

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

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**L.M., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
IMMIGRATION & CUSTOMS  
ENFORCEMENT, Long Beach, CA, Employer**

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**Docket No. 10-2111  
Issued: July 25, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 17, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) schedule award decision dated April 23, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she has more than a two percent permanent impairment of her right leg of one percent impairment of her left leg for which she received schedule awards.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On June 6, 2003 appellant, then a 48-year-old supervisory special agent, was injured when her left foot was caught in a seam on a floor where carpet and tile joined. She stopped work on June 6, 2003 and returned on June 16, 2003. OWCP accepted the claim for contusions of both knees, internal derangement of the left knee and contusion to the head. It subsequently accepted old bucket handle tear of the right medial meniscus and bilateral tear of the medial meniscus. Appellant underwent left knee arthroscopies in August 2003 and June 2004. She also underwent a partial medial meniscectomy at the right knee in September 2003. Appellant underwent additional right knee arthroscopic surgery in May 2006. She received compensation benefits.<sup>2</sup>

On November 12, 2008 appellant filed a claim for a schedule award.

In a report dated December 16, 2008, OWCP's medical adviser reviewed appellant's history of injury and treatment. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) to rate two percent impairment of the left leg for the partial meniscectomy and five percent impairment based upon evidence of roentgenographic narrowing and tenderness and crepitus. OWCP's medical adviser combined these impairments to find seven percent left leg impairment. He cautioned that this was not a final rating as the surgical reports from August 2003 and June 2004 required review to verify that appellant underwent a partial meniscectomy. OWCP's medical adviser noted that the right knee was not at maximum medical improvement as additional surgery was requested.

On March 6, 2009 OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon.

In a report dated May 1, 2009, Dr. Swartz described appellant's history of injury and treatment. He utilized A.M.A., *Guides* (6<sup>th</sup> ed. 2009). Dr. Swartz examined appellant and noted findings which included a painful and tender right heel, a mildly tender left heel and hyperalgesias in a stocking fashion in the right leg from the knee to the toes with pinwheel testing and normal sensation in the left leg. He found no atrophy in the lower extremities and good range of motion from 0 to 130 degrees in the right knee and 0 to 140 degrees in the left knee. Dr. Swartz also found patellofemoral compression and medial and lateral tenderness in both knees. For the right knee, he noted that the diagnoses included partial medial meniscectomy, partial medial meniscus tear and patellar chondromalacia. Dr. Swartz advised that the primary diagnosis would be the medial meniscus tear, which underwent a partial medial meniscectomy. He referred to the knee regional grid, Table 16-3 and determined that, for a meniscal injury with a partial medial meniscectomy or meniscus tear, appellant would be placed in a class 1 with a default value of two percent.<sup>3</sup>

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<sup>2</sup> On May 13, 2008 OWCP found that appellant failed, without good cause, to undergo vocational rehabilitation and reduced her compensation to reflect what her earnings would be as a claims examiner.

<sup>3</sup> A.M.A., *Guides* 509.

Dr. Swartz referred to Table 16-6 and noted that a Functional History (GMFH) grade modifier adjustment was 1 based on appellant's complaints of pain and a burning sensation in the right knee.<sup>4</sup> He referred to the physical examination adjustment pursuant to Table 16-7<sup>5</sup> and determined that she would be in a grade modifier 1 as she had limited squatting capacity and pain with McMurray's maneuver in the right knee and patellofemoral compression. Dr. Swartz advised that no atrophy was noted. He referred to Table 16-8 regarding Clinical Studies (GMCS) adjustments and advised that there were mild irregularities on the patellar surface of the right knee with her history of chondromalacia and accompanying surgery.<sup>6</sup> Dr. Swartz classified appellant with a mild problem which correlated to a grade 1 modifier. He noted applying the net adjustment formula and determined that she had one percent impairment of the right leg. For the left leg, Dr. Swartz referenced Table 16-3 on page 510 and advised that "under cruciate or collateral ligament injury," class 0 or no impairment because there was no instability. However, he also noted a GMFH modifier of 1, Physical Examination (GMPE) modifier of 0 and GMCS modifier of 1. Dr. Swartz applied the net adjustment formula to determine a net adjustment of 2. Based on this, he explained that his calculations would be "two up from the initial classification of 0, which would bring us into class 1, category C, which would be a [one percent] lower extremity impairment." Dr. Swartz opined that appellant had one percent impairment for both the right and left lower extremities.

