United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 20-1268**
	)	**Issued: February 24, 2021**
U.S. POSTAL SERVICE, SOUTHWARK POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Russell T. Uliase, 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, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 12, 2020 appellant, through counsel, filed a timely appeal from a February 24, 2020 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.

[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.*

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 schedule award compensation.

FACTUAL HISTORY

On January 4, 2010 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed an aggravation of a right knee degenerative condition as a result of her repetitive employment duties for 19 years, including daily walking and standing.[3] She indicated that her degenerative condition resulted in knee replacement surgery on January 11, 2010. Appellant also reported that she had a preexisting injury, which resulted in surgery and two screws in her right knee. She noted that she had fully recovered from her surgery. Appellant stopped work on January 4, 2010. OWCP accepted her claim for aggravation of right knee degenerative joint disease. It paid wage-loss compensation on the supplemental rolls beginning April 2, 2010 and placed appellant on the periodic rolls, effective February 12, 2012.

Appellant submitted an operative report dated January 11, 2010, which indicated that appellant underwent right total knee arthroplasty. The preoperative diagnosis was right knee arthritis.

On October 18, 2016 appellant filed a claim for a schedule award (Form CA-7).

Appellant submitted a June 14, 2016 report by Dr. David Weiss, an osteopath Board-certified in orthopedic surgery. He noted that appellant's employment duties as a letter carrier required repetitive climbing of stairs and walking up to 10 hours a day. Dr. Weiss reviewed appellant's history and noted that she underwent a right total knee replacement surgery in January 2010. He indicated that appellant currently complained of right knee pain, stiffness, swelling, and instability. Upon examination of appellant's right knee, Dr. Weiss observed a well-healed surgical scar, tenderness along the lateral joint line and over the lateral tibial plateau, and marked crepitus within the lateral joint compartment. He reported that the knee joint was stable to valgus and varus stress test. Range of motion (ROM) testing, performed three times, was 0 to 140 degrees.

Dr. Weiss 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 right total knee arthroplasty with fair results for mild instability resulted in a class 3 impairment with a default value of 37 percent. He assigned a grade modifier

[3] The present claim is assigned File No. xxxxxx394. OWCP has a previously accepted traumatic injury claim (Form CA-1) under File No. xxxxxx224 for a left knee sprain causally related to a July 25, 2005 employment injury. OWCP administratively combined File Nos. xxxxxx224 and, File No. xxxxxx394, with the latter designated as the master file.

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

for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 2, and a grade modifier for clinical studies (GMCS) of 4. He utilized the net adjustment formula (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (1 – 3) + (2 – 3) + (4 – 3) = -2, which resulted in a grade A or 31 percent permanent impairment of the right lower extremity.[5] Dr. Weiss noted that appellant reached maximum medical improvement (MMI) on June 14, 2016.

On November 3, 2016 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF), and the case file, and noted his disagreement with Dr. Weiss' June 14, 2016 impairment rating. He found that the diagnosis of status-post right total knee arthroplasty had been established, but disagreed with Dr. Weiss' assignment of a class 3 impairment. The DMA explained that Dr. Weiss' examination had revealed a full and symmetric (ROM), no instability, and normal gait mechanics, which was consistent with a class 2 impairment for a good result following knee replacement. Using the DBI method with reference to appellant's right knee condition, he found that, under the A.M.A., *Guides*, Table 16-3, page 511, appellant had 25 percent permanent impairment of the right lower extremity.

In a February 1, 2017 supplemental report, Dr. Weiss expressed his disagreement with the November 3, 2016 DMA report and alleged that his original impairment rating of 31 right lower extremity permanent impairment was correct. He noted that appellant complained of swelling and instability in her right knee, which was consistent with a class 3 impairment.

In a March 28, 2017 supplemental report, Dr. Harris reiterated that appellant had 25 percent right lower extremity permanent impairment based on a class 2 impairment for good results following a total right knee replacement surgery. He indicated that despite appellant's complaints of right knee instability, impairment was based on objective findings on examination.

OWCP determined that a conflict in the medical opinion evidence existed between Dr. Weiss and the DMA and referred appellant for an impartial medical examination in order to resolve the conflict. In an April 24, 2018 report, Dr. Ian Blair Fries, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), noted his review of the SOAF and appellant's medical records. He reported that appellant had reached MMI on September 2, 2010.[6] Dr. Fries noted appellant's current complaints of right knee stiffness throughout the day and right knee pain at the end of the day. Upon physical examination, he observed that appellant ambulated with a smooth and normal gait and was able to stand alternately on her right and left leg without difficulties or imbalance. ROM testing of appellant's right knee was performed three times and demonstrated flexion to 120 degrees and full extension. Dr. Fries reported that appellant had 1+ anterior drawer on the right and 1+ varus instability of both knees without specific complaint. He also noted mild medial and lateral laxity compatible with a right total knee replacement.

