United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
	)	
and	)	**Docket No. 23-1140**
	)	**Issued: July 8, 2024**
U.S. POSTAL SERVICE, FLAGLER STATION POST OFFICE, Miami, FL, Employer	)	

Appearances:
Misty L. Wenger, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 5, 2023 appellant, through his representative, filed a timely appeal from a May 31, 2023 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 18 percent permanent impairment of his right lower extremity and/or 18 percent permanent

[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.*

impairment of his left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On February 10, 2017 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed lower back, neck, right shoulder, and bilateral knee conditions due to factors of his federal employment, including repetitive grabbing, carrying, standing, walking, twisting, climbing, moving, pushing, and pulling over the course of 35 years of delivering mail. He noted that he first became aware of his condition on October 4, 2005, and realized its relationship to his federal employment on February 9, 2017. Appellant stopped work on November 9, 2005, and subsequently returned to work on March 21, 2017. On September 19, 2018 OWCP accepted the claim for right chondromalacia patellae, left chondromalacia patellae, and other intervertebral disc displacement in the lumbar region.

On October 28, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a September 16, 2019 report, Dr. Mark A. Seldes, a Board-certified family practitioner, evaluated appellant for the purposes of a lower extremity impairment rating. He noted appellant's accepted conditions, complaints of knee and lower back pain with bilateral lower extremity radiculopathy, reviewed diagnostic test reports, and related his physical examination findings. Dr. Seldes opined that appellant reached maximum medical improvement (MMI) on September 19, 2019, as his condition remained stable for an impairment rating of his S1 nerve root radiculopathy and right and left knee osteoarthritis. He determined that, using the diagnosis-based impairment (DBI) rating method under Table 16-3 (Knee Regional Grid), page 511, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] the class of diagnosis (CDX) of primary right knee joint osteoarthritis resulted in a Class 2, grade C impairment, with a default value of 20 percent. Application of the net adjustment formula amounted to grade E or 24 percent permanent impairment of the right lower extremity. Using a Class 1 impairment for the left lower extremity under the DBI rating method, Dr. Seldes calculated nine percent permanent impairment of the left lower extremity. However, he determined that the range of motion (ROM) method under Table 16-23, page 549, provided greater impairment than the DBI rating method. Under the ROM rating method, appellant had 40 percent permanent impairment of the right lower extremity and 30 percent permanent impairment of the left lower extremity. Dr. Seldes therefore opined that the higher ROM ratings should be used to determine appellant's lower extremity impairment. He also utilized *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), to find that appellant had severe sensory deficit at grade E, which resulted in 14 percent permanent impairment of the left lower extremity due to the S1 nerve root radiculopathy. Dr. Seldes concluded that appellant sustained 40 percent permanent impairment of the right lower extremity due to ROM impairment of the knee, and 40 percent permanent

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

impairment of the left lower extremity based on a combined left knee and left radiculopathy impairment rating.

In a December 16, 2019 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed the medical record along with Dr. Seldes' September 19, 2019 report. He noted that the prior reports of record indicated mild findings compared to the degree of motor and sensory deficits noted in Dr. Seldes' report, which appeared to be out of proportion. Dr. Katz recommended a second opinion examination to address discrepancies in the findings of motor and sensory impairments noted by Dr. Seldes.

On January 9, 2020 OWCP referred appellant, along with the case file, a statement of accepted facts (SOAF), and a series of questions, to Dr. Jon Donshik, a Board-certified orthopedic surgeon, for a second opinion medical examination and determination as to whether appellant sustained permanent impairment and to assign a date of MMI.

In a January 23, 2020 report, Dr. Donshik indicated that he reviewed the medical evidence of record, provided findings on physical examination, and determined that appellant had reached MMI. He provided a permanent impairment rating of appellant's left and right lower extremities utilizing the sixth edition of the A.M.A., *Guides*. Dr. Donshik utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), page 511, the CDX for appellant's left knee patellofemoral arthritis, resulted in a Class 1 impairment for full-thickness articular cartilage, grade C, with a default value of three percent. He assigned a grade modifier for functional history (GMFH) of 1 based on ambulatory, antalgic gait without use of a gait aid; and a grade modifier for physical examination (GMPE) of 2 based on moderate palpatory findings. Dr. Donshik assigned a grade modifier for clinical studies (GMCS) of 2 based on moderate pathology on imaging studies documenting cartilage loss and medial and lateral meniscal tears. He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1 - 1) + (2 - 1) + (2 - 1) = +2, which resulted in a grade E or five percent permanent impairment of the left lower extremity. Dr. Donshik repeated the same DBI rating method for the right lower extremity and identified the CDX for right knee patellofemoral arthritis as a Class 1 impairment, which yielded a default value of three percent permanent impairment in accordance with Table 16-3 on page 511 of the A.M.A., *Guides*. He assigned a GMFH of 1, a GMPE of 2, and a GMCS of 2, which yielded a net adjustment of plus two resulting in five percent permanent impairment of the right lower extremity. Dr. Donshik explained that as there were no sensory or motor deficit in the lower extremities, no impairment was justified for radiculopathy from a spinal nerve injury under the A.M.A., *Guides* and *The Guides Newsletter*.

