United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 22-1051**
	)	**Issued: May 4, 2023**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, U.S. BOARDER PATROL, Santee, CA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On July 8, 2022 appellant filed a timely appeal from a June 29, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award; and (2) whether OWCP properly determined the date of appellant's maximum medical improvement (MMI).

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On March 25, 2021 appellant, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee performing control drills while in the performance of duty. OWCP accepted his claim for other tear of medial meniscus, current injury, left knee, initial encounter; chondromalacia patellae, left knee; sprain of unspecified site of left knee, initial encounter; unspecified internal derangement of left knee; other tear of medial meniscus, current injury, left knee, subsequent encounter; and sprain of unspecified site of left knee, subsequent encounter. It paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from April 1 to May 11, 2022.

On May 4, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of his claim, appellant submitted an April 1, 2022 report from Dr. Mark Selecky, a Board-certified orthopedic surgeon. Dr. Selecky provided a history of appellant's injury and medical treatment.[2] He examined appellant's left knee and noted findings including range of motion (ROM) of the left knee of 0 to 130 degrees over three trials. Dr. Selecky further noted: mild crepitation and discomfort with patella grind test; tenderness over the medial greater than the lateral joint line; 1 cm of left thigh atrophy; squat to 90 degrees caused some anterior left knee pain; single-leg hop with mild pain and difficulty on the left foot; and distally intact neurovascular. He noted that March 31, 2021 weightbearing radiographs of the left knee showed greater than or equal to 4 millimeter (mm) cartilage intervals in all three compartments with slight osteophyte formation with no obvious loose body; May 14, 2021 weightbearing radiographs of the right/left knee showed medial joint space of 3.7/3.9 mm, lateral joint space of 3.8/5+ mm, and right knee patellofemoral compartment interval of 3.9 mm; October 29, 2021 weightbearing radiographs of bilateral knees showed no evidence of fracture subluxation or dislocation, some bone tunnels from previous ACL reconstruction in the right knee without any hardware, right/left knee medial joint space of 3.5/3.7 mm, lateral joint space 6.1/5.2 mm, and patellofemoral compartment of 5/5 mm; and April 1, 2022 weightbearing radiographs of the bilateral knees showed right/left medial joint space of 3.5/3.7 mm, lateral joint space of 5.0/5.2 mm, patellofemoral interval of 4/ 4.8 mm, some squaring of the condyles and small marginal bone spurs consistent with mild post-traumatic arthritis.

Dr. Selecky opined that an impairment rating using the ROM methodology resulted in zero percent left lower extremity impairment. He explained that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] Table 16-23 on page 549, his finding of 0 to 130 degrees of left knee flexion did not result in any ratable left lower extremity impairment using the ROM method.

Dr. Selecky opined that an impairment rating using the diagnosis-based impairment (DBI) method resulted in two percent left lower extremity permanent impairment. He referred to the

[2] Dr. Selecky noted that appellant had prior schedule awards for 10 percent to the right lower extremity for the right knee, and 10 percent to the left upper extremity for the left shoulder.

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

Knee Regional Grid at Table 16-3 on page 509 of the A.M.A., *Guides* and explained that two percent impairment was the default value for the class of diagnosis (CDX) diagnosis of a Class 1 medial or lateral meniscus tear, and that appellant did not have enough joint space narrowing for a post-traumatic arthritis rating. Dr. Selecky further explained that appellant's residual symptoms were likely due to the meniscal tear shown on a magnetic resonance imaging (MRI) scan and articular cartilage damage shown on the MRI and MRI arthrogram. He applied the net adjustment formula on page 521 of the A.M.A., *Guides* to the Class 1 diagnosis and default value of two percent impairment. For the grade modifier for functional history (GMFH), Dr. Selecky referred to Table 16-5 on page 516, and found that appellant's mild antalgic gait favoring the left lower extremity with a shortened stance phase and aggravation with physical activities resulted in a GMFH of 1. For the grade modifier for physical examination (GMPE), he referred to Table 16-7 on page 517, and found that the 1 cm of left thigh circumference atrophy resulted in a GMPE of 1. For the grade modifier for clinical studies (GMCS), Dr. Selecky referred to Table 16-8 on page 519, and explained that GMCS was not applicable because the imaging studies were used to determine the CDX for the meniscus tear. He calculated that the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in 1-1+1-1 = 0, which resulted in a net adjustment of 0. Therefore, Dr. Selecky concluded that the final left lower extremity impairment rating remained at the default value of two percent. He further opined that appellant could continue with full regular duties without restriction.

On May 17, 2022 OWCP routed Dr. Selecky's April 1, 2022 report and the case file to Dr. Arthurs S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of the permanent impairment of the left lower extremity and the date of MMI.

