

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

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**J.H., Appellant** )

**and** )

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

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**Docket No. 11-607**  
**Issued: December 7, 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 January 13, 2011 appellant, through his representative, filed a timely appeal from the October 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.

**ISSUE**

The issue is whether appellant has more than a 13 percent impairment of his right lower extremity, for which he received a schedule award.

**FACTUAL HISTORY**

Appellant, a 22-year-old baggage screener, experienced pain in his right knee on May 24, 2004, while picking up a bag from a table. He filed a claim for benefits, which was accepted for

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

torn anterior cruciate ligament (ACL) and sprained right knee. Appellant underwent reconstructive surgeries to ameliorate his torn ACL on August 13, 2004 and March 17, 2006.

On June 10, 2008 appellant, through counsel, requested a schedule award based on a partial loss of use of his right lower extremity.

In a March 12, 2008 report, received by OWCP on June 17, 2008, Dr. David O. Weiss, an osteopath, found that appellant had a 19 percent permanent impairment of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*).

By letter dated May 28, 2009, OWCP advised Dr. Weiss that he should submit a new report and impairment rating in conformance with the updated, sixth edition of the A.M.A., *Guides*, which became effective as of May 1, 2009.<sup>2</sup>

In an October 8, 2009 report, Dr. Weiss found that appellant had a 13 percent permanent impairment of the right lower extremity pursuant to the A.M.A., *Guides* (sixth edition). He found that appellant's partial right knee meniscectomy rated a class 1 default impairment, 10 percent impairment at Table 16-9, page 520, which yielded a grade 3 impairment, for a severe deficit, under the knee regional grid at Table 16-3, page 509 of the A.M.A., *Guides*.<sup>3</sup> Applying the net adjustment, grade modifier formula at pages 521-522 of the A.M.A., *Guides*,<sup>4</sup> Dr. Weiss found that the grade modifier at Table 16-6, page 516 for functional history was one, for a mild problem; the grade modifier at Table 16-7, page 517 for physical examination was three, for moderate atrophy and the grade modifier at Table 16-8, page 519 for clinical studies was a three, based on the most recent magnetic resonance imaging scan results. He then subtracted the grade modifier of one from each of these calculations, for a net adjusted grade modifier of zero for functional history, grade modifier of two for physical examination and grade modifier of two for clinical studies. Dr. Weiss added the totals of two and two for a net adjusted right extremity impairment of four. He concluded that the overall, net adjusted impairment for the right lower extremity was 13 percent.

In a January 31, 2010 report, OWCP's medical adviser adopted Dr. Weiss' findings and conclusions and found that appellant had a 13 percent impairment of the right lower extremity.

By decision dated May 27, 2010, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right lower extremity for a total of 37.44 weeks of compensation during the period March 12 to November 29, 2008.

By letter dated June 14, 2010, counsel requested a review of the written record. He contended that OWCP failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides* and thereby deprived appellant of his due process rights and

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). As of May 1, 2009, the sixth edition will be used. FECA Bulletin No. 09-03 (issued March 15, 2008).

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

<sup>4</sup> *Id.* at 521-522.

benefits under FECA. Counsel argued that its delay in adjudicating this schedule award claim reduced the amount of appellant's schedule award; he noted that the adoption of the sixth edition of the A.M.A., *Guides* substantially revised the evaluation methods used in previous editions of the A.M.A., *Guides* and consequently resulted in a dramatic decrease in the percentage of impairment calculated in schedule awards.

By decision dated October 4, 2010, OWCP's hearing representative affirmed the May 27, 2010 decision.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>5</sup> and its implementing regulations<sup>6</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 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.<sup>7</sup> The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.<sup>8</sup>

### **ANALYSIS**

In its May 27, 2010 decision OWCP granted appellant a schedule award for a 13 percent right lower extremity impairment. The section of the A.M.A., *Guides* which rates diagnosis-based impairments for the lower extremities is located at Chapter 16, which states at page 497, section 16.2a that impairments are defined by class and grade. This section states:

“The Impairment Class (IC) is determined first, by using the corresponding diagnosis-based regional grid. The grade is then determined using the adjustment grids.

“Once the impairment class has been determined, based on the diagnosis, the grade is initially assigned the default value, C. The final impairment grade, within the class, is calculated using the grade modifiers or [nonkey] factors, as described in [s]ection 16.3. Grade modifiers include functional history, physical examination and clinical studies. The grade modifiers are used on the net adjustment formula described in [s]ection 16.3d to calculate a net adjustment.

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>7</sup> *Id.*

<sup>8</sup> *Veronica Williams*, 56 ECAB 367, 370 (2005).

The final impairment grade is determined by adjusting the grade up or down the default value C. by the calculated net adjustment.”<sup>9</sup>

Using the formula above and the net adjustment formula outlined at pages 516-18 and 521-22 of the A.M.A., *Guides*, Dr. Weiss properly found that appellant had a class 1 default impairment and a grade 3 impairment for his partial meniscectomy; a grade 1 impairment for functional history; a grade 3 impairment for physical examination; and a grade 3 impairment for clinical studies. He then applied the net adjustment formula at pages 521-22 of the A.M.A., *Guides*. Using the net adjustment formula for functional history at Table 16-6 and physical examination and clinical studies at Table 16-7, Dr. Weiss subtracted the grade modifier of one from each of these categories, then added the results for an adjusted net impairment of four. He combined these figures and found that appellant had an adjusted 13 percent right lower extremity impairment.

The Board finds that appellant has a 13 percent permanent impairment of his right lower extremity, because this rating was based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*. Appellant did not submit any medical evidence to support an additional schedule award greater than 13 percent for the right lower extremity, the Board will affirm OWCP’s October 4, 2010 decision.

On appeal, appellant’s attorney asserts, as he did below, that he has a property right in a schedule award benefit under the fifth edition of the A.M.A., *Guides* and that 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). In *Harry D. Butler*,<sup>10</sup> 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.<sup>11</sup> 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*.<sup>12</sup> 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.

The Board finds that appellant has a 13 percent permanent impairment of his right lower extremity, as this rating was based on the applicable protocols and tables of the sixth edition of the A.M.A., *Guides*. As appellant did not submit any medical evidence to support an additional schedule award greater than the 13 percent for the right lower extremity already awarded, the Board will affirm OWCP’s October 4, 2010 decision.

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<sup>9</sup> A.M.A., *Guides* 497.

<sup>10</sup> 43 ECAB 859 (1992).

<sup>11</sup> *Id.* at 866.

<sup>12</sup> FECA Bulletin No. 09-03 (issued March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

**CONCLUSION**

The Board finds that appellant has no more than a 13 percent permanent impairment of the right lower extremity, for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' October 4, 2010 decision is affirmed.

Issued: December 7, 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