

appellant underwent an arthroscopic partial medial meniscectomy of his right knee with chondroplasty of his medial femoral condyle patella and synovectomy. The procedure was authorized by OWCP.

Appellant sustained several subsequent employment-related injuries for which he filed additional claims. OWCP accepted that on February 23, 2000 he sustained right shoulder impingement, partial tear of his right rotator cuff, neck sprain, bronchial neuritis, and other affectations of his right shoulder; that on February 22, 2001 he sustained a neck sprain and contusions of multiple sites; that on June 24, 2006 he sustained a left knee contusion; and that on December 28, 2007 he sustained a right rib sprain, aggravation of neck sprain, lumbar sprain and contusions of his right hip, shoulders and right foot.

By decision dated October 8, 2004, in connection with the claim for the February 23, 2000 injury, appellant was awarded compensation for an eight percent permanent impairment of his right arm. By decision dated November 20, 2006, he was awarded compensation for an additional three percent impairment to his right arm and, by decision dated July 12, 2007, he was awarded compensation for an additional 16 percent impairment of his right arm. Appellant has received schedule award compensation for a total permanent impairment of his right arm of 27 percent.²

On January 22, 2008 appellant filed a claim for a schedule award in connection with his April 14, 1999 injury.

On September 14, 2009 Dr. Diamond updated a previous evaluation in order to provide an impairment rating under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009).³ He determined that appellant had a three percent permanent impairment of his right leg, a nine percent permanent impairment of his right arm and a four percent permanent impairment of his left arm.⁴ With respect to the right leg, Dr. Diamond indicated that under Table 16-3 (Knee Regional Grid) on page 509 appellant fell under the diagnostic category of meniscal injury and had a class 1 partial medial meniscectomy with a default value of two percent. Appellant's functional history adjustment under Table 16-6 on page 516 warranted a grade modifier three; his physical examination adjustment under Table 16-7 on page 517 warranted a grade modifier two (for observed palpatory findings); and his clinical studies adjustment under Table 16-8 on page 519 warranted a grade modifier zero. Dr. Diamond applied the net adjustment formula found on page 521 to determine that appellant's condition warranted moving two spaces to the right of the default value listed on Table 16-3. Hence, appellant had a total right knee impairment of three percent.

² The Board notes that, in connection with the present appeal, appellant has not contested his receipt of schedule award compensation for a 27 percent permanent impairment of his right arm. Therefore, this matter is not currently before the Board.

³ The previous evaluation was dated October 19, 2006. Although it is not entirely clear from the record, it appears that a new examination was conducted in September 2009.

⁴ Dr. Diamond indicated that appellant's impairment was caused by his April 14, 1999 and February 22, 2000 employment injuries.

OWCP referred the case to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for review and an opinion regarding appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

In an April 18, 2010 report, Dr. Berman indicated that appellant's condition had reached maximum medical improvement on October 19, 2009. He expressed agreement with Dr. Diamond's calculation that appellant had a three percent permanent impairment of his right leg.⁵ Dr. Berman noted that Dr. Diamond provided a four percent impairment rating for appellant's left arm based on impingement syndrome of his left shoulder, but indicated that this rating was not warranted because it has not been accepted that appellant has a work-related impingement syndrome of his left shoulder.

In an April 22, 2010 decision, OWCP denied additional impairment for appellant's right arm. The decision did not address right leg impairment. Appellant disagreed with the April 22, 2010 decision and requested an oral hearing with OWCP's hearing representative.

By decision dated May 6, 2010, OWCP awarded appellant compensation for a three percent permanent impairment of his right leg. The award ran for 8.64 weeks from October 19 to December 18, 2009. OWCP indicated that the three percent impairment rating was based on the opinions of Dr. Diamond and Dr. Berman. It also noted that appellant had a nine percent permanent impairment of his right arm under the sixth edition of the A.M.A., *Guides* and was not entitled to additional schedule award compensation for his right arm as he already received schedule awards for a total impairment of his right arm of 27 percent.

On May 11, 2010 appellant, through counsel, expressed disagreement with OWCP's May 6, 2010 decision and requested a review of the written record with OWCP's hearing representative. Counsel argued that OWCP failed to make a timely schedule award determination under the fifth edition of the A.M.A., *Guides*, which would have resulted in a greater impairment award.⁶

In a September 17, 2010 decision, OWCP's hearing representative affirmed OWCP's May 6, 2010 decision finding that appellant had not shown that he has more than a 3 percent permanent impairment of his right leg and a 27 percent permanent impairment of his right arm. He found that appellant's impairment ratings were properly made under the standards of the sixth edition of the A.M.A., *Guides*.

