



representative on November 10, 2010.<sup>2</sup> On appeal appellant's attorney states that appellant had a second accepted left knee injury on January 23, 2007, adjudicated under OWCP file number xxxxxx576, for which he filed a schedule award claim. He asserted that a conflict in medical evidence has been created between the opinions of Dr. Nicholas Diamond, an attending osteopath, and an OWCP medical adviser regarding the degree of appellant's left leg impairment, and that appellant was entitled to an increased impairment for preexisting knee arthritis. Counsel contended that OWCP should have used the pay rate in effect on the later of the two left leg injuries, January 23, 2007, in calculating appellant's schedule award.

Regarding the degree of appellant's left leg impairment, the record forwarded to the Board, for OWCP file number xxxxxx101, includes a March 8, 2006 operative report in which Dr. John D. Kelly, a Board-certified orthopedic surgeon, performed a partial meniscectomy. The postoperative diagnosis was lateral meniscus tear with chondrosis patella. The record also contains evidence regarding the January 23, 2007 left knee injury, accepted for aggravation of left meniscus tear. This included an April 10, 2007 operative report when Dr. Kelly performed arthroscopic repair. The postoperative diagnoses were left lateral meniscus tear and left lateral compartment degenerative joint disease.

Following an August 24, 2010 hearing, appellant submitted a September 9, 2010 report in which Dr. Nicholas Diamond, an osteopath, advised that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),<sup>3</sup> in accordance with Table 16-3, Knee Regional Grid, appellant had a class 1 left knee impairment due to primary knee joint arthritis, 9 percent, and a class 1 left knee impairment due to patellofemoral arthritis, 5 percent, for total left leg impairment of 14 percent. On November 10, 2010 an OWCP hearing representative affirmed the April 9, 2010 schedule award, finding three percent impairment. He found Dr. Diamond's report not rationalized, stating that under the sixth edition of the A.M.A., *Guides*, in most cases only one diagnosis would be appropriate, and that left knee arthritis had not been accepted as employment related.

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.<sup>4</sup> As noted above, the medical evidence of record supports that appellant had preexisting knee arthritis, certainly before the April 2007 surgery on his left knee. Moreover, Dr. Diamond's report was not reviewed by an OWCP medical adviser. OWCP procedures provide that, after obtaining all necessary medical evidence,

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<sup>2</sup> Appellant submitted a July 29, 2008 report, revised on November 4, 2009, in which Dr. Steven M. Allon, an attending orthopedic surgeon, advised that appellant had a three percent left leg impairment. Dr. Andrew A. Merola, an OWCP medical adviser agreed that appellant had a three percent impairment, and by decision dated April 9, 2010, appellant was granted a schedule award for a three percent impairment of the left leg, for 8.64 weeks, to run from July 29 to September 27, 2008, based on a weekly pay rate of \$2,366.01, the effective rate of pay on March 1, 2006. Appellant requested a hearing, that was held on August 24, 2010. At the hearing, appellant's attorney noted that OWCP accepted that appellant had a new left knee injury of January 23, 2007. He requested that the two left leg claims be doubled, and stated that schedule award claims had been filed for both injuries. The attorney also argued that the 2007 pay rate should have been used in calculating the schedule award. Appellant testified regarding both left knee injuries.

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>4</sup> *Peter C. Belkind*, 56 ECAB 580 (2005).

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.<sup>5</sup> If more than one method can be used, the method that provides the higher rating should be adopted.<sup>6</sup>

Thus, the case must be remanded to OWCP to double the two left lower extremity claims.<sup>7</sup> OWCP should then compile an updated statement of accepted facts and forward all relevant medical evidence contained in both OWCP files, including Dr. Diamond's September 9, 2010 report, to an OWCP medical adviser for review and an opinion in accordance with the sixth edition of the A.M.A., *Guides* as to whether appellant's left knee arthritis is preexisting and for an impairment rating of appellant's left lower extremity.

Regarding the rate of pay issue, the schedule award granted on April 9, 2010 used the pay rate in effect on March 1, 2006, the day appellant's disability began for the January 2006 employment injury. Pay rate for compensation purposes is defined in section 8101(4) of FECA as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work with the United States, whichever is greater.<sup>8</sup> A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.<sup>9</sup> The compensation rate for schedule awards is the same as compensation for wage loss.<sup>10</sup> In this case, appellant returned to full duty on August 31, 2006 following his January 17, 2006 employment injury. He sustained a new left knee injury on January 23, 2007. While the record before the Board contains some evidence regarding the January 2007 injury, it does not indicate when appellant stopped work following this injury. It is therefore unclear if the proper pay rate was used to calculate appellant's schedule award. The Board had long held that rate of pay for schedule award purposes is the highest rate that satisfies the terms of section 8104(4).<sup>11</sup> The case must therefore also be remanded on the pay rate issue for OWCP to examine both OWCP claim files to determine whether a proper pay rate was used to calculate the April 4, 2010 schedule award, in light of the January 2007 left knee injury.

On remand, OWCP should combine the files for appellant's January 2006 and January 2007 left lower extremity injuries and follow the instructions outlined above. After such development deemed necessary, it should issue an appropriate merit decision on whether

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<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); see *Tommy R. Martin*, 56 ECAB 273 (2005).

<sup>6</sup> *James R. Hill, Sr.*, 57 ECAB 583 (2006).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000) (provides that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body).

<sup>8</sup> 5 U.S.C. § 8101(4); see *M.B.*, Docket No. 09-176 (issued September 23, 2009).

<sup>9</sup> *C.M.*, Docket No. 08-1119 (issued May 13, 2009).

<sup>10</sup> *T.T.*, Docket No. 09-1907 (issued June 28, 2010).

<sup>11</sup> *R.S.*, 58 ECAB 362

appellant is entitled to an increased schedule award for his left lower extremity and whether the correct pay rate was used for schedule award purposes.

**IT IS HEREBY ORDERED THAT** the case in this appeal, Docket No. 11-805, be remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this order of the Board.

Issued: October 26, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board