

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

B.M., Appellant

and

**DEPARTMENT OF JUSTICE, DRUG
ENFORCEMENT ADMINISTRATION,
Baltimore, MD, Employer**

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**Docket No. 12-1665
Issued: February 13, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2012 appellant filed a timely appeal from a March 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his schedule award claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of the right lower extremity, for which he received a schedule award.

¹ The record contains a March 19, 2012 decision, which is a duplicative of the March 12, 2012 decision.

² 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

On April 10, 2007 appellant, then a 40-year-old criminal investigator, filed a traumatic injury claim alleging that his right knee was injured in the performance of duty on April 4, 2007. OWCP accepted the claim for right knee sprain, lateral collateral ligament. The claim was later expanded to include a right knee meniscus tear, for which appellant underwent an authorized partial medial meniscectomy on July 13, 2007.

On March 31, 2009 appellant requested a schedule award. In letters dated January 21 and April 21, 2010, OWCP informed him of the medical evidence necessary to determine an impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and requested that appellant submit new and/or revised medical documentation from his treating physician. In several letters, appellant informed OWCP that the physician who performed his surgery would not cooperate or complete paperwork because of an outstanding balance for his surgery.

On May 20, 2010 OWCP received a May 6, 2010 partial report from Dr. James C. Murphy, a Board-certified orthopedic surgeon, which noted the history of injury, appellant's medical course and current complaints.

On June 24, 2010 appellant again requested a schedule award. To further consider the extent of his impairment, OWCP referred him to Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an August 4, 2010 report, Dr. Gordon opined that appellant had two percent impairment of the right lower extremity causally related to the work injury. He opined that appellant had reached maximum medical improvement. Dr. Gordon opined that, under Table 16-3 of the A.M.A., *Guides*, appellant's meniscal pathology of the knee was class 1. He indicated that appellant had functional, physical and clinical studies modifiers of 1 which resulted in a net adjustment of zero. Dr. Gordon concluded that appellant had grade C or two percent impairment for medial meniscus tear.

In an August 30, 2010 report, an OWCP medical adviser reviewed Dr. Gordon's August 4, 2010 report and opined that the date of maximum medical improvement was July 13, 2008, approximately one year after surgery. He noted the range of motion method of evaluation was not applicable in this case. The medical adviser found that appellant had one percent impairment of the right lower extremity. Under Table 16-3, he found that appellant had class 1 rating with default score of two percent lower extremity impairment for partial medial meniscectomy. Under Table 16-6, the medical adviser found grade modifier 0 for functional history and under Table 16-7, grade modifier 0 for physical examination. He noted that, under Table 16-8, there was no grade modifier for clinical studies as they were used to confirm the diagnostic severity. The medical adviser found net adjustment of -2, which translated to grade A or 1 percent lower extremity impairment.

By decision dated September 28, 2010, OWCP awarded appellant one percent right lower extremity impairment. The period of the award ran 2.88 weeks for the period July 13 to August 2, 2008.

On October 25, 2010 appellant requested an oral hearing before an OWCP hearing representative, which was held on March 29, 2011. He testified that Dr. Murphy had recommended additional surgery along with a reduction in his activities that affect his knee. Dr. Murphy's May 27, 2010 attending physician's report (Form CA-20) was submitted.

In an April 7, 2011 report, Dr. Murphy noted that appellant's condition had worsened. He stated that while appellant was definitely at two percent impairment rating he was very close to but not quite at three percent impairment. Dr. Murphy indicated that appellant's medial meniscus was mostly excised and, while he could do his job, there would be discomfort with a lot of stooping, squatting or stairs and long distance running would be a problem.

By decision dated June 10, 2011, an OWCP hearing representative affirmed the September 28, 2010 decision. On December 6, 2011 OWCP received appellant's request for reconsideration. In an October 27, 2011 report, Dr. Murphy opined that appellant had three percent impairment for class 1 meniscal injury with chondromalacia. Under Table 16-3, he assigned class 1 to appellant's meniscal injury with partial removal medially. A grade modifier of 1 was assigned for functional history due to reduced functional activity with stairs, walking and running. A grade modifier of 2 was assigned for physical examination because of palpable crepitation of the patellofemoral joint with range of motion and positive compression test with difficulty getting up from squatting position. A grade modifier of 2 was assigned for clinical studies. Dr. Murphy stated that this gave appellant three percent impairment for grade E value for class 1 meniscal injury with chondromalacia.