On May 12, 2020 OWCP requested that Dr. Katz, the DMA, review the case to determine whether appellant sustained permanent impairment of the right and left lower extremities and to assign the date of MMI.

In a May 21, 2020 report, Dr. Katz utilized the DBI rating method to find that, under Table 16-3, the appropriate CDX for both the right and left knee was primary knee arthritis resulting in a Class 2 impairment due to two-millimeter cartilage intervals with a default value of 20 percent. For each knee, he assigned a GMFH of 1 and a GMPE of 2, and found no assignment for GMCS as it was not applicable. Dr. Katz utilized the net adjustment formula, (1-2) + (2-2) = -1, which resulted in a grade B or 18 percent permanent impairment of the right lower extremity and 18

percent permanent impairment of the left lower extremity. He noted that the ROM rating method was not applicable in accordance with section 16.7, page 543 of the A.M.A., *Guides*. Dr. Katz further noted that Dr. Donshik's examination revealed no myotome motor or dermatomal sensory deficits in either lower extremity, which was consistent with prior examinations finding myotome muscle strength within normal limits, dermatome skin sensitivity within normal limits, and no focal neurological deficits present. Therefore, he concluded that the weight of the medical evidence favored Dr. Donshik's assessment over that of Dr. Seldes. Dr. Katz concluded that appellant reached MMI on January 23, 2020 the date of Dr. Donshik's examination.

On February 17, 2021 OWCP determined that a conflict of medical opinion existed between Dr. Seldes, appellant's treating physician, and Dr. Donshik, the second opinion physician.

On March 17, 2021 OWCP referred appellant, along with a SOAF, the medical record and a series of questions to Dr. Richard Rozencwaig, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In his April 13, 2021 report, Dr. Rozencwaig utilized the net adjustment formula and determined that appellant sustained five percent permanent impairment of the left lower extremity and five percent permanent impairment of the right lower extremity using a CDX for chondromalacia patella (patellofemoral arthritis) resulting in a Class 1 impairment for each knee. He further noted that appellant's examination revealed no objective evidence of lumbar radiculopathy indicating permanent impairment. Dr. Rozencwaig concluded that appellant had reached MMI.

By decision dated January 13, 2022, OWCP granted appellant a schedule award for 18 percent permanent impairment of the right lower extremity and 18 percent permanent impairment of the left lower extremity. The award ran for 103.86 weeks from January 23, 2020 through January 17, 2022.

In a June 2, 2022 medical report, Dr. Seldes disagreed with the impairment ratings provided by Dr. Katz, Dr. Donshik, and Dr. Rozencwaig. He reiterated his findings utilizing the ROM and DBI methodologies for left lower extremity S1 nerve root radiculopathy. Dr. Seldes reported that he maintained his initial impairment rating, which found that appellant sustained 40 percent permanent impairment of the right lower extremity due to ROM impairment and 40 percent permanent impairment of the left lower extremity due to combined ROM impairment and impairment for lumbar radiculopathy in the S1 nerve root.

On August 29, 2022 appellant, through her representative, requested reconsideration of OWCP's January 13, 2022 decision. The representative argued that Dr. Seldes' June 2, 2022 report established appellant's impairment rating to the lower extremities. He also submitted reports dated September 14, 2022, and January 4, 2023 from Dr. Seldes documenting treatment for appellant's injuries.

On February 3, 2023 OWCP requested that Dr. Katz review the case file, SOAF, and additional medical reports, and provide an opinion as to whether appellant had increased impairment.

In a February 7, 2023 memorandum, Dr. Katz noted his review of the additional medical reports and determined that his initial impairment rating had not changed. He indicated that neither Dr. Donshik nor Dr. Rozencwaig, both orthopedic specialists, determined evidence of spinal nerve motor or sensory deficits that were ratable. Dr. Katz found the weight of evidence reviewed favored their findings over those of Dr. Seldes. He further explained that the key diagnostic factors utilized in the DBI rating method were not eligible for an alternative ROM rating under Table 16-3. Based upon his review of the records submitted, Dr. Katz determined that the criteria listed to justify the use of a ROM impairment in the lower extremity did not exist for either knee as used in Dr. Seldes' impairment rating.

By decision dated March 15, 2023, OWCP denied modification of the January 13, 2022 decision.

On March 22, 2023 appellant, through his representative, requested reconsideration.

In a March 10, 2023 report, Dr. Seldes reiterated his rating of 40 percent permanent impairment of the right lower extremity and 40 percent permanent impairment of the left lower extremity.

On April 5, 2023 OWCP requested that DMA Dr. Katz provide an addendum report.

