

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 11-834
Issued: December 19, 2011**

Appearances:
Christopher D. Brown, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2011 appellant, through his attorney, filed a timely appeal from a November 18, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) rescinding an increased schedule award. 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The issue is whether OWCP properly rescinded its finding that appellant was entitled to an additional schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 27, 1984 appellant, then a 44-year-old carrier, sustained a torn medial meniscus of the left knee in the performance of duty. On January 18, 1985 appellant underwent a partial medial meniscectomy.

By decision dated September 10, 1990, OWCP granted appellant a schedule award for a 54 percent permanent impairment of the left leg.² The period of the award ran for 155.52 weeks from May 25, 1990 to May 17, 1993. In decisions dated October 25, 2001 and October 27, 2005, OWCP denied appellant's request for an additional schedule award.³

In September 2003 appellant underwent a total replacement of the left knee. In July 2006 he underwent a revision of the left total knee replacement.

In an impairment evaluation dated February 11, 2008, Dr. Robert W. Macht, a surgeon, advised that appellant had a 75 percent permanent impairment of the left lower extremity according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). On May 30, 2008 Dr. Hampton Jackson, Jr., a Board-certified orthopedic surgeon, opined that he had a 71 percent permanent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*.

On June 16, 2008 appellant, through his attorney, requested an increased schedule award.

On November 25, 2008 an OWCP medical adviser reviewed the evidence and found that appellant had a 37 percent permanent impairment of the left lower extremity using Table 17-33, page 547 of the A.M.A., *Guides*.

OWCP determined that a conflict existed between Dr. Jackson and OWCP's medical adviser regarding the extent of appellant's injury-related impairment. It referred him to Dr. Sankara Kothakota, a Board-certified orthopedic surgeon, for an impartial medical examination. On January 30, 2009 Dr. Kothakota diagnosed post total left knee arthroplasty with a satisfactory result. He stated:

“Examination of the left knee reveals very minimal swelling. [Appellant] can flex up to 90 degrees or [a] little beyond that with no pain. There is very minimal mediolateral and anteroposterior laxity. The only complaint [appellant] has is occasional pain and ache particularly going up and down the steps. He does not have any fixed flexion contracture. There is no evidence of any extension lag. Both clinically and radiologically, implants are very satisfactorily aligned. Limb lengths were equal on both sides. There is no neurologic deficit. There is a minimal amount of wasting. Strength is between grade 4 and grade 5 in the left lower extremity.”

² OWCP amended the September 10, 1990 schedule award on August 4, 1992 to reflect that the award was for an impairment of the left rather than right leg.

³ In a decision dated February 20, 1997, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a distribution clerk fairly and reasonably represented his wage-earning capacity.

Dr. Kothakota provided points for appellant's slight pain on the stairs, range of motion, minimal laxity. He stated that appellant had a 50 percent impairment of the left lower extremity for a fair result from a total knee replacement according to Table 17-33, page 547 of the fifth edition of the A.M.A., *Guides*.

On March 6, 2009 an OWCP medical adviser concurred with Dr. Kothakota's finding that appellant had a 50 percent left lower extremity impairment using Table 17-33 of the A.M.A., *Guides*. He stated:

"I reviewed the records and found the [OWCP medical adviser's] report dated May 25, 1990 that advises [a] 54 [percent] impairment of the lower extremity. This was not given for the knee replacement, but rather for range of motion, partial meniscectomy, degenerative arthritis, varus deformity of the knee and anterior cruciate ligament deficiency. Therefore, the 50 [percent] impairment for the knee replacement is not reflected in the previous award and should be in addition to the previous award."

On May 22, 2009 appellant's attorney requested that an OWCP medical adviser review the evidence and provide an opinion on the extent of impairment pursuant to the sixth edition of the A.M.A., *Guides*. On June 6, 2009 the medical adviser determined that appellant had a 37 percent left lower extremity impairment for a total knee replacement with fair results using Table 16-3, page 511 of the sixth edition of the A.M.A., *Guides*.

By decision dated August 12, 2009, OWCP denied appellant's claim for an increased schedule award. It found that the evidence did not establish that he had more than the amount previously awarded for his left lower extremity impairment.

On August 14, 2009 appellant submitted a September 28, 2009 impairment evaluation from an orthopedic committee composed of Dr. Henry M. Daniels, a surgeon, Dr. Daniel Ignacio, a Board-certified physiatrist, and Dr. Peter S. Trent, a Board-certified orthopedic surgeon.⁴ The physicians concluded that appellant had a 75 percent permanent impairment using Table 17-33 on page 547 of the fifth edition of the A.M.A., *Guides* after finding that he had a poor result from his total knee replacement.

On June 7, 2010 appellant's attorney requested reconsideration. By decision dated June 23, 2010, OWCP vacated the August 12, 2009 decision and found that he was entitled to an additional schedule award for a 37 percent left lower extremity impairment. It noted that OWCP's medical adviser, in his March 6 and June 6, 2010 reports, applied the sixth edition of the A.M.A., *Guides* and determined that appellant had a 37 percent impairment of the left lower extremity due to his knee replacement. The medical adviser indicated that the impairment for the knee replacement was not part of the prior award for a 54 percent left lower extremity impairment.

⁴ On August 14, 2009 appellant, through his attorney, requested an oral hearing; however, on November 2, 2009 he withdrew his request. OWCP accepted the withdrawal of the request on November 16, 2009.

On September 10, 2010 OWCP requested that its medical adviser address whether appellant was entitled to an award for an additional 37 percent impairment. It noted that it would bring his total left lower extremity impairment to 91 percent.

