United States Department of Labor
Employees' Compensation Appeals Board

V.D., Appellant	)	
and	)	**Docket No. 24-0532**
	)	**Issued: July 30, 2024**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Jamaica, NY, Employer	)	

Appearances:
Aaron Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 22, 2024 appellant, through counsel, filed a timely appeal from an October 24, 2023 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] A claimant has 180 days from the date of OWCP's decision to timely file an appeal. 20 C.F.R. § 501.3(e). The 180th day following OWCP's October 24, 2023 decision was Sunday, April 21, 2024. However, when the last day to file an appeal falls on a Saturday, Sunday, or Federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(3). Appellant therefore had until Monday, April 22, 2024, to file this appeal. As this appeal was received by the Office of the Clerk of the Appellate Boards on Monday, April 22, 2024, it was timely filed.

Federal Employees' Compensation Act[3] (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 her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, zero percent permanent impairment of the right lower extremity, zero percent permanent impairment of the left upper extremity, and zero percent permanent impairment of the right upper extremity, for which she previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board on different issues. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.[4] The relevant facts are as follows.

On February 14, 2001 appellant, then a 29-year-old detention enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that on January 17, 2001 she injured her lower back and knees when she slipped on a greasy floor and grabbed a desk to prevent falling while in the performance of duty. On May 15, 2001 OWCP accepted the claim for lumbar and thoracic radiculopathy, cervical sprain, and bilateral traumatic knee chondromalacia. It authorized left knee arthroscopy, with two-compartment partial synovectomy, and lateral meniscal shaving, which was performed on November 15, 2001. OWCP paid appellant wage-loss compensation on the periodic rolls commencing July 14, 2001.

In an October 27, 2020 report, Dr. Joshua B. Macht, an attending Board-certified internist, noted that appellant was seen on October 22, 2020 for a permanent impairment evaluation with regard to her January 17, 2001 employment injury. He discussed the medical treatment she had received following her injury. Dr. Macht related that appellant continued to complain of lower back pain radiating down to her bilateral knee area, intermittent bilateral knee and ankle numbness and tingling, bilateral knee pain, and intermittent tingling in her right wrist and ventral forearm. On examination, he observed lower cervical spine, lower lumbar spine, and bilateral lumbar paraspinal region tenderness, diminished sensation to light touch involving the left hand, and diminished sensation along the right wrist and forearm area. Motor strength of the upper and lower extremities were symmetric and intact. Dr. Macht provided range of motion (ROM) findings of appellant's back, neck, and lower extremities. The ROM findings included 138 degrees flexion and 0 degrees extension of the left knee; 138 degrees flexion and 0 degrees extension of the right knee; 50 degrees flexion, 60 degrees extension, 35 leftward bending, 35 rightward bending, 60 degrees left rotation, and 60 degrees right rotation of the neck; and 54 degrees flexion, 8 degrees extension, 35 leftward bending, and 35 rightward bending of the lumbar spine. He discussed appellant's diagnostic testing, noting that a January 19, 2012 electromyogram/nerve conduction

[3] 5 U.S.C. § 8101 *et seq*.

[4] Docket No. 17-0838 (issued August 24, 2017); Docket No. 19-0979 (issued February 5, 2020); Docket No. 22-0123 (issued April 20, 2023).

velocity (EMG/NCV) study showed evidence of right L5-S1 chronic lumbosacral radiculopathy and a March 28, 2013 EMG/NCV study showed evidence of right C5-6 cervical radiculopathy. Dr. Macht reported diagnoses of aggravation of right C6 cervical radiculopathy, bilateral L5 lumbar radiculopathy, and bilateral knee chondromalacia.

