating that he had moderately stiff lower extremities, mild pain when walking on flat surfaces, moderate pain when going up or down stairs, and moderate pain while lying in bed. Dr. Hartunian measured range of motion (ROM) of the left knee of 95 degrees flexion, and 0 degrees extension. He noted x-rays reviewed by appellant's treating physician documented "[appellant] was functioning well with good position of components." Dr. Hartunian opined that appellant reached maximum medical improvement on July 17, 2018. He used the sixth edition of the American Medical

³ 5 U.S.C. § 8101 *et seq.*

⁴ Dr. Hartunian also provided examination findings and an impairment rating for the right knee. He noted that the impairment rating for the left knee was the same as the right knee.

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ and 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 appellant's total left knee replacement was Class 3 based on mild motion deficit in flexion and x-ray showing fair knee position. Dr. Hartunian did not assign a grade modifier for clinical studies (GMCS) or a grade modifier for physical examination (GMPE) findings as he had used ROM and x-rays to confirm the class of impairment. He found a grade modifier for functional history (GMFH) of 2 based on the AAOS Lower Limb Questionnaire. Dr. Hartunian determined that the GMFH was unreliable and should be excluded from the calculation as it differed by two or more from the GMCS and GMPE, which he indicated were zero for the purpose of modifier determination. He concluded that the net adjustment formula did not apply, and that appellant had 37 percent permanent impairment of the left lower extremity.

On August 22, 2019 OWCP forwarded Dr. Hartunian's March 4, 2019 report, the medical record, and a statement of accepted facts (SOAF) to the district medical adviser (DMA) for review

In an August 30, 2019 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the medical evidence of record and determined that appellant's date of injury was undetermined as reports from appellant's treating physician, Dr. Eric L. Smith, a Board-certified orthopedic surgeon, from April 9, 2018 until the present were necessary for review.

On September 16, 2019 OWCP forwarded the medical reports requested by Dr. Katz for review.

Dr. Katz, in a September 23, 2019 report, reviewed the medical reports of record including Dr. Hartunian's March 4, 2019 report and the reports from Dr. Smith. He concurred with Dr. Hartunian that the CDX for total knee replacement, fair result (mild motion deficit), was a Class 3 impairment, which had a default value of 37 percent. Dr. Katz indicated that he had not used x-rays in identifying the class of impairment, as appellant's x-rays showing good position of the prosthesis would be a Class 2 impairment. Instead, he had used appellant's motion deficit to identify the class as 3. Dr. Katz further explained that the fact that a grade modifier is excluded from the net adjustment calculation does not reduce its value to zero. He applied a GMFH of 3, a GMCS of 2 and found that a GMPE was not applicable as it was used to identify the CDX. After applying the net adjustment formula, Dr. Katz found that appellant had 31 percent permanent impairment of the left lower extremity. He noted that the method Dr. Hartunian used in calculating his net adjustment was not consistent with the methodology set forth by the A.M.A., *Guides*. Regarding ROM methodology, the DMA explained that the key diagnostic factors were not eligible for an alternative impairment rating. Dr. Katz advised that he was reached on January 7, 2019, and he concluded that appellant had 31 percent permanent impairment of the left lower extremity.

On January 8, 2020 OWCP referred appellant for a second opinion evaluation, together with a SOAF, list of questions, and medical record, to Dr. John Goldberg, a Board-certified orthopedic surgeon, for an assessment of appellant's employment-related conditions and any resulting permanent impairment. In a report dated February 3, 2020, Dr. Goldberg noted

⁵ A.M.A., *Guides* (6th ed. 2009).

appellant's diagnoses of status post left open fracture with open reduction and internal fixation, status post hardware removal, and status post left total knee arthroplasty. He concluded that appellant had 26 percent left lower extremity permanent impairment. Dr. Goldberg explained that, under Table 16-3, page 511 of the A.M.A., *Guides*, appellant's total knee replacement would be a Class 2 impairment. He indicated that appellant had a GMFH of 1, and a GMPE of 1 which would result in 23 percent permanent impairment rating. Dr. Goldberg then noted that he would elevate appellant's Class 2 rating for appellant's total knee replacement to Class 3 due to his prior fracture and assign 26 percent permanent impairment rating.

On March 20, 2020 OWCP provided Dr. Hartunian with Dr. Goldberg's February 3, 2020 report for his review and comment. In a letter dated April 14, 2020, Dr. Hartunian explained that Dr. Goldberg selected the wrong class of impairment and that his application of the grade modifiers and methodology were not in accordance with the A.M.A., *Guides*.

On July 20, 2020 OWCP requested Dr. Katz review the medical record, SOAF, Dr. Hartunian's reports dated March 4, 2019 and April 14, 2020, and Dr. Goldberg's February 3, 2020 report. In a July 27, 2020 report, Dr. Katz agreed with Dr. Hartunian's opinion that Dr. Goldberg had not properly rated appellant's permanent impairment under Table 16-3 of the A.M.A., *Guides*. He again found that appellant had a total 31 percent permanent impairment of the left lower extremity.

