

FACTUAL HISTORY

On January 11, 2007 appellant, then a 50-year-old aircraft mechanic, filed a traumatic injury claim, asserting that he slipped while attempting to enter an aircraft cockpit and injured his right knee and leg. He stopped work that day. OWCP accepted that appellant sustained a sprain of the medial collateral ligament of the right knee. On April 24, 2007 Dr. David A. Bundens, a Board-certified orthopedic surgeon, performed arthroscopy and partial medial meniscectomy. Appellant received appropriate compensation and on July 2, 2007 returned to full duty.³

On November 20, 2008 appellant, through his attorney, requested a schedule award. He submitted a September 4, 2008 report in which Dr. Nicholas Diamond, an osteopath, provided physical examination findings and diagnosed post-traumatic chondromalacia patella of the right knee. Dr. Diamond advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant had a motor strength deficit of the right quadriceps muscle of 12 percent, a motor strength deficit of the right gastrocnemius muscle of 17 percent, for a combined right lower extremity impairment of 23 percent. He added 3 percent impairment for pain, yielding a total 26 percent right lower extremity impairment and found that maximum medical improvement was reached on September 4, 2008.

On December 17, 2008 Dr. Henry J. Magliato, an OWCP medical adviser who is a Board-certified orthopedist, reviewed the case record and agreed with Dr. Diamond's assessment that appellant had a 26 percent right lower extremity impairment.

By letter dated July 13, 2009, OWCP asked Dr. Diamond to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.⁴ Dr. Diamond resubmitted his September 4, 2008 report, updated on July 8, 2009. He advised that, under Table 16-3 of the sixth edition of the A.M.A., *Guides*, appellant had a class 1 impairment due to partial medial meniscectomy which yielded a two percent impairment. Dr. Diamond then used the net adjustment formula and found an additional one percent impairment, for a total three percent right lower extremity impairment, with a date of maximum medical improvement of September 4, 2008.

In a September 14, 2009 report, Dr. Andrew A. Merola, OWCP's medical adviser who is Board-certified in orthopedic surgery, noted his review of the record. He agreed with Dr. Diamond's assessment that appellant established a three percent right lower extremity impairment, with September 4, 2008, the date of maximum medical improvement.

On March 22, 2010 appellant was granted a schedule award for a three percent permanent impairment of the right lower extremity, for a total of 8.64 weeks, to run from September 4 to November 3, 2008. On March 26, 2010, through his attorney, he requested a review of the written record. In a July 28, 2010 decision, OWCP's hearing representative affirmed the March 22, 2010 decision.

³ By decision dated December 18, 2007, OWCP found an overpayment in compensation in the amount of \$623.88. Appellant repaid the overpayment.

⁴ A.M.A., *Guides* (6th ed. 2008).

LEGAL PRECEDENT

The schedule award provision of FECA,⁵ and its implementing federal regulations,⁶ 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.⁷ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸ For decisions issued after May 1, 2009, the sixth edition will be used.⁹

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).¹⁰ 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 Examination (GMPE) and Clinical Studies (GMCS).¹¹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹² Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹³

OWCP 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.¹⁴ In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.¹⁵

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

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

¹⁰ A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

¹¹ *Id.* at 494-531.

¹² *Id.* at 521.

¹³ *Id.* at 23-28.

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

¹⁵ *Peter C. Belkind*, 56 ECAB 580 (2005).

ANALYSIS

On appeal counsel argued that OWCP deprived appellant of due process of law and property rights by failing to adjudicate the schedule award claim in a timely manner pursuant to the fifth edition of the A.M.A., *Guides*. He cited the cases *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases, however, hold that a claimant who is in the receipt of benefits could not have those benefits terminated without procedural due process.¹⁶ In this case, appellant made a claim for a schedule award. He was not in the receipt of schedule award benefits and OWCP did not attempt to terminate his benefits.

Appellant further asserted that the delay in adjudicating appellant's schedule award deprived him of due process. In *Harry D. Butler*,¹⁷ 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.¹⁸ 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*.¹⁹ 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 did not abuse its discretion in determining appellant's right lower extremity permanent impairment under that edition.

The Board notes that appellant did not challenge the impairment percentage granted under the sixth edition. The record supports that Dr. Diamond properly rated appellant's lower extremity impairment under Table 16-3, Knee Regional Grid, as class 1, due to his partial meniscectomy. This has a default value of two percent.²⁰ Dr. Diamond then utilized the net adjustment formula and found an additional one percent impairment, for a total three percent right lower extremity impairment. Dr. Merola, OWCP's medical adviser, concurred with this impairment rating. There is no probative medical evidence of record to establish greater than a three percent impairment of the right lower extremity.

For these reasons, the Board finds that appellant does not have more than a three percent impairment of the right lower extremity.

¹⁶ In *Goldberg*, appellant was in the receipt of public assistance, and in *Mathews*, in the receipt of social security benefits.

¹⁷ 43 ECAB 859 (1992).

¹⁸ *Id.* at 866; 20 C.F.R. § 10.404(a).

¹⁹ FECA Bulletin No. 09-03, *supra* note 9. The FECA Bulletin was incorporated into the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

²⁰ A.M.A., *Guides*, *supra* note 4 at 509.

Appellant may request an increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in an increased impairment.²¹

CONCLUSION

The Board finds that appellant has not established that he has right lower extremity impairment greater than three percent, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 5, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ *J.S.*, Docket No. 10-1712 (issued March 23, 2011).