

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

S.G., Appellant)	
)	
and)	Docket No. 23-1170
)	Issued: April 11, 2024
U.S. POSTAL SERVICE, BROOKLYN)	
CARRIER ANNEX, Baltimore, MD, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 11, 2023 appellant filed a timely appeal from an August 14, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 August 14, 2023 decision, OWCP received additional evidence. 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 21 percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On October 1, 2010 appellant, then a 27-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right lower leg when she was chased by a dog while in the performance of duty. OWCP accepted the claim for right knee strain, closed dislocation of the right patella, sprain and strain of the right lateral collateral ligament, sprains of the right knee and leg, and other acquired deformity of the right lower limb. Appellant underwent surgery to the right knee on January 20, 2012, including right knee arthroscopy, chondroplasty of patella, arthroscopic lateral release, anterior compartment fasciotomy, and tibial tubercle osteotomy. She returned to full-time work, with restrictions, effective May 2, 2013.

On September 20, 2013 Dr. Morley Slutsky, a physician Board-certified in occupational medicine serving as a district medical adviser (DMA), reviewed the medical record and evaluated appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He found 21 percent permanent impairment of the right lower extremity due to appellant's tibial osteotomy and noted that she had been diagnosed with patellar subluxation/dislocation and patellofemoral chondromalacia. Dr. Slutsky indicated that appellant underwent surgery which included a tibial tubercle osteotomy. He opined that she had reached maximum medical improvement (MMI) as of May 10, 2013.

OWCP granted appellant a schedule award for 21 percent permanent impairment of the right lower extremity. The award ran for 60.48 weeks from May 10, 2013 through July 7, 2014.

On January 13, 2023 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

By letter dated January 27, 2023, OWCP advised appellant of the evidence necessary to establish an entitlement to an increased schedule award under the sixth edition of the A.M.A., *Guides*.⁴

On February 28, 2023 OWCP referred appellant, along with the medical record, a February 22, 2023 statement of accepted facts (SOAF), and a list of questions to Dr. David Lumsden, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated March 24, 2023, Dr. Lumsden reviewed the SOAF and medical record and indicated that he had examined appellant on March 13, 2023. He noted that she related

³ A.M.A., *Guides* (6th ed 2009).

⁴ *Id.*

complaints of right knee pain, instability, and patellofemoral pain. On physical examination, Dr. Lumsden documented reduced motor strength in the quadriceps and hamstrings, pain and prominent palpatory and audible crepitus of the patellofemoral joint during range of motion testing, pain with palpation of the patella, positive patellofemoral compression test, and slight lateral tilt of the patella. He found no significant instability to the knee. Dr. Lumsden reviewed a magnetic resonance imaging (MRI) scan dated March 24, 2021, which revealed moderate patellofemoral chondrosis compatible with lateral patellar tracking abnormality, marked lateral patella tilt, moderate lateral patellar subluxation, and edema. He diagnosed chronic right knee pain, patellofemoral arthritis, and a history of subluxation of the right patella prior to surgery. Dr. Lumsden opined that appellant's condition was stable and that she had reached MMI as of the date of his examination. He referred to the sixth edition of the A.M.A., *Guides* and found 19 percent right lower extremity impairment.

On April 6, 2023 OWCP referred the record and SOAF to Dr. Herbert White, Jr., a physician Board-certified in occupational medicine and serving as DMA, and requested that he evaluate appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

In an April 19, 2023 report, Dr. White recommended that OWCP obtain clarification from Dr. Lumsden regarding the diagnosis that he utilized to rate appellant's impairment.

On April 25, 2023 OWCP requested clarification from Dr. Lumsden.

In a report dated June 1, 2023, Dr. Lumsden referenced Table 16-3 (Knee Regional Grid – Lower Extremity Impairments), on page 510 of the A.M.A., *Guides*, and identified a class of diagnosis (CDX) for a patella subluxation dislocation with severe instability that required surgical intervention of 2. He noted that appellant's "surgical outcome appeared to be good, with a good residual return to function." Dr. Lumsden again found 19 percent permanent impairment of the right lower extremity.