In a July 11, 2009 report, OWCP's medical adviser agreed with Dr. Swartz, with the exception of the left lower extremity. He referred to Table 16-3, page 509, to determine that appellant had an impairment of two percent impairment of the right leg, due to her partial medial meniscectomy and one percent permanent impairment of the left leg due to "residual problems" in the left knee. OWCP's medical adviser explained the discrepancy for the right leg. He referred to Table 16-3 and determined that a patient who had undergone a partial medial meniscectomy, without an additional grade modifier would be entitled to an impairment of two percent to the lower extremity. OWCP's medical adviser indicated that appellant reached maximum medical improvement on May 1, 2009.

On July 22, 2009 OWCP granted appellant a schedule award for two percent impairment of the right leg and one percent impairment of the left leg. The award covered a period of 8.64 weeks from May 1 to June 30, 2009.

On August 15, 2009 appellant requested an oral hearing.

In a November 18, 2009 decision, OWCP's hearing representative affirmed OWCP's July 22, 2009 decision following a review of the written record.

In a letter dated December 14, 2009, appellant indicated that she had requested a hearing. She argued that OWCP should vacate the November 18, 2009 decision and provide her with a hearing. In a January 4, 2010 decision, OWCP vacated the November 18, 2009 decision and

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<sup>4</sup> *Id.* at 516.

<sup>5</sup> *Id.* at 517.

<sup>6</sup> *Id.* at 519.

remanded the case for appropriate action consistent with her request for a hearing. The hearing was held on February 1, 2010.<sup>7</sup>

By decision dated April 23, 2010, OWCP's hearing representative affirmed the July 22, 2009 decision.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>8</sup> and its implementing federal regulations<sup>9</sup> 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. However, FECA does not specify the manner in which the percentage of loss 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.<sup>10</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>11</sup>

The sixth edition requires identifying the impairment class for the Diagnosed Condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>12</sup> The net adjustment formula is GMFH-CDX + GMPE-CDX + GMCS-CDX.<sup>13</sup>

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.<sup>14</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for appellant's claim for contusions of both knees, internal derangement of the left knee, contusion to the head, old bucket handle tear of the medial

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<sup>7</sup> In a letter dated January 4, 2010, appellant requested a postponement of her hearing. She indicated that she wanted a copy of an audiotape from her examination with Dr. Swartz. Appellant alleged that Dr. Swartz either overlooked her medical record or omitted medical information. Her request for a postponement of the hearing was denied.

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.* at § 10.404(a).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>12</sup> A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>13</sup> *Id.* at 521.

<sup>14</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

meniscus right, tear of the medial meniscus bilateral. Appellant underwent left knee arthroscopy in August 2003 and June 2004. She also underwent a partial medial meniscectomy, right knee September 2003 and right knee arthroscopic surgery in May 2006.