Dr. Macht referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[5] and *The Guides Newsletter*, *Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) and indicated that, under proposed Table 1 of *The Guides Newsletter*, the class of diagnosis (CDX) for mild sensory deficit in the right C6 radiculopathy due to her cervical radiculopathy resulted in a Class 1 impairment of the right upper extremity with a default value of one percent. He assigned a grade modifier for functional history (GMFH) of 1 due to her *Quick*DASH score. Dr. Macht reported that, according to Table 15-7 (Shoulder Range of Motion), page 406 of the A.M.A., *Guides*, this represented a grade modifier for physical examination (GMPE) of 4; however, this could not be used as it was three grades higher than appellant's impairment class. Thus, he found a Class 1, grade C impairment which represented one percent permanent impairment of the right upper extremity due to her right C6 radiculopathy. Next, Dr. Macht indicated that, under Table 2 of *The Guides Newsletter*, the CDX for mild motor and sensory deficit at the bilateral L5 level due to appellant's lower back injury was a Class 1 impairment with a default value of one percent. He assigned a GMFH of 2 due to her lower limb questionnaire and calculated that appellant had two percent permanent impairment for mild sensory deficits and seven percent permanent impairment for mild motor deficits of each lower extremity, resulting in nine percent permanent impairment of each lower extremity due to mild motor and sensory deficits in her bilateral L5 distribution.

Dr. Macht also indicated that appellant had a history of bilateral knee chondromalacia due to the accepted January 17, 2001 employment injury. Using Table 16-3, page 509, (Knee Regional Grid), he related that appellant's findings of bilateral meniscal injury represented a Class 1 impairment with a grade C or default value of two percent lower extremity permanent impairment. Dr. Macht referenced to Table 16-6, page 516, regarding appellant's functional history of an American Academy of Orthopedic Surgeons (AAOS) Lower Limb Questionnaire score of 34 and assigned a GMFH of 2. He referenced Table16-7, page 517, and found a GMPE of 1. Dr. Macht did not assign a grade modifier for clinical studies (GMCS) because they were used to define her impairment class. The net adjustment formula warranted movement one place to the right of the default value at grade C to grade D, which resulted in two percent permanent impairment of each lower extremity. Dr. Macht concluded that appellant had a total 11 percent permanent impairment of each lower extremity for her bilateral knee chondromalacia and bilateral L5 lumbar radiculopathy, and l percent permanent impairment of the right upper extremity as a result of her right C6 radiculopathy. He opined that these impairment ratings were causally related to her January 17, 2001 employment injury. Dr. Macht concluded that appellant had reached maximum medical improvement (MMI) as of October 22, 2020, the date of his evaluation.

On November 12, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

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

On January 21, 2021 OWCP prepared a statement of accepted facts (SOAF) that listed appellant's accepted conditions as including lumbar radiculopathy, thoracic radiculopathy, cervical sprain, and bilateral traumatic chondromalacia. It referred appellant's case record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the right upper extremity and bilateral lower extremities, and the date of MMI.

In a February 1, 2021 report, Dr. Katz concurred with Dr. Macht's impairment ratings of 2 percent permanent impairment of the right upper extremity and 11 percent permanent impairment of each lower extremity, but recommended a referral for a second opinion evaluation to determine whether Dr. Macht's impairment findings were due to the work-related injury rather than the result of aging.

By decision dated June 14, 2021, OWCP denied appellant's schedule award claim, finding the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

On July 12, 2021 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated October 20, 2021, OWCP's hearing representative affirmed the June 14, 2021 schedule award decision.

On November 1, 2021 appellant, through counsel, filed a timely appeal to the Board.

By decision dated April 20, 2023, the Board set aside the October 20, 2021 schedule award decision, finding that the case was not in posture for a decision as OWCP failed to refer appellant for a second opinion evaluation as recommended by the DMA. On remand, the Board instructed OWCP to refer appellant for a second opinion evaluation regarding the nature and extent of her permanent impairment.[6]

On June 13, 2023 OWCP referred appellant, along with the case record, a SOAF, and a series of questions, to Dr. Stephen D. Koss, a Board-certified orthopedic surgeon, for a second opinion permanent impairment evaluation.