On March 1, 2012 an OWCP medical adviser opined that appellant reached maximum medical improvement on August 30, 2010. He reviewed Dr. Murphy's October 27, 2011 report and found under Table 16-3 that appellant had class 1 rating for partial medial or lateral meniscectomy which had default lower extremity rating of two percent impairment. Under Table 16-6, a grade modifier of 0 was assigned for functional history as opposed to Dr. Murphy's grade modifier of 1 as the objective evidence and clinical examination did not support appellant had antalgic gait. Under Table 16-7, a grade modifier of 1 was assigned for physical examination as opposed to Dr. Murphy's grade modifier of 2 as Dr. Murphy did not report any findings of atrophy, range of motion deficits or alignment deformity or instability. Under Table 16-8, a grade modifier for clinical studies was found to be inapplicable as the clinical studies were used to confirm the diagnostic severity. Thus, the medical adviser concluded that appellant had functional history grade modifier 0, physical examination grade modifier 1 and grade modifier for clinical studies not applicable. He found a net adjustment of -1, which translated to grade B or 2 percent lower extremity impairment.

In a letter of March 5, 2012, OWCP vacated its June 10, 2011 decision. It noted that appellant was entitled to two percent permanent impairment of the right lower extremity based on the opinion of its medical adviser. Since he had already received one percent impairment of the right leg from the September 28, 2010 decision, appellant was entitled to receive an additional one percent impairment of the right lower extremity.

By decision dated March 12, 2012, OWCP granted appellant an additional one percent impairment of the right lower extremity. The period of the award ran from August 3 to 23, 2008 for 2.88 weeks.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations³ 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 shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁴ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

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).⁷ Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Evidence (GMPE) and Clinical Studies (GMCS).⁸ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with an OWCP medical adviser providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS

The sixth edition of the A.M.A., *Guides* provides that lower extremity impairments are to be classified by diagnosis. The classification is then adjusted by grade modifiers according to the formula noted above.¹¹ Appellant's accepted diagnosed condition was right knee sprain,

³ 20 C.F.R. § 10.404.

⁴ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁵ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ A.M.A., *Guides* 3-6 (6th ed. 2008).

⁸ *Id.* at 494-531.

⁹ *Id.* at 521.

¹⁰ See Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.808.6(d) (August 2002).

¹¹ *Supra* notes 8 and 9.

lateral collateral ligament and right knee meniscus tear. He underwent authorized arthroscopic surgery for partial medial meniscectomy on July 13, 2007. By decision dated September 28, 2010, OWCP awarded appellant one percent impairment of the right leg and he later claimed an increased schedule award. By decision dated March 19, 2012, it awarded him an additional one percent impairment of the right lower extremity, for a total impairment of two percent by according determinative weight to its medical adviser.

The Board finds that OWCP properly relied on the opinion of its medical adviser in determining that appellant had a total two percent right lower extremity impairment.

Dr. Murphy, appellant's physician, opined that appellant had three percent impairment for class 1 meniscal injury with chondromalacia while the medical adviser opined that appellant had two percent lower extremity impairment for the same diagnosis. Under Table 16-3, he assigned class 1 to appellant's meniscal injury with partial medial meniscectomy, which the medical adviser agreed. However, the medical adviser disagreed with Dr. Murphy's assignment of grade modifiers. Under Table 16-6, Dr. Murphy assigned grade modifier of 1 for functional history due to reduced functional activity with stairs, walking and running. The medical adviser opined that appellant had grade modifier 0 for functional history as Table 16-6 refers to antalgic gait and the objective and clinical evidence did not support that appellant had an antalgic gait. Under Table 16-7, Dr. Murphy assigned grade modifier of 2 for physical examination because of palpable crepitation of the patellofemoral joint with range of motion and positive compression test with difficulty getting up from squatting position. The medical adviser properly noted that Dr. Murphy did not report any findings of atrophy, range of motion deficits or alignment deformity or instability and assigned a grade 1 modifier for physical examination. While Dr. Murphy assigned a grade modifier 2 for clinical studies, the medical adviser properly explained that under Table 16-8 this was inapplicable as the clinical studies were used to confirm the diagnostic severity.¹² Thus, the weight of the medical evidence rests with the medical adviser who provided rationale and concluded that appellant had functional history grade modifier 0, physical examination grade modifier 1 and a grade modifier for clinical studies was not applicable. Under the net adjustment formula, (GMFH - CDX) (0-1) + (GMPE - CDX) (1-1) + (GMCS - CDX) (N/A) results in a net adjustment of -1, which translates to grade B or two percent lower extremity impairment for partial medial meniscectomy.

Appellant had previously received a schedule award based on a permanent impairment to the right lower extremity of one percent. When a current impairment duplicates a prior impairment, the schedule award benefits are reduced by the period of compensation paid under the schedule award for an earlier injury.¹³ Since the current impairment for the right leg is two percent and appellant was previously paid for one percent impairment, he is entitled to an additional award of one percent for a total award of two percent impairment. The Board finds that OWCP properly awarded an additional schedule award of one percent in this case.

¹² See A.M.A., *Guides* 520, 521 (if a particular criterion was used to determine impairment class, it may not be used again to determine the grade).

¹³ T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

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 appellant has no more than a two percent permanent impairment of the right lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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