

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

D.E., Appellant)	
)	
and)	Docket No. 22-1197
)	Issued: May 2, 2023
DEPARTMENT OF THE AIR FORCE, KELLY)	
AIR FORCE BASE, San Antonio, TX, 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 August 8, 2022 appellant filed a timely appeal from a June 14, 2022 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 June 14, 2022 merit decision OWCP received additional evidence. However, 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 his burden of proof to establish greater than 69 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

On January 30, 1997 appellant, then a 41-year-old air craft engine mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that date he was working with a hydraulic wrench and heater when he sustained an electrical shock in the left arm and was knocked approximately six feet backward, while in the performance of duty.

OWCP accepted the claim for electrocution and nonfatal effects of electric shock, bilateral knee tears of the medial meniscus, hypertension, bilateral lateral epicondylitis, left sensorineural hearing loss, bilateral carpal tunnel syndrome, epistaxis, other disease of nasal cavity and sinuses, hemorrhage complicating a procedure, benign neoplasm of the lymph nodes, right plantar fibromatosis, and right lower leg primary osteoarthritis.

Appellant underwent a left knee medial compartment replacement on November 28, 2016.

OWCP granted appellant schedule awards for permanent impairment of his left lower extremity. On June 19, 2003 it granted him a schedule award for 16 percent permanent impairment of the left lower extremity. On November 7, 2005 OWCP granted appellant a schedule award for an additional four percent permanent impairment of the left lower extremity. On November 14, 2013 it granted him a schedule award for an additional six percent permanent impairment of the left lower extremity. On August 31, 2017 OWCP granted appellant a schedule award for an additional 43 percent permanent impairment of the left lower extremity, for a total of 69 percent permanent impairment.

In a May 19, 2022 report, Dr. Yury Sless, Board-certified in orthopedic surgery, noted appellant's history of injury and medical treatment. He related that appellant presented with a left knee brace, ambulated an assistive device, had an antalgic limp, and difficulty rising from a seated position and getting on and off the examination table. Dr. Sless noted well-healed surgical scars. He found mild tenderness upon palpation mid-thigh, moderate tenderness distal thigh and lower leg, and anterior and posterior left knee severe tenderness. Dr. Sless found deep tendon reflexes of the patella were 2+ and Achilles were +1 bilaterally. He performed manual muscle testing of the knees bilaterally and found flexion 5/5 5/5, and extension 5/5 5/5. For orthopedic testing, Dr. Sless found valgus/varus (-) and antepost drawer (-). For range of motion (ROM), he found right and left flexion 108, 106, 110 and 73, 75, 75, and extension 0, 0, 0 and -18, -20, -20. Dr. Sless opined that appellant reached maximum medical improvement (MMI) on May 19, 2022.

Dr. Sless completed a permanent impairment rating pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He applied the diagnosis-based impairment (DBI) methodology, pursuant Table 16-3

³ A.M.A., *Guides* (6th ed. 2009).

on page 511 of the A.M.A., *Guides*, and explained that appellant had undergone a left knee total knee replacement, which was the class of diagnosis (CDX), with poor results due to moderate-to-severe motion deficit. Dr. Sless therefore assigned appellant's impairment as a Class 4. He also noted that a lower limb questionnaire was administered and a score of 57 was recorded for which he assigned a grade modifier for functional history (GMFH) of 2. Dr. Sless used Table 16-7 and assigned a grade modifier for physical examination (GMPE) of 2. Using Table 16-8 on page 519, he assigned a grade modifier for clinical studies (GMCS) of 3. Dr. Sless noted that he applied the net adjustment formula which resulted in a net adjustment of -2 and a final rating of 59 percent permanent impairment of the left lower extremity.

On June 1, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On June 6, 2022 OWCP referred the case record, including a statement of accepted facts (SOAF), to Dr. Herbert White, Jr., Board-certified in occupational medicine, serving as the OWCP district medical adviser (DMA). The referral letter noted that appellant had previously been paid schedule awards for a total of 69 percent permanent impairment of the left lower extremity.