In a July 21, 2023 report, Dr. Koss reviewed the medical evidence and SOAF. On physical examination, he found no cervical tenderness to palpation, normal bilateral upper extremity motor strength, bilateral upper and lower extremity intact sensation to light and coarse touch, negative bilateral Spurling's test, no bilateral clonus, negative bilateral Hoffman's test, no muscular atrophy, some slight lower L4-5 region tenderness, no bilateral knee tenderness to palpation, some mild right knee patellofemoral crepitus, negative bilateral McMurray's test, negative Lachman's test, negative anterior and posterior drawer tests, and negative valgus and varus stress tests. Dr. Koss provided ROM measurements of 70 degrees left rotation, 70 degrees right rotation, 45

[6] Docket No. 22-0123 (issued April 20, 2023). The Board also affirmed a May 5, 2021 decision, finding that appellant had not met her burden of proof to establish continuing residuals or disability on or after December 22, 2011, causally related to her accepted January 17, 2001 employment injury.

degrees flexion, 40 degrees extension, 30 degrees left lateral flexion, and 30 degrees right lateral flexion for the cervical spine; 75 degrees flexion, 25 degrees extension, 35 degrees right lateral flexion, and 35 degrees left lateral flexion for the lumbar spine; 0 degrees extension and 130 degrees flexion for the left knee; and 0 degrees extension and 130 degrees flexion for the right knee. He diagnosed lumbar and thoracic radiculopathy, cervical sprain, and traumatic bilateral knee chondromalacia. Dr. Koss opined that appellant's bilateral knee chondromalacia was likely age-related degeneration and unrelated to the accepted employment injury.

Using Table 16-3, page 509, (Knee Regional Grid), Dr. Koss related that appellant's left knee arthroscopy partial lateral meniscectomy represented a Class 1 impairment with a grade C or default value of two percent lower extremity permanent impairment. He found no evidence of cervical or lumbar spine nerve root entrapment. Dr. Koss determined that appellant had two percent left lower extremity permanent impairment and no impairment due to cervical or lumbar spine nerve root entrapment. Lastly, he found that the date of MMI was August 7, 2023, the date of his examination.

In an August 22, 2023 report, Dr. Katz, OWCP's DMA, reviewed Dr. Koss' July 21, 2023 report. Using the diagnosis-based impairment (DBI) rating methodology for the left knee, he found, under Table 16-3, page 509, the knee regional grid, that appellant's partial medial meniscectomy was a Class 1, grade C impairment with a default value of two percent. Under Table 16-6, Table 16-7, and Table 16-8 of the A.M.A., *Guides*, the DMA found a GMPE of 1 and a GMFH of 1, and noted that a GMCS was not applicable. He applied the net adjustment formula and determined that (GMPE - CDX) (1-1) + (GMCS - CDX) (1-1) = 0, which resulted in two percent impairment of the left lower extremity. Regarding appellant's lumbar and spinal conditions, Dr. Katz noted that Dr. Koss found no motor or sensory deficits in either the upper or lower extremities. He referenced Proposed Table 1 of *The Guides Newsletter* and found that appellant had zero percent permanent impairment of the upper extremities due to no motor or sensory deficits. Dr. Katz also referenced Proposed Table 2 of *The Guides Newsletter* and reported that appellant had zero percent permanent impairment of the lower extremities due to no motor or sensory deficits. He concluded that appellant had two percent left lower extremity permanent impairment, zero percent right lower extremity permanent impairment, zero percent left upper extremity permanent impairment, and zero percent right upper extremity permanent impairment. Dr. Katz opined that MMI occurred on July 21, 2023, the date of Dr. Koss' permanent impairment evaluation.

By decision dated September 13, 2023, OWCP granted appellant a schedule award for two percent left lower extremity permanent impairment, zero percent right lower extremity permanent impairment, zero percent right upper extremity permanent impairment, and zero percent left upper extremity permanent impairment. The period of the award ran for 5.76 weeks from July 21 to August 30, 2023.

