

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

C.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Newark, NJ, Employer)

Docket No. 11-480
Issued: September 26, 2011

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2010 appellant, through his attorney, filed a timely appeal of a September 17, 2010 Office of Workers' Compensation Programs' (OWCP) merit schedule award decision. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has permanent impairment of his right lower extremity entitling him to a schedule award.

On appeal counsel argued that appellant was deprived of property rights through OWCP's use of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 7, 2003 appellant, then a 52-year-old clerk, filed a traumatic injury claim alleging that he injured his right knee on that date picking up a sack of mail. On April 22, 2003 appellant underwent a magnetic resonance imaging (MRI) scan which demonstrated mild soft tissue swelling and a tear of the anterior lateral meniscus as well as mild to moderate chondromalacia patella and mild degenerative arthritic changes of the patellofemoral joint.

In a report dated April 10, 2003, Dr. Andre J. Pagliaro, a Board-certified orthopedic surgeon, stated that appellant was lifting and throwing a heavy bag of mail into a bin when he sustained a twisting injury to his right knee which caused him to fall and jam both knees into the bin. Appellant sought additional treatment on April 18, 2003 due to increased pain, discomfort and swelling of the right knee. On April 22, 2003 Dr. Pagliaro reviewed the result of the MRI scan and recommended arthroscopic evaluation.

OWCP accepted appellant's claim for right knee sprain on May 22, 2003. On March 3, 2009 appellant filed a claim for compensation requesting a schedule award. In a report dated January 6, 2009, Dr. Arthur Becan, a Board-certified orthopedic surgeon, reviewed appellant's medical history and examined his right knee finding no gross effusion. He listed range of motion as flexion/extension from 0 to 130 degrees. On manual muscle testing Dr. Becan found 4/5 strength in the right quadriceps and quadriceps circumference of 43 on the right and 46 on the left. He diagnosed sprain and strain of the right knee, torn right lateral meniscus and aggravation preexisting chondromalacia patella. Dr. Becan applied the fifth edition of the A.M.A., *Guides* and found right lower extremity of 16 percent. Dr. Henry J. Megalith, a district medical adviser, reviewed this report on March 19, 2009 and concurred with Dr. Becan's findings.

In a letter dated May 19, 2009, OWCP informed appellant that beginning May 1, 2009 the sixth edition of the A.M.A., *Guides* became effective for determining permanent impairment for schedule award purposes.² Counsel responded on May 27, 2009 and requested that OWCP issue a schedule award based on the fifth edition of the A.M.A., *Guides* as the claim was timely submitted for an award under that edition of the A.M.A., *Guides*.

By decision dated March 22, 2010, OWCP denied appellant's claim as he failed to submit evidence of his permanent impairment in accordance with the appropriate edition of the A.M.A., *Guides*. Counsel requested an oral hearing on March 30, 2010. On March 5, 2010 Dr. Becan addressed appellant's permanent impairment under the sixth edition of the A.M.A., *Guides* and found that appellant had a class 1 impairment of the right knee due to patellofemoral arthritis resulting in three percent impairment.³ Dr. Becan found that appellant had a function history modifier of two, physical examination modifier of three due to atrophy and clinical studies modifier of two due to his positive findings on MRI scan and applied the appropriate formula to

² For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

³ A.M.A., *Guides* 511, Table 16-3.

reach a grade modifier of four for an impairment rating of five percent. He stated that appellant reached maximum medical improvement on January 6, 2009.

Counsel appeared at the oral hearing on July 19, 2010 and argued that OWCP improperly failed to issue a schedule award based on the fifth edition of the A.M.A., *Guides* at the time Dr. Megalith issued his report on March 19, 2009. The hearing representative noted that OWCP did not have a copy of appellant's surgical report and that the condition upon which Dr. Becan based appellant's schedule award under the sixth edition was patella femoral arthritis which was not an accepted condition. He requested these documents.

On May 28, 2003 appellant underwent a right knee arthroscopy with resection of the lateral meniscus, medial femoral condyle chondroplasty and microfracture, chondroplasty patellofemoral joint and resection of hypertrophic synovium, loose bodies and hypertrophic plica.

By decision dated September 17, 2010, the Branch of Hearings and Review found that appellant was not entitled to a schedule award on the grounds that the sixth edition of the A.M.A., *Guides* did not provide for an impairment rating for the accepted condition of right knee sprain and that appellant was therefore not entitled to a schedule award for the preexisting condition of right knee patellofemoral arthritis.