In a May 1, 2009 report, Dr. Swartz, the second opinion physician, noted appellant's history, examined her and rated permanent impairment. The sixth edition of the A.M.A., *Guides* provides that lower extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula noted above.<sup>15</sup> In this case, regarding the right leg, Dr. Swartz referred to the knee regional grid, Table 16-3, page 509 and determined that, for a meniscal injury with a partial medial meniscectomy or meniscus tear, appellant would be placed in a class 1 with a default value of two percent. He also found grade modifiers of 1 for GMPE findings, functional complaints and GMCS under Table 16-6 through Table 16-8 and applied the net adjustment formula.<sup>16</sup> Dr. Swartz found a net adjustment of 0. He determined the class 1 impairment without adjustment for the right leg, equated to one percent impairment for the right leg. The Board notes that the default impairment, grade C, for a class 1 partial medial meniscectomy, page 509 of the A.M.A., *Guides*, is two percent impairment, not one percent. In his July 11, 2009 report, OWCP's medical adviser properly noted this error by Dr. Swartz and explained that appellant had two percent right leg impairment, which is what OWCP awarded her. The Board finds there is no medical evidence conforming with the A.M.A., *Guides* which establishes more than two percent impairment of the right leg.

The Board finds that the case is not in posture for a decision regarding permanent impairment of the left leg. For the left leg, Dr. Swartz referenced Table 16-3 on page 510, "under cruciate or collateral ligament injury." He found that appellant was class 0 or no impairment, as she had instability. This is correct as class 0 for cruciate or collateral ligament injury allows for no impairment. However, Dr. Swartz proceeded to find grade modifiers of 1 for GMFH and GMCS and advised that the net adjustment formula resulted in a net adjustment of two. Based on this, he stated that this moved appellant from class 0 to class 1 for impairment of one percent. However, movement from class 0 to class one based on grade modifiers is not allowed by the A.M.A., *Guides*. The A.M.A., *Guides* provide that, while grade modifiers allow movement within a class, they do not allow movement into a different class.<sup>17</sup> Furthermore, if class 1 were established for a cruciate or collateral ligament injury in Table 16-3, the range of impairment is 7 to 13 percent. A rating of one percent is not provided for a class 1 cruciate or collateral ligament injury in Table 16-3. Dr. Swartz provided no other reasoning to explain his left leg rating.

OWCP's medical adviser also found one percent impairment of the left leg but did not clearly explain his rating under the A.M.A., *Guides*. He referred to an unspecified provision in Table 16-3 at page 509 and only attributed impairment to "residual problems with the left knee." OWCP's medical adviser did not note a specific diagnosis in the A.M.A., *Guides*, reference any grade modifiers or indicate that he applied the net adjustment formula. As such, OWCP's

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<sup>15</sup> 20 C.F.R. § 10.404.

<sup>16</sup> See A.M.A., *Guides* 516, 521.

<sup>17</sup> *Id.* at 497.

medical adviser's opinion regarding left leg impairment is not in conformance with the A.M.A., *Guides*. As neither Dr. Swartz nor OWCP's medical adviser provided a left leg impairment rating in conformance with the A.M.A., *Guides*, their opinions are insufficient to establish the extent of left leg impairment.<sup>18</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>19</sup>

The Board will remand the case for further medical development regarding appellant's left leg impairment. OWCP should obtain a new and reasoned medical opinion regarding the extent of appellant's left leg impairment pursuant to the A.M.A., *Guides*. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant essentially expresses dissatisfaction with the results of her second opinion examination. The Board notes that there is no evidence to support the examination was improper. As noted, the evidence establishes that appellant has no more than two percent impairment of the right leg. Furthermore, the case is remanded for further medical development regarding permanent impairment of the left leg.<sup>20</sup>

### CONCLUSION

The Board finds that appellant has no more than two percent impairment of the right leg for which she received a schedule award. The Board further finds that the case is not in posture for decision with regards to appellant's left leg impairment.

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<sup>18</sup> See *I.F.*, Docket No. 08-2321 (issued May 21, 2009) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of diminished probative value in determining the extent of permanent impairment).

<sup>19</sup> *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

<sup>20</sup> Appellant contends that she would like to submit additional evidence in support of her claim. However, the Board cannot consider new evidence, as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may wish to submit additional evidence to OWCP for its consideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2010 Office of Workers' Compensation Programs decision is affirmed in part and set aside. The case is remanded for further action consistent with this decision.

Issued: July 25, 2011  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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