[5] Dr. Weiss also determined that according to the A.M.A., *Guides* appellant had five percent right upper extremity permanent impairment for entrapment neuropathy at the right median nerve, five percent left upper extremity permanent impairment for entrapment neuropathy at the left median nerve, and two percent left lower extremity permanent impairment for left knee strain.

[6] Dr. Fries explained that this was the date that Dr. William Hozack, a Board-certified orthopedic surgeon who performed appellant's January 2010 surgery, had evaluated her.

Dr. Fries first explained that the ROM method for rating appellant's right knee was not necessary because appellant had good ROM. Utilizing the DBI method, he referred to Table 16-3, page 511, and determined that for a CDX of status post total knee replacement appellant had a class 1 impairment for good result (good position, stable, functional) with a default value of 25 percent. Dr. Fries expressed his agreement with Dr. Weiss determining appellant's knee instability based on her complaints and reported that he found no objective evidence of knee instability upon physical examination. He assigned a GMFH of 2 based on the Activities of Daily Living Questionnaire and current complaints. Dr. Fries assigned a GMPE of 1 and a GMCS of 1. After applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (2 – 1) + (1 – 1) + (1 – 1), Dr. Fries calculated a net adjustment of +1 for grade C or 25 percent permanent impairment of the right lower extremity.

In a June 19, 2018 supplemental report, Dr. Fries clarified that he could assign the date of his own examination, April 17, 2018, as the MMI date, if required.

By decision dated September 14, 2018, OWCP granted appellant a schedule award for 25 percent right lower extremity permanent impairment. The award ran for 72 weeks from October 31, 2015 through March 17, 2017. The MMI date was noted as September 2, 2010. OWCP indicated that the schedule award was based on the April 24 and June 19, 2018 reports of Dr. Fries, the IME.

On September 20, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 21, 2019.

Appellant subsequently submitted a February 15, 2019 report by Dr. Weiss. Dr. Weiss expressed his disagreement with Dr. Fries' impairment rating and noted that instability was defined as "one bony component moves on another in an abnormal fashion." He indicated that Dr. Fries reported 1+ anterior drawer on the right and 1+ varus instability on both knees, which qualified for mild instability of the right knee.

By decision dated May 7, 2019, an OWCP hearing representative set aside the September 14, 2018 schedule award decision and remanded the case for OWCP to obtain a supplemental report from Dr. Fries explaining, with medical rationale, as to whether appellant had a class 2 impairment even though his examination findings showed 1+ anterior drawer and 1+ varus instability of both knees. She instructed OWCP to amend the SOAF to include appellant's previous nonwork and work-related injuries to both knees, to provide Dr. Fries with additional medical reports, and to issue a *de novo* decision with April 17, 2018 as the correct MMI date.

On June 11, 2019 OWCP referred the updated SOAF[7] and additional medical reports to Dr. Fries for a supplemental report. In a July 16, 2019 supplemental report, Dr. Fries reiterated that appellant had a smooth and normal gait, had full extension of both knees, and could stand alternately on her right and left legs without difficulty. Regarding the examination findings of 1+ anterior drawer on the right and 1+ varus instability of both knees, he indicated that mild laxity was expected after a total knee replacement and did not place appellant in a class 3 impairment for

[7] The updated SOAF indicated that appellant sustained a softball injury to the right leg in 1983 and that appellant's accepted left knee occupational injury occurred on July 27, 2005.

fair results. Utilizing the DBI method, Dr. Fries referred to Table 16-3, page 511, and assigned a class 2 impairment for good results following a total right knee replacement. Dr. Fries assigned a GMFH of 2 based on the Activities of Daily Living Questionnaire and current complaints. He assigned a GMPE of 1 and a GMCS of 1. After applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (2 – 2) + (1 – 2) + (1 – 2), Dr. Fries calculated a net adjustment of -2 for 21 percent permanent impairment of the right lower extremity.

In an August 5, 2019 supplemental report, Dr. Fries reiterated his examination findings from the April 17, 2018 examination and confirmed that based on his findings appellant had a class 2 impairment for good results after a total right knee replacement.

By decision dated October 7, 2019, OWCP granted appellant a schedule award for 21 percent right lower extremity permanent impairment. It noted that since she had been previously granted a schedule award for 25 percent permanent impairment, "no additional payment is being issued." The award ran for 60.48 weeks from April 17, 2018 to June 14, 2019. The MMI date was April 17, 2018. OWCP indicated that the schedule award was based on the reports of Dr. Fries, the impartial medical examiner.

On October 18, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 22, 2020. Counsel alleged that Dr. Fries' impartial medical reports could not carry the special weight of medical evidence because he did not correct the retroactive MMI date and did not discuss appellant's previous bilateral knee injuries as instructed in the May 7, 2019 hearing representative decision.