In a June 15, 2023 amended report, Dr. White reviewed Dr. Lumsden's June 1, 2023 report and opined that appellant had reached MMI on March 13, 2023. Utilizing Table 16-3, page 510, he identified the CDX of patellar subluxation or dislocation with mild instability as a Class 1 impairment, which yielded a default value of seven percent. Dr. White applied a grade modifier for functional history (GMFH) of two due to antalgic gait, a grade modifier for physical examination (GMPE) of two due to moderate crepitations, and a grade modifier for clinical studies (GMCS) of two due to moderate pathology. He found that application of the net adjustment formula resulted in an overall impairment of nine percent of the right lower extremity. Dr. White noted that Table 16-3 did not provide range of motion (ROM) as an alternative rating method for the diagnosed impairing condition. He disagreed with Dr. Lumsden's 19 percent right lower extremity rating and explained that the March 13, 2023 physical examination revealed only slight instability of the patellofemoral joint. Dr. White advised that the 9 percent impairment rating included the prior 21 percent permanent impairment rating, and, thus, found that appellant did not have additional right lower extremity impairment.

By decision dated August 14, 2023, OWCP denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ and its implementing regulations⁶ 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. OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants. As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

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): A Contemporary Model of Disablement*.⁸ Under the sixth edition, for lower extremity impairments, the evaluator identifies the impairment of the CDX, which is then adjusted by a GMFH, a GMPE, and/or a GMCS.⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.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 extent of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹²

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹³

⁵ *Supra* note 1.

⁶ 20 C.F.R. § 10.404.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a. (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ A.M.A., *Guides*, page 3, section 1.3.

⁹ *Id.* at 493-556.

¹⁰ *Id.* at 521.

¹¹ *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹² *See supra* note 7 at Chapter 2.808.6f (March 2017).

¹³ 20 C.F.R. § 10.404(d). *See D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish greater than 21 percent permanent impairment of the right lower extremity for which she previously received a schedule award.

In accordance with its procedures, OWCP properly referred the evidence of record to Dr. Lumsden for a second opinion examination and permanent impairment evaluation. In his March 24 and June 1, 2023 reports, he found that appellant had 19 percent right lower extremity impairment.

OWCP thereafter referred the evidence of record, including Dr. Lumsden's reports, to Dr. White, serving as DMA. In a June 15, 2023 report, Dr. White utilized Table 16-3, page 510, and identified the CDX of patellar subluxation or dislocation with mild instability as a Class 1 impairment, which yielded a default value of seven percent. He applied a GMFH of 2, a GMPE of 2, and a GMCS of 2 and found that application of the net adjustment formula resulted in an impairment rating of nine percent of the right lower extremity. Dr. White properly advised that ROM was not an alternative method for rating appellant's condition and explained that he disagreed with Dr. Lumsden's 19 percent right lower extremity rating as the physical examination findings as of the date of MMI supported a nine percent rating. He opined that the nine percent impairment rating included the prior 21 percent permanent impairment rating. When the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁴ Thus, Dr. White properly found that appellant was not entitled to a schedule award for additional permanent impairment of the right lower extremity.¹⁵

Neither Dr. Lumsden nor Dr. White's reports established an impairment greater than 21 percent permanent impairment of the right lower extremity. Appellant did not submit any other medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing that she has greater than 21 percent permanent impairment of her right lower extremity. Accordingly, the Board finds that she has not established that she is entitled to increased schedule award compensation.¹⁶

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.

¹⁴ *Supra* note 13; *see also S.T.*, Docket No. 22-1342 (issued November 9, 2023).

¹⁵ *See A.R.*, Docket No. 21-0346 (issued August 17, 2022).

¹⁶ *See A.R., id.; P.S.*, Docket No. 22-1051 (issued May 4, 2023); *M.H.*, Docket No. 20-1109 (issued September 27, 2021); *R.H.*, Docket No. 20-1472 (issued March 15, 2021); *L.D.*, Docket No. 19-0495 (issued February 5, 2020).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than 21 percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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