In an April 8, 2023 addendum report, Dr. Katz reviewed the additional medical documentation and reiterated that his impairment rating had not changed. He explained that Dr. Seldes incorrectly utilized the A.M.A., *Guides* and also incorrectly calculated his impairment rating as it related to lower extremity spinal nerve impairment. Dr. Katz explained that using the DBI method per Table 16-3 for arthritis was the appropriate method as previously stated.

By decision dated May 31, 2023, OWCP denied modification of the March 15, 2023 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,[4] and its implementing federal regulations,[5] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.[6] 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.[7]

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 knees, reference is made to Table 16-3 (Knee Regional Grid).[8] Under each table, after the CDX is determined and a default grade value is identified, the net adjustment formula is applied using a GMFH, GMPE, and/or GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9] 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.[10]

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI where impairment class is determined by the diagnosis and specific criteria as adjusted by the GMFH, GMPE, and GMCS. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and ROM. ROM is primarily used as a physical examination adjustment factor.[11] The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.[12]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[13] However, a schedule award is permissible where the employment-related spinal condition affects the upper

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[6] 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 2.808.5c(3) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[8] A.M.A., *Guides* 509-11.

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

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

[11] *Id.* at 497, section 16.2.

[12] *Id.* at 543; *see also M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (200

and/or lower extremities.[14] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[15]

In addressing upper or lower extremity impairment due to peripheral or spinal nerve root involvement, the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* require identifying the impairment CDX, which is then adjusted by the GMFH and the GMCS. The effective net adjustment formula is (GMFH - CDX) + (GMCS - CDX).[16]

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 permanent impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 18 percent permanent impairment of the right lower extremity and/or 18 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

The Board has reviewed the reports of Dr. Katz, the DMA, who calculated the permanent impairment of appellant's right and left lower extremities. The Board finds that Dr. Katz properly applied the standards of the sixth edition of the A.M.A., *Guides* to find that he has no greater than 18 percent permanent impairment of his right lower extremity and 18 percent permanent impairment of his left lower extremity.

Dr. Katz properly utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid), the appropriate CDX for both the right and left knee was primary knee arthritis resulting in a Class 2 impairment due to two-millimeter cartilage intervals with a default value of 20 percent.[18] For each knee, he assigned a GMFH of 1 and a GMPE of 2, and made no assignment for GMCS as it was not applicable. Dr. Katz properly utilized the net adjustment formula, (1 - 2) + (2 - 2) = -1, which resulted in a grade B or 18 percent permanent impairment of the right lower

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[14] *Supra* note 6 at Chapter 2.808.5c(3) (March 2017).

[15] *Id.* at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

[16] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *see also The Guides Newsletter*; A.M.A., *Guides* 430.

[17] *See supra* note 6 at Chapter 2.808.6(f) (March 2017). *See also D.J.*, Docket No. 19-0352 (issued July 24, 2020).

[18] *L.B.*, Docket No. 22-1031 (issued April 6, 2023).

extremity and 18 percent permanent impairment of the left lower extremity. He further explained that appellant's lower extremity conditions did not meet the criteria for applying the ROM impairment rating method.[19]

Dr. Katz accurately summarized the relevant medical evidence including findings on examination and reached conclusions about appellant's conditions that comported with these findings.[20] He properly referred to the A.M.A., *Guides* in calculating appellant's percentage of permanent impairment of the right and left lower extremity based on right and left knee diagnosis for primary osteoarthritis Class 2 impairment. Dr. Katz further found that appellant's examination findings revealed no sensory or motor deficit in the lower extremities, and therefore no impairment was justified for radiculopathy from a spinal nerve injury under the A.M.A., *Guides* and *The Guides Newsletter*.[21]

The Board finds that the well-rationalized reports of Dr. Katz provided an opinion on appellant's lower extremity permanent impairment, which were derived in accordance with the standards of the sixth edition of the A.M.A., *Guides* and therefore, entitled to the weight of the evidence.[22]

As there is no medical evidence of record, in conformance with the A.M.A., *Guides*, establishing greater than the 18 percent permanent impairment of the right lower extremity and 18 percent permanent impairment of the left lower extremity previously awarded, the Board finds that appellant has not met his burden of proof.[23]

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 greater than 18 percent permanent impairment of the right lower extremity and/or 18 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

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[19] Table 16-3 does not provide for use of the ROM method to rate a claimant's lower extremity impairment. *See* A.M.A., *Guides* at 543, section 16.7. *See also supra* note 17.

[20] *K.K.*, Docket No. 20-1532 (issued January 24, 2022); *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

[21] *T.M.*, Docket No. 23-0211 (issued August 10, 2023).

[22] *See N.B.* Docket No. 22-1295 (issued May 25, 2023); *Y.S.*, Docket No. 19-0218 (issued May 15, 2020); *R.D.*, Docket No. 17-0334 (issued June 19, 2018).

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

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2024
Washington, DC

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

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

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