

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

E.W., Appellant

and

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

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**Docket No. 13-506
Issued: May 13, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2013 appellant, through her attorney, filed a timely appeal from the September 26, 2012 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.

ISSUE

The issue is whether appellant met her burden of proof to establish a schedule award for permanent impairment of her right leg.

FACTUAL HISTORY

OWCP accepted that on September 10, 1999 appellant, then a 22-year-old letter carrier, sustained a right knee sprain when she twisted her right knee while getting out of a truck at work. It authorized the performance of plicectomy and revision of the synovial shelf of her right knee

¹ 5 U.S.C. §§ 8101-8193.

on September 25, 2001.² The surgery was performed by Dr. Alfred Greisman, an attending Board-certified orthopedic surgeon.

The results of May 8, 2001 magnetic resonance imaging (MRI) scan testing of appellant's right knee revealed mucoid degeneration but no evidence of patellar chondromalacia. It was noted that the joint space demonstrated no loose intra-articular bodies. In a March 31, 2003 note, Dr. Greisman indicated that recent x-rays of appellant's right knee showed "no evidence of any arthritis."

In an October 20, 2004 report, Dr. Nicholas Diamond, an attending osteopath, reported the findings of his examination on that date and determined that appellant had 30 percent permanent impairment of her right leg under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).³

On February 24, 2011 appellant filed a claim for a schedule award due to her September 1999 work injury.

In a May 25, 2011 decision, OWCP denied appellant's claim for schedule award compensation finding that the October 20, 2004 impairment rating of Dr. Diamond was not calculated under the edition of the A.M.A., *Guides* then in effect, *i.e.*, the sixth edition which became effective May 1, 2009.

In a May 16, 2011 report, Dr. Diamond applied the standards of the sixth edition of the A.M.A., *Guides* to the findings of the physical examination of appellant's right knee that he conducted on October 20, 2004.⁴ He determined that appellant had nine percent permanent impairment of her right leg noting that, under Table 16-3 (Knee Regional Grid) on page 511, she had a diagnosis-based impairment for "primary knee joint arthritis." Dr. Diamond found that appellant's arthritic condition fell under the class 1 default value of seven percent, but that modifiers raised the impairment to nine percent for the right leg.

In a December 9, 2011 decision, an OWCP hearing representative set aside OWCP's May 25, 2011 decision and remanded the case to OWCP for further development. She directed OWCP to have an OWCP medical adviser review the May 16, 2011 impairment rating of Dr. Diamond.

On January 11, 2012 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, determined that the May 16, 2011 report of Dr. Diamond did not establish appellant's entitlement to schedule award compensation. He stated:

"Dr. Diamond's calculations are based upon an old examination done in 2004 and are based upon a diagnosis that is not borne out by the imaging studies done years ago. We do not know if she has primary knee joint arthritis at this time or not.

² Appellant previously underwent right knee arthroscopic surgery with joint aspiration on April 17, 2000.

³ Dr. Diamond found that the impairment was due to muscle weakness and pain in appellant's right leg.

⁴ OWCP did not receive the report until September 22, 2011.

The surgery only revealed a plica and synovial shelf which are relatively insignificant findings. Some chondromalacia was found. Arthritis of the knee was never accepted.”⁵

In a February 21, 2012 letter, OWCP requested that Dr. Diamond provide a supplemental report concerning impairment within 30 days of the letter. Dr. Diamond was asked to provide any diagnostic testing results which confirmed the existence of primary joint arthritis of the right knee. He did not respond within the allotted time.

In an April 9, 2012 decision, OWCP denied appellant’s claim for entitlement to schedule award compensation noting that the opinion of Dr. Magliato explained why the May 16, 2011 impairment rating of Dr. Diamond did not establish his entitlement to schedule award compensation.

Appellant requested a hearing with an OWCP hearing representative. At the July 10, 2012 hearing, appellant’s counsel at the time argued that appellant’s September 10, 1999 work injury constituted more than just a right knee sprain. She indicated that appellant filed a schedule award claim in January 2005 but that OWCP unreasonably delayed in issuing a decision.

In a September 26, 2012 decision, OWCP’s hearing representative affirmed OWCP’s April 9, 2012 decision. She discussed the impairment rating of Dr. Diamond noting the old examination findings and the fact that primary knee joint arthritis had not been accepted as a preexisting impairment or as being related to the September 10, 1999 work injury.