In a May 18, 2022 report, Dr. Harris noted that he reviewed the statement of accepted facts (SOAF) and the medical record. He explained that the examination findings made by Dr. Selecky on April 1, 2022, revealed left knee motion of 0 to 130 degrees with crepitation, the left knee x-rays did not demonstrate any significant joint space narrowing, and the left knee MRI scan on April 5, 2021, was consistent with patella chondromalacia, without medial meniscal tear. Dr. Harris noted that his review of the medical record established diagnoses of left knee strain and left knee patella chondromalacia. Applying the DBI methodology, he opined that appellant had two percent left lower extremity impairment for knee strain, which was a Class 1 diagnosis according to Table 16-3 at page 509 (the Knee Regional Grid). Dr. Harris also discussed the ROM methodology and explained that, according to the A.M.A., *Guides* at section 16.7 on page 543, the ROM method was to be used as a standalone rating when there were no applicable DBI-based sections, or in very rare cases where a severe injury results in a passive ROM loss qualifying for Class 3 or 4 impairment, or for amputation ratings. He noted that in this case, the A.M.A., *Guides* did contain an appropriate DBI-based rating methodology, and that the left knee conditions did not meet any of the criteria for the use of the ROM method. Dr. Harris concluded that appellant had two percent left lower extremity impairment. He also noted that appellant reached MMI on April 1, 2022, the date of Dr. Selecky's examination.

By decision dated June 29, 2022, OWCP granted appellant a schedule award for two percent left lower extremity impairment. The award ran for 5.76 weeks from April 1 to May 11, 2021, and was based on the impairment ratings of Dr. Selecky and the DMA.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[4] and its implementing 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 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.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[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 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.[8] After 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).[9] Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.[10]

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 OWCP's medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS -- ISSUE 1

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

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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

[7] 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* Chapter 3.700, Exhibit 1 (January 2010).

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

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

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

[11] *Supra* note 7 at Chapter 2.808.6f (March 2017).

Appellant submitted an April 1, 2022 report from Dr. Selecky, who referenced the Knee Regional Grid at Table 16-3 on page 509 of the A.M.A., *Guides*, and determined that appellant had a Class 1 impairment with a default value of two percent for the CDX of medial meniscal tear. Dr. Selecky also noted that he applied the net adjustment formula and found a GMFH of 1, based on mild symptoms, a GMPE of 1 based on mild physical examination findings, and that GMCS was not applicable, as the clinical studies where used to determine the CDX.[12] Application of the net adjustment formula (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) resulted in 1-1+1-1 = 0, and no change from the default value of two percent. Dr. Selecky concluded that appellant had two percent permanent impairment of his lower left extremity, based on the DBI methodology. He also properly concluded that appellant did not have ratable loss of ROM of the left knee, pursuant to Table 16-2 at page 549 of the A.M.A., *Guides*, or ratable joint space narrowing pursuant to Table 16-3, page 511, for knee joint arthritis.

OWCP properly routed the SOAF and medical history to the DMA, Dr. Harris, including the April 1, 2022 report of Dr. Selecky.[13] Dr. Harris concurred with Dr. Selecky's impairment rating of two percent using the DBI method.[14] Although the DMA selected knee strain instead of a medial or lateral meniscus tear, which was also an accepted condition, his findings yielded the same permanent impairment rating. Dr. Harris also explained that the ROM method was not applicable because the DBI method was available, and the established diagnoses did not meet any of the exceptions to allow the use of the ROM method.

The Board finds that the opinions of Dr. Selecky and Dr. Harris, the DMA, properly applied the appropriate standards of the A.M.A., *Guides* and constitute the weight of the medical evidence with respect to the permanent impairment of appellant's left lower extremity.[15]

As the record contains no other probative, rationalized medical opinion based on the sixth edition of the A.M.A., *Guides*, appellant has not met his burden of proof to establish more than two percent permanent impairment of the left lower extremity, for which he previously received a schedule award.[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.

[12] A.M.A., *Guides* 509-11 and 494-531.

[13] *See V.S.*, Docket No. 19-1679 (issued July 8, 2020); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[14] A.M.A., *Guides*, Knee Regional Grid in Table 16-3 at page 509.

[15] *See N.M.*, Docket No. 19-1925 (issued June 3, 2020); *L.D.*, Docket No. 19-0797 (issued October 2, 2019).

[16] *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).

LEGAL PRECEDENT -- ISSUE 2

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.[17] The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.[18] The date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.[19] The Board also has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI if OWCP selects a retroactive date.[20]

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined the date of MMI for appellant's schedule award.

On June 29, 2022 OWCP granted appellant a schedule award for two percent left lower extremity impairment which ran for 5.76 weeks from April 1 to May 11, 2021. However, the Board finds that the June 29, 2022 schedule award decision sets forth an incorrect date of MMI of April 1, 2021. OWCP's medical adviser, Dr. Harris, reported that appellant reached MMI on April 1, 2022, the date of the evaluation by Dr. Selecky. The Board finds that appellant's date of MMI was therefore April 1, 2022.[21]

Accordingly, the Board will modify OWCP's June 29, 2022 decision to find that appellant reached MMI on April 1, 2022 and that the period of his schedule award should begin on that date.[22]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than two percent permanent impairment of his left lower extremity, for which he previously received a schedule award. The Board further finds that OWCP improperly determined the date of MMI for appellant's schedule award.

[17] *See N.A.*, Docket No. 12-1299 (issued September 16, 2013); *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

[18] *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

[19] Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700.3.a (January 2010).

[20] *James E. Earle*, 51 ECAB 567 (2000).

[21] *G.G.*, Docket No. 12-1106 (issued November 2, 2012).

[22] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2022 decision of the Office of Workers' Compensation Programs is affirmed, as modified to reflect the corrected date of MMI as April 1, 2022.

Issued: May 4, 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