

On February 19, 2008 Dr. Gary C. Canner, Board-certified in orthopedic surgery, performed a partial medial meniscectomy procedure on appellant's right knee.

In a report dated September 23, 2008, Dr. Arthur F. Becan, Board-certified in orthopedic surgery, found that appellant had 19 percent right lower extremity impairment. He based this rating on atrophy of his right thigh, 13 percent impairment pursuant to Table 17-6, at page 546 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*), atrophy of the right calf under Table 17-6, 3 percent impairment and 3 percent impairment for pain pursuant to Table 18-1.

On December 16, 2008 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his right lower extremity.

Appellant was referred to Dr. Robert F. Draper, Board-certified in orthopedic surgery, for a second opinion examination. Dr. Draper found in a February 19, 2009 report that appellant had a two percent right lower extremity impairment based on a partial meniscectomy pursuant to Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides*.

By decision dated March 25, 2009, OWCP granted appellant a schedule award for a two percent permanent impairment of the right lower extremity for the period February 19 to March 31, 2009, for a total of 5.76 weeks of compensation.

By letter dated March 31, 2009, appellant, through his attorney, requested an oral hearing.

By decision dated June 3, 2009, OWCP's hearing representative set aside the March 25, 2009 schedule award decision. She found that there was a conflict in the medical evidence between the opinions of Dr. Becan, appellant's treating physician and Dr. Draper, the second opinion examiner, regarding the appropriate degree of impairment stemming from appellant's accepted right knee condition. The hearing representative further found that Dr. Draper failed to comment on Dr. Becan's findings that appellant had impairment stemming from his right thigh and right calf atrophy. She remanded for referral to an impartial medical examiner to resolve the outstanding conflict in the medical evidence.

Appellant was referred to Dr. John Donahue, Board-certified in orthopedic surgery and an impartial medical examiner, who found in a November 2, 2009 report that appellant had a one percent impairment pursuant to the updated, sixth edition of the A.M.A., *Guides*.

By decision dated December 3, 2009, OWCP denied modification of the March 25, 2009 decision.

By letter dated December 8, 2009, counsel requested an oral hearing.

In an OWCP memorandum dated May 5, 2010, the claims examiner stated that any decision issued after May 1, 2009 must be in accordance with the updated, sixth edition of the A.M.A., *Guides*. He noted that since Dr. Donahue's November 2, 2009 referee examination resolved a conflict between two reports containing an impairment rating under the fifth edition of the A.M.A., *Guides*, it was not valid resolution of the conflict. The claims examiner stated that

the conflict could not be resolved inasmuch as one edition of the A.M.A., *Guides* uses subjective findings and the other relied on objective findings. He therefore scheduled appellant for a second opinion examination under the sixth edition of the A.M.A., *Guides*.

OWCP referred appellant to Dr. Steven J. Valentino, an osteopath, who found in a May 25, 2010 report that appellant had a two percent right lower extremity impairment under the sixth edition of the A.M.A., *Guides*. Dr. Valentino rendered this rating pursuant to Table 16-3, page 509 of the A.M.A., *Guides*, which outlines an impairment rating based on a partial meniscectomy, under a class 2 impairment.²

In a report dated July 6, 2010, Dr. Christopher Brigham, Board-certified in orthopedic surgery and OWCP's medical adviser, determined that appellant had a one percent permanent impairment of the right lower extremity. He found, however, that Dr. Valentino's findings were "supportable."

By decision dated July 7, 2010, OWCP denied appellant's request for an additional schedule award.

By letter dated July 13, 2010, appellant, through counsel, requested an oral hearing.

By decision dated August 23, 2010, OWCP's hearing representative set aside the July 7, 2010 decision. She found that there was an unresolved conflict in the medical evidence between the opinions of Dr. Becan, appellant's treating physician and Dr. Valentino, the second opinion examiner, regarding the appropriate degree of impairment stemming from appellant's accepted right knee condition. The hearing representative remanded for referral to an impartial medical examiner to resolve the outstanding conflict in the medical evidence.

Appellant was referred to Dr. William H. Spellman, Board-certified in orthopedic surgery, for a referee medical examination. In an October 29, 2010 report, Dr. Spellman reviewed the medical history and the statement of accepted facts, stated findings on examination, and concluded that appellant had a two percent impairment of his right lower extremity under the A.M.A., *Guides*. He found that appellant had a default impairment of class 1, which yielded a grade D impairment of two percent at Table 16-3, page 509 of the A.M.A., *Guides*.³ Dr. Spellman applied the net adjustment formula at pages 521-22 of the A.M.A., *Guides*,⁴ finding that the grade modifier at Table 16-6 for functional history was zero, the grade modifier for physical examination at Table 16-7 was minus one and the grade modifier at Table 16-8 for clinical studies was two. He stated:

"In the case of this patient, the important grade modifier was in the class, grade modifier for clinical studies. The important finding here was the x-ray finding, reported by Dr. Canner: "standing AP and lateral of the right knee ... shows severe collapse of the medial compartment although not all quite bone on bone.

