

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

E.F., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 13-1914
Issued: January 17, 2014**

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 August 19, 2013 appellant filed a timely appeal from a March 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a July 17, 2013 nonmerit decision of 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.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than a 31 percent permanent impairment of his right leg, for which he received a schedule award; and (2) whether OWCP properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on November 25, 1992 appellant, then a 37-year-old marine insulator, sustained a work-related tear of the medial meniscus of his right knee, unspecified osteoarthritis and effusion of the joint of his lower right leg. On September 7, 2010 he underwent an arthroscopy of his right knee and, on September 9, 2011, he underwent a total right knee arthroplasty. These surgeries were authorized by OWCP.

By decision dated October 10, 1996, OWCP granted appellant a schedule award for 17 percent permanent impairment of his right leg. In a July 6, 2000 decision, it granted him a schedule award for an additional 10 percent impairment of his right leg, such that he was compensated for a total right leg impairment of 27 percent.

On October 18, 2012 appellant filed a claim for an increased schedule award.

In an October 31, 2012 report, Dr. Mark A. Bewley, an attending Board-certified orthopedic surgeon, stated that appellant had a right total knee arthroplasty and that he had reached maximum medical improvement on March 14, 2012. He noted that, based on Table 16-3 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) appellant's total knee arthroplasty fell under class 2, grade C and constituted 25 percent permanent impairment of his right leg.²

In a January 30, 2013 report, Dr. Lawrence A. Manning, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that, under Table 16-3 on page 511 of the sixth edition of the A.M.A., *Guides*, appellant's mild motion deficit placed appellant under a "fair result" for a diagnosis-based rating for his right total knee arthroplasty.³ The impairment ratings for such a result ranged from 31 to 43 percent, but calculation of grade modifiers and application of the Net Adjustment Formula meant that appellant fell under a class 3, grade A category which equaled a 31 percent permanent impairment of his right leg. Dr. Manning stated:

"In summary, based on the information at hand, the claimant would have 31 percent permanent partial impairment of the right lower extremity. The date of [maximum medical improvement] is September 8, 2012, one year from the date of knee surgery. It is noted that the claimant received a schedule award of 27 percent for the right lower extremity for the period January 5 to July 24, 2000. This impairment was given for factors other than the knee replacement. Thirty one percent is based on his knee replacement and it would be considered in addition to the impairment given for factors not related to his knee replacement."

² Dr. Bewley stated that appellant had 0 to 100 degrees of right knee flexion. He indicated that appellant was involved in a nonwork-related automobile accident on March 23, 2012 and noted that a revision right total knee arthroplasty was scheduled. However, Dr. Bewley later determined that appellant's right knee hardware was intact and it does not appear that additional surgery was carried out.

³ Dr. Manning indicated that the 0 to 100 degrees of right knee flexion reported by Dr. Bewley meant that, under Table 16-23 on page 549, appellant had a mild problem.

OWCP requested that Dr. Manning clarify whether his rating of 31 percent impairment of the right leg included the 27 percent award previously received for the right leg. In a supplemental report dated February 23, 2013, Dr. Manning stated that, based on information he received about appellant's prior receipt of schedule award compensation, his opinion was that appellant had a total right knee impairment of 31 percent and that he should receive an additional award of four percent to reflect the schedule award compensation he already received for the right knee.

In a March 7, 2013 decision, OWCP granted appellant a schedule award for an additional four percent permanent impairment of his right leg, such that he was compensated for a total right leg impairment of 31 percent. The award ran for 11.52 weeks from September 8 to November 27, 2012.

In a June 13, 2013 report, Dr. Markham indicated that appellant would be sent for an impairment rating.

In a form completed on July 1, 2013 and received on July 8, 2013, appellant requested reconsideration of OWCP's March 7, 2013 schedule award decision.⁴

In a July 13, 2013 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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.⁷ For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.⁸

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower

⁴ Appellant indicated that medical documentation had already been sent off by his physical therapy office, but he did not identify the nature of this evidence.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ See FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.⁹ After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a work-related tear of the medial meniscus of his right knee, unspecified osteoarthritis of his lower right leg and effusion of the joint of his lower right leg. Appellant received schedule award compensation for 31 percent total permanent impairment of his right leg. The Board finds that he has not established entitlement to additional schedule award compensation.

In January 30 and February 23, 2013 reports, Dr. Manning, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, properly determined that appellant had 31 percent permanent impairment of his right leg. He indicated that, under Table 16-3 on page 511 of the sixth edition of the A.M.A., *Guides*, appellant's mild motion deficit placed him under a "fair result" for a diagnosis-based rating for his right total knee arthroplasty.¹¹ Dr. Manning explained that calculation of grade modifiers and application of the Net Adjustment Formula meant that appellant fell under a class 3, grade A category which equaled 31 percent permanent impairment of his right leg.¹² As appellant had previously received schedule awards totaling 27 percent leg impairment attributable to his right knee condition, OWCP properly compensated appellant for an additional four percent right leg impairment.¹³ Appellant did not submit medical evidence showing that he has a greater percentage of right knee impairment.

Therefore, appellant has not shown that he has more than 31 percent permanent impairment of his right leg and OWCP properly denied his claim for additional schedule award compensation. 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.

⁹ See *id.* at (6th ed. 2009) 509-11.

¹⁰ *Id.* at 515-22.

¹¹ A.M.A., *Guides* 511, Table 16-3 (Knee Regional Grid).

¹² See *supra* notes 9 and 10.

¹³ See 5 U.S.C. § 8108; 20 C.F.R. § 10.404(d) (provides for reduction of the period of schedule award compensation if there was an earlier schedule award for impairment to the same member or function and the later impairment would, in whole or part, duplicate the compensation payable for preexisting impairment).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁷ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While a reopening of a case may be predicated solely on a legal premise not previously considered such reopening is not required where the legal contention does not have a reasonable color of validity.²⁰

ANALYSIS -- ISSUE 2

OWCP issued a schedule award decision on March 7, 2013. Appellant requested reconsideration of this decision on July 8, 2013. The issue now presented on appeal is whether he met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Appellant submitted a June 13, 2013 report in which Dr. Markham indicated that he would be sent for an impairment rating, but no such impairment rating was submitted to OWCP in support of the reconsideration request.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or

¹⁴ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁰ *John F. Critz*, 44 ECAB 788, 794 (1993).

submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than 31 percent permanent impairment of his right leg, for which he received a schedule award. The Board further finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 17 and March 7, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 17, 2014
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