Appellant subsequently submitted a January 31, 2020 report by Dr. Weiss who reiterated his assessment that appellant had 31 percent right lower extremity permanent impairment.

By decision dated February 24, 2020, OWCP's hearing representative affirmed the October 7, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA[8] and its implementing regulations[9] 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

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

adoption.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[11]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] Under the sixth edition, the evaluator identifies the impairment for the CDX, which is then adjusted by GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[14]

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.[15] After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for functional history, grade modifier for physical examination and grade modifier for clinical studies. The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[16] 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.[17]

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 IME) who shall make an examination.[18] 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 case.[19] When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an IME

[10] 20 C.F.R. § 10.404 (a); *see also T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

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

[12] A.M.A., *Guides* (6th ed. 2009), p3, section 1.3.

[13] *Id.* at 494-531.

[14] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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

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

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

[18] 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).

[19] 20 C.F.R. § 10.321.

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.[20]

ANALYSIS

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

OWCP properly found a conflict in the medical opinion evidence regarding permanent impairment between appellant's treating physician, Dr. Weiss, and the DMA, Dr. Harris. It properly referred appellant's case to Dr. Fries pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion.[21]

In his initial report dated April 24, 2018, Dr. Fries discussed appellant's history of injury and her medical records. Upon physical examination, he observed that appellant ambulated with a smooth and normal gait and was able to stand alternately on her right and left leg without imbalance. ROM testing of appellant's right knee was performed three times and demonstrated flexion to 120 degrees and full extension. Dr. Fries reported that appellant had 1+ anterior drawer on the right and 1+ varus instability of both knees. He also noted mild medial and lateral laxity. Utilizing Table 16-3, page 511 of the A.M.A., *Guides*, Dr. Fries found a CDX of 1 for good result (good position, stable, functional) after a total knee replacement, which yielded a default value of 25 percent. He noted that Dr. Weiss based his class 3 assignment on appellant's complaints of knee instability, but indicated that he found no objective evidence of knee instability upon physical examination.

In supplemental reports, Dr. Fries clarified appellant's MMI date as April 17, 2018. He also further explained that mild laxity did not place appellant in a class 3 impairment for fair results. Utilizing the DBI method, Dr. Fries referred to Table 16-3, page 511, and assigned a class 2 impairment for good result (good position, stable, functional) following a total right knee replacement. Dr. Fries assigned a GMFH of 2 based on the Activities of Daily Living Questionnaire and current complaints. He also assigned a GMPE of 1 and a GMCS of 1. After applying the net adjustment formula, (GMFH – CDX) + (GMPE – CDX) + (GMCS – CDX) = (2 – 2) + (1 – 2) + (1 – 2), Dr. Fries calculated a net adjustment of -2, which moved the grade C default value of 25 percent to a grade A of 21 percent permanent impairment.

Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[22] In this case, the Board finds that Dr. Fries accurately summarized the relevant medical evidence, provided detailed findings on examination, and

[20] *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[21] *See E.M.*, Docket No. 19-1535 (issued August 27, 2020); *see also W.C.*, Docket No. 19-1740 (issued June 4, 2020).

[22] *Supra* note 21.

reached conclusions about appellant's condition, which comported with his findings.[23] Dr. Fries noted that physical examination findings showed smooth and normal gait, stability on both legs, full ROM, and mild laxity, which placed appellant in a CDX of 2 for good result following total knee replacement according to the sixth edition of the A.M.A., *Guides.* As his report is detailed, well rationalized, and based on a proper factual background, his opinion is entitled to the special weight accorded to an IME.[24]

The Board further finds that Dr. Weiss' January 31, 2020 report is insufficient to overcome the special weight accorded to Dr. Fries because reports from a physician who was on one side of a medical conflict resolved by an IME are insufficient to overcome the special weight accorded the report of the IME or create a new conflict.[25] Thus, the Board finds that the medical evidence of record fails to establish that appellant has more than 21 percent right lower extremity permanent impairment, for which she previously received a schedule award.

On appeal counsel argues in his brief that Dr. Fries' medical reports could not carry the special weight of the medical evidence. In the alternative, he also alleges that the DMA's report was insufficiently rationalized to create a conflict in medical evidence, and thus, Dr. Fries should be considered a second opinion examiner. As previously discussed, the Board finds that Dr. Fries' opinion is entitled to the special weight accorded to the IME because it is detailed, well rationalized, and based on a proper factual background.

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 impairment.

CONCLUSION

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

[23] *See J.B.*, Docket No. 18-0116 (issued October 2, 2020); *see also P.D.*, Docket No. 18-1289 (issued January 2, 2019).

[24] *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

[25] *J.M.*, *id.*; *D.M.*, Docket No. 17-1992 (issued September 12, 2018); *S.F.*, Docket No. 17-1427 (issued May 16, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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