On September 16, 2010 the medical adviser related that the issue was legal rather than medical. He noted that the “factors that gave [the] 54 [percent] impairment are the same factors that led up to the total knee arthroplasty and an award that supersedes the arthroplasty impairment was already given.” The medical adviser reiterated that appellant currently had a 37 percent left lower extremity impairment under the sixth edition of the A.M.A., *Guides*.

By decision dated November 18, 2010, OWCP rescinded its June 23, 2010 decision and its finding that appellant was entitled to an additional schedule award. It found that he had previously received an award for a 54 percent left lower extremity for the same injury and the medical evidence currently established that he had no more than a 37 percent left lower extremity impairment under the sixth edition of the A.M.A., *Guides*.

On appeal appellant’s attorney argued that OWCP did not meet its burden of proof to rescind acceptance as it did not present new or different evidence. He maintained that OWCP readjudicated the claim. Counsel further argued that the March 6 and June 9, 2009 reports from the medical adviser established that appellant had a greater impairment than the 54 percent previously awarded.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.⁵ The Board has upheld OWCP’s authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁶ The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.⁷

Workers’ compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.⁸ It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.⁹ OWCP’s burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously

⁵ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁶ *John W. Graves*, 52 ECAB 160 (2000).

⁷ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁸ *L.C.*, 58 ECAB 493 (2007).

⁹ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.¹⁰

A claim for an increased schedule award may be based on new exposure or, absent any new exposure to employment factors, medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.¹¹ In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included. Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.¹²

ANALYSIS

OWCP accepted that appellant sustained a torn medial meniscus of the left knee due to an August 27, 1984 employment injury. On September 10, 1990 it granted him a schedule award for a 54 percent permanent impairment of the left leg. In September 2003 appellant underwent a total left knee replacement and subsequently filed a claim for an increased schedule award. OWCP determined that a conflict arose between Dr. Jackson, appellant's physician, and OWCP's medical adviser regarding the extent of impairment. It referred him to Dr. Kothakota for an impartial medical examination.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.¹³ Dr. Kothakota properly reviewed the evidence and discussed appellant's complaints of occasional pain on stairs. On examination he found minimal laxity of the left lower extremity with good strength and range of motion. Dr. Kothakota determined that, under Table 17-33 of the fifth edition of the A.M.A., *Guides*, appellant had a 50 percent permanent impairment of the left lower extremity due to his fair result following the total knee replacement. As his report was detailed and well rationalized, it constitutes the weight of the evidence.¹⁴ An OWCP medical adviser applied the sixth edition of the A.M.A., *Guides* to Dr. Kothakota's conclusion. He found that a fair result from a total knee replacement yielded a 37 percent impairment under Table 16-3 of the sixth edition of the A.M.A., *Guides*.¹⁵

¹⁰ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹¹ See *James R. Hentz*, 56 ECAB 573 (2005).

¹² See *Carol A. Smart*, 57 ECAB 340 (2006); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (March 2011).

¹³ See *Willie M. Miller*, 53 ECAB 697 (2002); *Gloria J. Godfrey*, 52 ECAB 496 (2001).

¹⁴ *Id.*

¹⁵ While OWCP's medical adviser did not provide grade modifiers, as the most appellant could receive for a fair result from a total knee replacement under Table 16-3 is 43 percent, less than the previously awarded 54 percent, the failure of the medical adviser to apply grade modifiers does not alter the outcome of the case.

In an impairment evaluation dated September 28, 2009, Drs. Daniels, Ignacio and Trent applied the fifth edition of the A.M.A., *Guides* and advised that appellant had a 75 percent left lower extremity impairment. Their opinions, which are based on an out-of-date edition of the A.M.A., *Guides*, are insufficient to overcome the weight accorded Dr. Kothakota's opinion as the impartial medical examiner.¹⁶

The evidence establishes that appellant has no more than a 37 percent left lower extremity impairment under the sixth edition of the A.M.A., *Guides*. In a decision dated June 23, 2010, however, OWCP granted him a schedule award for an additional 37 percent left lower extremity impairment even though it had previously granted him a schedule award for a 54 percent left lower extremity impairment. Subsequently, by decision of November 18, 2010, OWCP rescinded its finding that appellant was entitled to an additional schedule award. It provided a clear explanation for its rescission. OWCP found that under its procedures any prior impairment to a member was included in calculating the percentage of the loss of a member unless the impairment was due to a previous work injury.¹⁷ Board case law also provides that any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.¹⁸ OWCP determined that the medical evidence established that appellant had no more than a 37 percent left lower extremity impairment, and thus rescinded its finding that he was entitled to more than the 54 percent left lower extremity impairment previously awarded for the same injury. The Board thus finds that OWCP met its burden in rescinding its finding that he was entitled to a schedule award for an additional 37 percent impairment of the left leg.

On appeal appellant's attorney maintained that as OWCP did not present new evidence, it did not meet its burden of proof to rescind its granting of an additional schedule award. As the Board found above, it met its burden of proof by providing clear rationale for its rescission.

Counsel also argued that the March 6 and June 9, 2009 reports from OWCP's medical adviser established that appellant had a greater impairment than the 54 percent previously awarded. In these reports, however, the medical adviser did not subtract the impairment previously awarded for the work injury from the current percentage of impairment in calculating the left lower extremity impairment.

CONCLUSION

The Board finds that OWCP properly rescinded its finding that appellant was entitled to an additional schedule award.

¹⁶ See *Fritz A. Klein*, 53 ECAB 642 (2002) (a medical opinion not based on the appropriate edition of the A.M.A., *Guides* has diminished probative value in determining the extent of a claimant's permanent impairment).

¹⁷ See *supra* note 12.

¹⁸ See *Carol A. Smart*, *supra* note 12; *Tammy L. Meehan*, 53 ECAB 229 (2001).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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