LEGAL PRECEDENT

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 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.⁸ The effective date of the sixth edition of

⁵ Dr. Magliato indicated that he would get a second opinion and an impairment rating under the sixth edition of the A.M.A., *Guides*.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

the A.M.A., *Guides* is May 1, 2009.⁹ The Board has held that preexisting impairments are to be included in impairment ratings.¹⁰

ANALYSIS

OWCP accepted that on September 10, 1999 appellant sustained a right knee sprain when she twisted her right knee while getting out of a truck at work.¹¹ On February 24, 2011 appellant filed a claim for a schedule award due to her September 1999 work injury.¹² OWCP found that appellant did not meet her burden of proof to establish entitlement to schedule award compensation for permanent impairment of her right leg.

Before OWCP and on appeal, counsel argued that a May 16, 2011 impairment rating of Dr. Diamond, an attending osteopath, established appellant's claim. The Board finds that this assessment by Dr. Diamond does not establish appellant's entitlement to schedule award compensation. In his May 16, 2011 report, Dr. Diamond applied the standards of the sixth edition of the A.M.A., *Guides* to find that appellant had a nine percent permanent impairment of her right leg.¹³ He based his rating on his opinion that, under Table 16-3 (Knee Regional Grid) on page 511, appellant had a diagnosis-based impairment for "primary knee joint arthritis." The Board notes, however, that Dr. Diamond failed to use reasonably current examination findings on which to base his impairment rating. Rather, he used findings from October 20, 2004, a time more than six years prior to his May 2011 impairment rating.¹⁴ In addition, the record does not establish preexisting right knee arthritis due to her September 10, 1999 work injury.¹⁵ In fact, the record

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ *Dale B. Larson*, 41 EACB 481 (1990).

¹¹ OWCP authorized the performance of arthroscopic surgery on appellant's right knee on September 25, 2011, but it did not accept any additional work conditions as a result of authorizing surgery. The surgery was performed by Dr. Greisman, an attending Board-certified orthopedic surgeon.

¹² Counsel argued that appellant had filed a schedule award claim in 2005 and that OWCP unnecessarily delayed in rendering a decision. The record does not contain evidence of such a claim and appellant has not submitted evidence and/or argument showing improper actions by OWCP in this regard. OWCP acted in a timely manner after receiving the February 24, 2011 schedule award claim.

¹³ The sixth edition was in effect at the time. *See supra* note 9.

¹⁴ *See W.M.*, Docket No. 12-773 (issued March 29, 2013) (where the Board found that a physician's 2010 impairment opinion, seeking to update a prior report based on 2004 findings, constituted stale medical evidence); *P.S.*, Docket No. 12-649 (issued February 14, 2013) (the Board found a physician's impairment opinion of reduced probative value where the physician relied on three-year-old findings to update his impairment rating).

¹⁵ *See supra* note 10. *But see Thomas P. Lavin*, 57 ECAB 353 (2006) (where the claimant did not demonstrate any permanent impairment caused by the accepted occupational exposure, the claim was not ripe for consideration of any preexisting impairment).

contains evidence suggesting the opposite conclusion.¹⁶ Therefore, Dr. Diamond could not base his impairment rating on such a nonwork-related and after-acquired condition.

Moreover, Dr. Magliato, a Board-certified orthopedic surgeon serving as an OWCP hearing representative, determined in a January 11, 2012 report that the May 16, 2011 rating of Dr. Diamond did not establish appellant's entitlement to schedule award compensation due to the age of the findings and the failure to establish arthritis as a work-related or preexisting condition.¹⁷

For these reasons, appellant has not shown that she is entitled to schedule award compensation for permanent impairment of her right leg and OWCP properly denied her claim. She 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 did not meet her burden of proof to establish that she is entitled to schedule award compensation for permanent impairment of her right leg.

¹⁶ The results of May 8, 2001 MRI scan testing of appellant's right knee revealed muroid degeneration, but no evidence of patellar chondromalacia. It was noted that the joint space demonstrated no loose intra-articular bodies. In a March 31, 2003 note, Dr. Greisman indicated that recent x-rays of appellant's right knee showed "no evidence of any arthritis."

¹⁷ Counsel argued on appeal that OWCP should have followed Dr. Magliato's suggestion to obtain a second opinion, but OWCP appropriately developed the case by requesting that Dr. Diamond provide an additional report. Dr. Diamond did not respond to this request within the allotted time.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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