In a June 12, 2022 report, Dr. White noted appellant's history of injury and medical treatment. He explained that the relevant anatomic region was the left knee and referred to the A.M.A., *Guides*, Regional Grid for Total Knee Replacement, at Table 16-3, page 511. The DMA indicated that the CDX is a Class 4 impairment, for a poor result with moderate motion. He assigned a GMFH of 2 for antalgic gait with assistive device, and explained that the GMFH was increased to 3 for a Class 4 impairment, according to Table 16-6, page 516. The DMA assigned a GMPE of 2, and explained that the GMPE was increased to Grade 3 for a Class 4 impairment, according to Table 16-7, page 517. For the GMCS, he assigned Grade 3 and explained the GMCS was increased to 4 for a Class 4 impairment, according to Table 16-8, page 519. The DMA applied the net adjustment formula⁴ and found a net adjustment of -2. He explained that the default impairment rating for Class 4, Grade C, was 67 percent, pursuant to Table 16-3, page 511, and that the net adjustment of -2 moved the impairment rating down 2 grades to Class 4, Grade A, which resulted in a rating of 59 percent permanent impairment of the left lower extremity. The DMA also explained that the ROM method could not be used to rate the impairment, according to page 552 of A.M.A., *Guides* which indicates, "Only if no other approach is available to rating, calculate impairment based on range of motion as explained in section 16.7." Dr. White noted that he concurred with Dr. Sless and opined that appellant's left lower extremity permanent impairment rating was 59 percent. The DMA also noted that MMI was reached on May 19, 2022, the date of Dr. Sless' examination.

On June 14, 2022 OWCP denied appellant's claim for an increased schedule award.

⁴ A.M.A., *Guides* 521.

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. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, good administrative practice necessitates 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 specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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.⁸

In determining permanent impairment of 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 509.⁹ After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Under Chapter 2.3, the evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

The A.M.A., *Guides* explain that, while the ROM method is an alternative approach for calculating permanent impairment of the lower extremities, it is to be used primarily as a physical examination factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment.¹²

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ 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 2.808.5a (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

⁸ *See C.L.*, Docket No. 20-0316 (issued November 22, 2022); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* 509-11 (6th ed. 2009).

¹⁰ *Id.* at 515-22.

¹¹ *Id.* at 23-28.

¹² A.M.A., *Guides* 497; *see D.C.*, Docket No. 21-0954 (issued October 11, 2022); *see also M.S.*, Docket No. 20-0036 (issued February 5, 2021); *N.M.*, Docket No. 19-1925 (issued June 3, 2020); *M.P.*, Docket No. 18-1298 (issued April 12, 2019).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 69 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

The Board notes that appellant's treating physician, Dr. Sless, and the DMA, Dr. White, concurred in their opinions and found that appellant had 59 percent permanent impairment of the left lower extremity. The report from Dr. Sless dated May 19, 2022, and the report from Dr. White dated June 12, 2022, applied the A.M.A., *Guides* and found that appellant had a Class 4 impairment, based on the CDX of left knee total knee replacement with poor results due to moderate-to-severe motion deficit.¹³ They also found that the net adjustment formula resulted in a net adjustment of minus 2, and that the final impairment rating was 59 percent.¹⁴

The Board also notes that the DMA explained why the ROM method could not be used to rate the impairment, and referred to page 552 of the A.M.A., *Guides* which indicates, "Only if no other approach is available to rating, calculate impairment based on range of motion as explained in section 16.7."

As there is no medical evidence of record supporting greater impairment than the 69 percent award for the left lower extremity, for which appellant previously received schedule award compensation, the Board finds that he has not met his burden of proof. 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 69 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.

¹³ *Supra* note 8.

¹⁴ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2023
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