² A.M.A., *Guides* 509.

³ *Id.* at 509.

⁴ *Id.* at 521-22.

“Table 16-8, page 519, states that the cartilage interval loss needs to be compared to the opposite uninjured side. Assuming when a weight-bearing film of both knees is compared the cartilage interval is normal or less than 25 percent compared to the opposite uninjured side, the grade modifier would be 1.

“On a regional grid [at] [T]able 16-3, this would result in a shift from default C, one place to the left, B. This still corresponds with [two] percent impairment of the right lower extremity.”

In a report dated December 21, 2010, Dr. Brigham, OWCP’s medical adviser, reiterated his previous determination that appellant had a one percent permanent impairment of the right lower extremity. As he found with regards to Dr. Valentino, however, he found that Dr. Spellman’s findings were “supportable.”

By decision dated January 5, 2011, OWCP denied appellant’s request for an additional schedule award. It found that Dr. Spellman’s impartial opinion represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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.⁷ 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.⁸

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee the Secretary shall appoint a third physician who shall make an examination.⁹ It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁰

⁵ 5 U.S.C. § 8107.

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

⁷ *Id.*

⁸ *Veronica Williams*, 56 ECAB 367, 370 (2005).

⁹ *Regina T. Pellicchia*, 53 ECAB 155 (2001).

¹⁰ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

ANALYSIS

In its January 5, 2011 decision, OWCP properly found that appellant was not entitled to an additional schedule award. It relied on Dr. Spellman's impartial opinion that appellant had a schedule award for a two percent right lower extremity impairment based on a partial meniscectomy, pursuant to Table 16-3 of the A.M.A., *Guides*. The Board notes that the A.M.A., *Guides* directs examiners to rate diagnosis-based impairments for the lower extremities pursuant to Chapter 16, which states at page 497, section 16.2a that impairments are defined by class and grade. In accordance with this section the examiner is instructed to utilize the net adjustment formula outlined at pages 521-22 of the A.M.A., *Guides*, to obtain the proper impairment rating. Dr. Spellman determined that appellant's partial meniscectomy should be rated as a two percent impairment, as a class 1 impairment, pursuant to the regional grid at Table 16-3, page 509 of the A.M.A., *Guides*. He applied the net adjustment formula at pages 521-22 of the A.M.A., *Guides*, finding that the grade modifier at Table 16-6 for functional history was zero, the grade modifier for physical examination at Table 16-7 was minus one and the grade modifier at Table 16-8 for clinical studies was two, grade modifier at Table 16-8 for clinical studies was two. Dr. Spellman stated that the grade modifier for clinical studies was the most significant factor in rendering appellant's impairment rating. He noted that Dr. Canner's x-ray finding of the right knee showed a severe collapse of the medial compartment, nearly bone to bone in the meniscus. Table 16-8 at page 519 instructs the examiner to compare the cartilage interval loss to the opposite, uninjured side; under this table, where a weight-bearing film of both knees is compared and the cartilage interval is normal or less than 25 percent compared to the opposite uninjured side, the grade modifier would be one. Dr. Spellman stated that, under the regional grid at Table 16-3, page 509, this would result in a shift from default C to default B, which yielded a two percent impairment of the right lower extremity.

In his appeal to the Board, counsel argues that OWCP erred by allowing the same medical adviser, Dr. Bingham, who reviewed Dr. Valentino's May 25, 2010 second opinion report to review Dr. Spellman's October 29, 2010 impartial report. OWCP, however, did not rely on Dr. Bingham's report in its January 5, 2011 decision. Rather, it relied on the impartial report of Dr. Spellman. Finally, counsel contends that appellant is also entitled to an impairment for the right calf atrophy which was identified by several physicians of record. The Board finds, however, that OWCP properly relied on Dr. Spellman's impartial opinion, which determined by measurement that there was no difference in calf circumference. Dr. Spellman reviewed the entire medical history, was sufficiently probative, rationalized and based upon a proper factual background and entitled to the special weight of an impartial medical examiner.¹¹ The Board therefore finds that his opinion constituted the weight of medical opinion and supports OWCP's determination denying appellant an additional schedule award greater than the two percent already awarded. The Board will affirm the January 5, 2011 decision.

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

¹¹ Gary R. Seiber, 46 ECAB 215 (1994).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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