LEGAL PRECEDENT

A claimant seeking compensation under FECA, has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.⁴ Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his employment.⁶ In other words, it is the claimant's burden of proof to establish that he sustained a permanent impairment of a scheduled member or function as a result of an employment injury.⁷

The schedule award provision of FECA⁸ and its implementing regulations⁹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method

⁴ *Tammy L. Meehan*, 53 ECAB 229, 230 (2001).

⁵ 5 U.S.C. § 8107.

⁶ *Veronica Williams*, 56 ECAB 367 (2005).

⁷ *Meehan*, *supra* note 4.

⁸ 5 U.S.C. §§ 8101-8193, 8107.

⁹ 20 C.F.R. § 10.404.

used in making such determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.¹⁰

ANALYSIS

In this case, OWCP accepted appellant's claim for right knee sprain on May 22, 2003. While Dr. Becan attributed appellant's permanent impairment to right knee patella femoral arthritis, OWCP has not accepted this condition as causally related to appellant's employment injury of April 7, 2003.

The medical evidence supporting appellant's claim for a schedule award consists of the reports of Dr. Becan who diagnosed strain and sprain of the right knee, but does not provide an impairment rating based on the accepted condition. Instead Dr. Becan based his impairment rating only on patellofemoral arthritis. He did not opine that this was a preexisting condition instead listing the diagnoses of aggravation of preexisting chondromalacia patella. Dr. Becan did not explain why he felt that the implicated condition of patellofemoral arthritis was due to the accepted employment injury. The A.M.A., *Guides* provide that this condition may be rated due to either a full thickness articular cartilage defect or ununited osteochondral fracture or based on the cartilage interval from two millimeters to no cartilage interval.¹¹ Dr. Becan does not describe these findings in his report. As his report does not comport with the A.M.A., *Guides* in regard to his finding of patella femoral arthritis, this report is not sufficient to meet appellant's burden of proof.

Furthermore, Dr. Becan did not provide an impairment rating based on the accepted condition of strain. Consequently, there is no medical evidence in the record which addresses appellant's permanent impairment, if any, resulting from the strain accepted by OWCP as employment related. The Board notes that not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.¹² The Board further notes that while Dr. Becan's report suggests that the diagnosed condition of patella femoral arthritis predated the April 7, 2003 employment injury and thus this condition would be considered in evaluating whether he has any permanent impairment as a result of the accepted conditions of strain of the right knee,¹³ where the evidence does not demonstrate any permanent impairment caused by the

¹⁰ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹¹ A.M.A., *Guides* 511, Table 16-3.

¹² *Thomas P. Lavin*, 57 ECAB 353, 358 (2006).

¹³ When assessing the percentage of impairment of those conditions accepted by OWCP as job related, any preexisting permanent impairment of the same member is included. *J.H.*, 59 ECAB 377, 380 (2008).

accepted occupational exposure, the claim is not ripe for consideration of any preexisting impairment.¹⁴

On appeal, appellant asserts that she has property rights in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.¹⁵ In this case, appellant is simply making a claim for a schedule award. She was not in receipt of schedule award benefits nor was OWCP attempting to terminate benefits. Appellant has no vested right to a schedule award under the fifth edition of the A.M.A., *Guides*.

Appellant argued that there was a delay in the adjudication of the claim for a schedule award, which deprived him of due process rights regarding a determination under the fifth edition of the A.M.A., *Guides*. The Board does not find that there was any delay in the adjudication of the schedule award claim. As noted by the hearing representative, the record before OWCP did not contain the operative report prior to May 9, 2009. Dr. Becan addressed this report in formulating his impairment rating and OWCP could not reasonably determine appellant's permanent impairment without reviewing this report. In *Harry Butler*,¹⁶ 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.¹⁷ 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*.¹⁸ 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. OWCP properly determined appellant's lower extremity permanent impairment under that edition.

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.

¹⁴ *Lavin*, *supra* note 12.

¹⁵ In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient and due process would not require an evidentiary hearing.

¹⁶ 43 ECAB 859 (1992).

¹⁷ *Id.* at 866.

¹⁸ FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

CONCLUSION

The Board finds that appellant has not submitted the necessary detailed medical opinion evidence to establish his permanent impairment as a result of his accepted right knee strain.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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