

truck. OWCP accepted the claim for a right knee internal derangement and meniscus tear and approved arthroscopic surgery, which he underwent on December 15, 2006. Appropriate benefits were paid and appellant eventually returned to full duty on January 22, 2007.

On May 22, 2008 appellant requested a schedule award. In a January 14, 2008 report, Dr. David Weiss, an osteopath, noted the history of injury and his review of the medical reports. He diagnosed post-traumatic internal derangement to the right knee with medial meniscus tear; post-traumatic chondromalacia patella to the right knee; status post arthroscopic surgery to the right knee with partial medial meniscectomy and status post chondroplasty of the medial femoral condyle and patellofemoral joint. Dr. Weiss also noted preexisting conditions of the back. He opined that appellant reached maximum medical improvement on January 14, 2008. Dr. Weiss further opined that appellant had 15 percent right lower extremity impairment under the fifth edition of the A.M.A., *Guides*.

On September 8, 2008 an OWCP medical adviser reviewed appellant's medical file along with a statement of accepted facts. He concurred with Dr. Weiss' findings and conclusions that appellant had 15 percent permanent impairment of the right leg under the fifth edition of the A.M.A., *Guides*. The medical adviser noted that, while Dr. Weiss could have used a different table to obtain a higher percentage for pain, he accepted Dr. Weiss' judgment that the impairment provided for pain was adequate.

In an October 23, 2008 letter, OWCP advised appellant and his attorney of the medical adviser's findings and provided a copy of the report. It requested that Dr. Weiss provide an addendum report as to whether he agreed with the medical adviser's findings. OWCP sent a follow-up letter on November 28, 2008 and telephoned appellant's attorney's office on January 5, 2009 requesting an addendum report. No additional report was received.

On June 10, 2009 appellant's attorney requested a decision on the schedule award claim.

In a June 15, 2009 letter to Dr. Weiss, OWCP advised that the sixth edition of the A.M.A., *Guides* was being used as of May 1, 2009 and requested that he provide an impairment rating under the sixth edition of the A.M.A., *Guides*.

On August 10, 2009 OWCP received a copy of Dr. Weiss' January 14, 2008 report with revised calculations under the sixth edition of the A.M.A., *Guides*. Dr. Weiss opined that appellant reached maximum medical improvement on January 14, 2008. He further opined that appellant had two percent right lower extremity impairment. Under Table 16-3, page 509, Dr. Weiss stated that appellant had a class 1 partial right medial meniscectomy which equaled two percent impairment. He opined that appellant's grade modifiers for function history was 1,² for physical examination was one³ and for clinical studies was one.⁴ Dr. Weiss applied the net adjustment formula of (GMFH – CDX) (1-1) + (GMPE – CDX) (1-1) + (GMCS – CDX) (1-1)

² A.M.A., *Guides* at Table 16-6, page 516.

³ *Id.* at Table 16-7, page 517.

⁴ *Id.* at Table 16-8, page 519.

and found a net adjustment of zero. Thus, he concluded appellant's final right lower extremity impairment was two percent.

In a December 31, 2009 report, Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed the statement of accepted facts along with the medical evidence of record and set forth his examination findings. He noted that appellant had subjective complaints of pain and there was some discomfort with full flexion and some mild tenderness to palpation in the medial joint line. The McMurray test was negative. Dr. Hutter diagnosed torn medial meniscus of the right knee. He opined that appellant reached maximum medical improvement and had two percent impairment. In an April 18, 2010 addendum report, Dr. Hutter advised appellant's two percent right leg impairment was based on class 1 impairment under Table 16-3, page 509 of the sixth edition of the A.M.A., *Guides*. He further stated that appellant reached maximum medical improvement when he returned to full-duty work following his surgery.

On May 11, 2010 an OWCP medical adviser noted that Dr. Hutter used Table 16-3, page 509 and got a class 1 impairment with a default value of two percent. He stated that, while Dr. Hutter did not use any grade modifiers, this would not change the ultimate result. Based on Dr. Hutter's findings, the medical adviser assigned grade modifier of one to functional history, physical examination and clinical studies. He applied the net modifier adjustment formula and found that there was zero net modifier adjustment. Thus, Dr. Hutter opined that the final right lower extremity impairment was two percent. He also opined that the date-of-maximum medical improvement was January 22, 2007, the date appellant returned to full duties.

On May 28, 2010 OWCP awarded appellant a schedule award for two percent permanent impairment of the right lower extremity.⁵ On September 8, 2010 OWCP's hearing representative affirmed.

On appeal, appellant's representative argues that OWCP's delay in adjudicating the claim deprived appellant of a protected interest in property without due process of law. He reasoned that, had the delay not occurred, appellant would have been provided a decision under the fifth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA provides for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ Schedule award decisions issued

⁵ The award ran from January 22 to March 3, 2007 for a total of 5.76 weeks of compensation.

⁶ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

between February 1, 2001 and April 30, 2009 utilize the fifth edition of the A.M.A., *Guides*.⁷ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*,⁸ published in 2008, as the appropriate edition for all awards issued after that date.⁹

ANALYSIS

Appellant's representative does not contest the percentage of impairment awarded on May 28, 2010. He contests OWCP's delay in issuing a decision and the resulting application of the sixth edition of the A.M.A., *Guides*. OWCP procedures are clear: As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition. It correctly followed its procedures.

Appellant asserts that he has property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathew v. Eldridge*, 424 U.S. 319 (1976). He asserted that appellant was entitled to a hearing before use of the sixth edition of the A.M.A., *Guides*, was imposed. The Board notes that these cases hold only that a claimant who was in receipt of benefits (in *Goldberg* public assistance and in *Mathews* social security benefits) could not be terminated without due process. Appellant had received no schedule award under the fifth edition.

In *Harry D. Butler*,¹⁰ the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.¹¹ On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.¹² The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date-of-maximum medical improvement or when the claim for such award was filed.

The Board finds that OWCP did not deprive appellant of an established property interest. Consistent with its procedures, OWCP applied the correct edition of the A.M.A., *Guides* and found on May 28, 2010 that he was entitled to benefits for a two percent impairment of his right

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ *Supra* note 7, Exhibit 1 (January 9, 2010).

¹⁰ 43 ECAB 859 (1992).

¹¹ *Id.* at 866.

¹² FECA Bulletin No. 09-03 (issued March 15, 2009). FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, *supra* note 7, Chapter 2.808.6(a) (January 2010).

lower extremity.¹³ The Board will therefore affirm OWCP's September 8, 2010 decision affirming his schedule award.

Appellant may request a schedule award or increased schedule award 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 OWCP applied the correct edition of the A.M.A., *Guides*.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ An OWCP's medical adviser properly noted that while Dr. Hutter did not provide modifiers for the class 1 two percent right lower extremity impairment under Table 16-3, page 509, this would not change the result. Based on Dr. Hutter's findings, the medical adviser opined that appellant had grade modifiers of 1 for functional history, physical examination and clinical studies under Tables 16-6, 16-7 and 16-8, pages 516, 517, 519, respectively. He properly applied the net adjustment formula of (GMFH – CDX) (1-1) + (GMPE – CDX) (1-1) + (GMCS – CDX) (1-1) and found a net adjustment of zero. Thus, he properly concluded that appellant's final right lower extremity impairment was two percent. This is also consistent with Dr. Weiss' August 10, 2009 opinion that appellant has two percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. There is no medical evidence establishing an impairment greater than two percent under the sixth edition of the A.M.A., *Guides*.