By decision dated September 18, 2020, OWCP granted appellant a schedule award for an additional 22 percent left lower extremity permanent impairment, resulting in a total 31 percent left lower extremity permanent impairment. The period of the award ran for 63.36 weeks for the period January 7, 2019 through March 25, 2020.

On May 19, 2021 appellant's counsel requested reconsideration contending that he disagreed with the application of the A.M.A., *Guides*, especially the grade modifiers, in determining appellant's permanent impairment of the left lower extremity.

By decision dated June 9, 2021, OWCP denied modification.

On June 29, 2021 appellant requested reconsideration. Counsel requested that OWCP seek a supplemental report from Dr. Katz regarding appellant's left knee impairment rating in view of his June 1, 2021 impairment rating for the right knee in OWCP File No. xxxxxx746. Accompanying appellant's reconsideration request was Dr. Katz' June 1, 2021 permanent impairment rating.

By decision dated February 22, 2022, OWCP denied modification.

LEGAL PRECEDENT

The schedule award provisions of FECA⁶ and its implementing regulations⁷ 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 position 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 the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.¹²

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 extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹³

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* See also *M.F.*, Docket Nos. 21-0759 & 21-1037 (issued May 4, 2022); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ 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 Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); see also *id.* at Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ See A.M.A., *Guides* 509-11.

¹¹ *Id.* at 515-22.

¹² *Id.* at 23-28.

¹³ *Supra* note 9 at Chapter 2.808.6f (March 2017).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

On March 4, 2019 Dr. Hartunian discussed appellant's history of bilateral total knee replacements. On examination he found no tenderness or laxity of the left knee. Dr. Hartunian measured ROM of 95 degrees flexion and 0 degrees extension of the left knee. He identified a Class 3 impairment, based on appellant's mild motion deficit and x-ray showing fair knee position. Dr. Hartunian found that a GMCS and a GMPE were inapplicable as he had used ROM and x-rays to confirm the class of impairment. He determined that the GMCS and GMPE were zero for purposes of determining the modifier and that, consequently, the GMFH was unreliable as it differed by two or more grades from that of the GMPE and GMCS. Dr. Hartunian, however, incorrectly assigned grade modifiers of zero for GMPE and GMCS studies as they are excluded from the net adjustment calculation.¹⁴ The A.M.A., *Guides* provides, "If a particular criterion, such as [ROM], was used to determine impairment class, it may not be used again to determine the grade and is disregarded in the impairment calculation."¹⁵ As Dr. Hartunian found that appellant's ROM and x-rays were used to determine the class of impairment, he improperly assigned GMPE and GMCS of zero.¹⁶ His impairment rating, consequently, is not in accordance with the provisions of the A.M.A., *Guides*.

In a February 3, 2020 report, Dr. Goldberg assigned a Class 3 impairment for appellant's CDX of total knee arthroplasty and found that he had 26 percent left lower extremity permanent impairment under Table 16-3 of the A.M.A., *Guides*. The Board notes that, while Dr. Goldberg rendered an impairment rating of 26 percent and made references to the A.M.A., *Guides*, his rating did not conform with Table 16-3 of the A.M.A., *Guides* as a Class 3 impairment under Table 16-3 does not allow a 26 percent impairment rating, but rather would result in a rating between 31 and 43 percent. Since Dr. Goldberg improperly applied the A.M.A., *Guides* to rate appellant's permanent impairment, his opinion is of limited probative value.

Dr. Katz, OWCP's DMA, reviewed Dr. Hartunian's findings and concurred with the applicable Class 3 impairment, with a default value of 37 percent. He applied GMFH of 2 and GMCS of 2 and found that a GMPE was inapplicable as it was used in identifying the CDX. Utilizing the net adjustment formula discussed above, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, or $(2 - 3) + (2 - 3)$, yielded an adjustment of two places to the left, or 31 percent impairment of each lower extremity. In a July 27, 2020 report, Dr. Katz again found that appellant had 31 percent left lower extremity permanent. The Board has reviewed Dr. Katz' opinion and finds that it conforms to the provisions of the A.M.A., *Guides*. Dr. Katz properly reviewed the medical evidence and evaluated appellant's impairment of the lower extremities in accordance

¹⁴ *R.H.*, Docket No. 20-1472 (issued March 15, 2021).

¹⁵ A.M.A., *Guides* 411.

¹⁶ *R.H.*, *supra* note 14.

with the A.M.A., *Guides*. There is no medical evidence in conformance with the A.M.A., *Guides* showing greater permanent impairment.¹⁷

The Board thus finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ See *L.D.*, Docket No. 19-0495 (issued February 5, 2020).