⁵ Dr. Berman also concluded that appellant had a nine percent permanent impairment of his right arm as calculated by Dr. Diamond. As previously noted, the matter of appellant's right arm impairment is not currently before the Board.

⁶ By letter dated June 21, 2010, OWCP's hearing representative advised appellant and counsel that, in view of the decision dated May 6, 2010, there was no longer a basis for holding a hearing on the April 22, 2010 decision, which had been effectively vacated by the latter decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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. In *Harry D. Butler*,⁹ the Board noted that Congress delegated authority to the Director of OWCP 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.¹⁰ 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*.¹¹

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 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 509.¹² 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).¹³ 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.¹⁴

ANALYSIS

OWCP accepted that appellant sustained a right knee contusion and a partial torn medial meniscus of his right knee.¹⁵ On August 27, 1999 appellant underwent an arthroscopic partial

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ 43 ECAB 859 (1992).

¹⁰ *Id.* at 866.

¹¹ FECA Bulletin No. 09-03 (March 15, 2009). For OWCP's decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used. The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 1 -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.(6)(a) (January 2010).

¹² See A.M.A., *Guides* 509-11 (6th ed. 2009).

¹³ *Id.* at 521.

¹⁴ *Id.* at 23-28.

¹⁵ Appellant sustained other employment injuries, but the subject of present appeal is his right leg impairment.

medial meniscectomy of his right knee with chondroplasty of his medial femoral condyle patella and synovectomy. The procedure was authorized by OWCP. Appellant received a schedule award for a three percent permanent impairment of his right leg.

The Board finds that OWCP properly determined that appellant does not have more than a three percent impairment of his right leg based on the opinions of Dr. Diamond, an attending osteopath, and Dr. Berman, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser. In a September 4, 2009 evaluation, Dr. Diamond properly concluded that appellant had a three percent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides*. He indicated that under Table 16-3 (Knee Regional Grid) appellant fell under the diagnostic category of meniscal injury and had a class 1 partial medial meniscectomy with a default value of two percent.¹⁶ Appellant's functional history adjustment under Table 16-6 warranted a grade modifier three; his physical examination adjustment under Table 16-7 warranted a grade modifier two; and his clinical studies adjustment under Table 16-8 warranted a grade modifier zero.¹⁷ Dr. Diamond applied the net adjustment formula to determine that appellant's condition warranted moving two spaces to the right of the default value listed on Table 16-3, a move which yielded a three percent impairment rating.¹⁸ Hence, Dr. Diamond properly concluded that appellant had a total right knee impairment of three percent. In addition, Dr. Berman indicated that he agreed with Dr. Diamond's impairment evaluation.¹⁹ There is no medical evidence in the record showing that appellant has more than a three percent permanent impairment of his right leg.

On appeal, counsel argues that OWCP unnecessarily delayed the development of appellant's case such that the assessment of his permanent impairment was made under the sixth edition of the A.M.A., *Guides* rather than the fifth edition, hence resulting in a lower impairment rating. OWCP received a September 14, 2009 impairment evaluation of Dr. Diamond and appropriately evaluated it under the standards of the sixth edition of the A.M.A., *Guides* which became effective May 1, 2009. Counsel has not shown that an unnecessary delay in the development of appellant's case occurred. He also asserts that appellant has a property right in a schedule award benefit under the fifth edition and 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). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance, and in *Mathews* social security benefits) could not have those benefits terminated without procedural due process.²⁰ In this case, appellant is simply making a claim for a schedule award. He is not currently in receipt of schedule award benefits; nor is OWCP attempting to terminate any benefits. Appellant has not established a vested right

¹⁶ A.M.A., *Guides* 509, Table 16-2.

¹⁷ *Id.* at 516, 517 and 519, Tables 16-6, 16-7 and 16-8.

¹⁸ *Id.* at 521.

¹⁹ Dr. Berman also properly noted that, although Dr. Diamond provided a four percent impairment rating for appellant's left arm based on impingement syndrome of his left shoulder, this rating was not warranted because it has not been accepted that he has a work-related impingement syndrome of his left shoulder.

²⁰ In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient, and due process would not require an evidentiary hearing.

to a schedule award decision under the fifth edition of the A.M.A., *Guides*, nor has he identified any procedural due process which he has been denied. The cases cited by him are not applicable to the present case.

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.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a three percent permanent impairment of his right leg, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 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