By decision dated October 24, 2023, OWCP reissued appellant's schedule award for two percent left lower extremity permanent impairment, zero percent right lower extremity permanent impairment, zero percent right upper extremity permanent impairment, and zero percent left upper extremity permanent impairment at the augmented rate. The period of the award ran for 5.76 weeks from July 21 to August 30, 2023.

LEGAL PRECEDENT

The schedule award provisions of FECA[7] and its implementing regulations[8] 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.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[10]

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*.[11] 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.[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] 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.[14]

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.[15] Furthermore, the back is specifically excluded from the definition of an organ under FECA.[16] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id.* at § 10.404 (a); *see also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides*, page 3, section 1.3.

[12] *Id.* at 493-556.

[13] *Id.* at 521.

[14] *J.B.*, Docket No. 23-0926 (issued January 23, 2024); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 issued October 5, 2010); *Robert Y. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[15] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see J.B.*, *id.*; *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[16] *See id.* at § 8101(19); *J.B.*, *id.*; *Francesco C. Veneziani*, 48 ECAB 571 (1997).

upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.[17]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[18]

ANALYSIS

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

Appellant's attending physician, Dr. Macht, conducted a physical examination and documented lower cervical spine, lower lumbar spine, and bilateral lumbar paraspinal region tenderness, diminished sensation to light touch involving the left hand, and diminished sensation along the right wrist and forearm area. Motor strength of the upper and lower extremities were symmetric and intact. Dr. Macht provided ROM findings of appellant's back, neck, and bilateral lower extremities. He concluded that appellant had a total of 11 percent permanent impairment of each lower extremity for her bilateral knee chondromalacia and bilateral L5 lumbar radiculopathy and l percent permanent impairment of each upper extremity permanent impairment as a result of her January 17, 2001 employment injury.

OWCP referred appellant to Dr. Koss for a second opinion examination. Dr. Koss, during his July 21, 2023 examination, noted that appellant presented with no sensory deficits; 5/5 muscle strength in the upper and lower extremities; negative supine straight leg raise, sitting straight leg raise, and sitting root tests; and some limited range of motion of the cervical spine and right ankle. He found that appellant had no ratable impairment causally related to her accepted lumbar, cervical, and right lower extremity employment conditions and two percent permanent impairment of the left lower extremity.

In accordance with its procedures,[19] OWCP properly routed the case record to its DMA, Dr. Katz. In his August 22, 2023 report, Dr. Katz concurred with Dr. Koss' two percent left lower extremity permanent impairment rating, zero percent right lower extremity permanent rating, zero percent left upper extremity permanent impairment rating, and zero percent right upper extremity permanent impairment rating.

The Board thus finds that there is a conflict in the medical opinion evidence between the opinion of Dr. Macht, appellant's physician, and Dr. Koss OWCP's second opinion physician and

[17] *Supra* note 10 at Chapter 3.700 (January 2010), *The Guides Newsletter* is included as Exhibit 4.

[18] *Supra* note 10 at Chapter 2.808.6f. *See also R.J.*, Docket No. 23-0580 (issued April 15, 2024); *J.T.,* Docket No. 17-1465 (issued September 25, 2019); *C.K.,* Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

[19] *Id.*

Dr. Katz, the DMA, regarding the nature and extent of appellant's bilateral upper and lower extremity permanent impairment.

Because there is an unresolved conflict in the medical opinion evidence regarding appellant's bilateral upper and lower extremity permanent impairment, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the case record and a SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to resolve the conflict.[20] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's permanent impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2023 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 30, 2024
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

[20] *R.J.*, Docket No. 23-0580 (issued April 15, 2024); *P.B.,* Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy,* 57 ECAB 414 (2006); *Gloria J. Godfrey,* 52 ECAB 486 (2001); *James P. Roberts,* 31 ECAB 1010 (1980).