

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

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G.B., Appellant )

and )

DEPARTMENT OF THE TREASURY, )  
INTERNAL REVENUE SERVICE, )  
Holtsville, NY, Employer )

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**Docket No. 12-588**  
**Issued: August 23, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 24, 2012 appellant timely appealed the January 11, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration. He also timely appealed the September 22, 2011 merit decision that affirmed the denial of his claim for a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 (2011), the Board has jurisdiction over the merits of the schedule award claim.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has a ratable impairment of the right lower extremity; and (2) whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (2006).

<sup>2</sup> The record includes evidence received after the January 11, 2012 decision. As this evidence was not part of the record when OWCP issued its final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

Appellant, a 58-year-old tax examining technician, was injured in an employment-related fall on August 18, 2005. OWCP accepted his claim for neck sprain, cervicgia, cervicobrachial syndrome, lumbago, lumbar sprain, right knee sprain and aggravation of right knee osteoarthritis. On June 19, 2009 appellant filed a claim for a schedule award (Form CA-7). In a September 25, 2009 decision, OWCP denied the claim because he did not submit medical evidence in support of his claimed impairment. By decision dated January 19, 2010, the Branch of Hearings & Review set aside the September 25, 2009 denial and remanded the case for further medical development regarding the cause and extent of any right lower extremity permanent impairment.

OWCP initially referred appellant to Dr. Richard L. Parker, a Board-certified orthopedic surgeon, but he was unfamiliar with the application of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2008). In a November 8, 2010 report, Dr. Parker noted that appellant needed a total knee replacement and had “certainly not reached maximum medical improvement [MMI].”

On March 16, 2011 OWCP authorized right total knee arthroplasty.

In a report dated April 29, 2011, Dr. Michael J. Katz, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed, *inter alia*, severe tri-compartmental arthritis of the right knee. He indicated that the August 18, 2005 employment injury permanently aggravated underlying degenerative changes and that appellant was totally disabled. Dr. Katz also noted that appellant was scheduled to undergo a right total knee arthroplasty. He explained that the surgical procedure should be followed by physical therapy three times per week for six weeks. Dr. Katz further explained that under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008), one should wait a year following surgery before evaluating permanent impairment. Accordingly, he did not rate appellant’s right lower extremity impairment and advised OWCP to await recovery from his upcoming total knee arthroplasty.

In a June 4, 2011 decision, OWCP denied appellant’s claim for a schedule award because he had not yet reached MMI.

On June 19, 2011 appellant requested a review of the written record.

On August 17, 2011 Dr. Bradley D. Gerber, a Board-certified orthopedic surgeon, performed a right total knee replacement. Appellant submitted various medical records pertaining to his surgery and hospitalization from August 17 to 19, 2011. He also expressed concern regarding OWCP’s reliance on Dr. Katz’ opinion.

By decision dated September 22, 2011, the Branch of Hearings & Review affirmed OWCP’s June 4, 2011 decision. OWCP’s hearing representative noted that appellant had recently undergone surgery and the medical evidence did not indicate that he had since reached MMI. The hearing representative specifically noted that her decision did not preclude appellant from filing another schedule award claim in the future once his physician deems that he has reached MMI.

On September 27, 2011 appellant requested reconsideration. He continued to challenge OWCP’s reliance on Dr. Katz’ opinion. While appellant did not submit any new evidence with

his request for reconsideration, OWCP had already received various postoperative treatment records from Dr. Gerber, as well as appellant's physical therapy records. This evidence did not specifically address either permanent impairment or whether appellant had reached MMI following his August 17, 2011 right knee surgery.

In a January 11, 2012 decision, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>3</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>4</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>5</sup>

Before an award may be made, it must be medically determined that no further improvement can be anticipated and the impairment must reach a fixed and permanent state, which is known as MMI.<sup>6</sup> The determination of whether an injury has stabilized and will not improve further is factual in nature and depends primarily on the medical evidence.<sup>7</sup> While additional medical treatment, such as surgery, may be recommended in order to improve the injured employee's condition, he is not required to undergo such treatment.<sup>8</sup> If the employee declines such intervention, OWCP must calculate the percentage of the award as if no further improvement were possible.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Neither Dr. Parker nor Dr. Katz provided a lower extremity impairment rating under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008) prior to appellant's latest surgery. The current record does not indicate that appellant has reached MMI following his August 17, 2011 right total knee arthroplasty. Because appellant has not reached MMI, he is not currently eligible to receive a schedule award. As the hearing representative correctly noted in her September 22, 2011

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<sup>3</sup> For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

<sup>6</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 3.700.3a(1).

<sup>7</sup> *Id.* at Chapter 3.700.3a(1)(b).

<sup>8</sup> *Id.* at Chapter 3.700.3a(1)(a).

<sup>9</sup> *Id.*

decision, he is not precluded from filing another claim for a schedule award once his physician finds that he has reached MMI. Accordingly, the Board affirms the hearing representative's September 22, 2011 decision.

### **LEGAL PRECEDENT -- ISSUE 2**

OWCP has the discretion to reopen a case for review on the merits.<sup>10</sup> An application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>11</sup> When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's September 27, 2011 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Appellant's request focused on the reports of Dr. Parker and Dr. Katz, but neither physician calculated a right lower extremity impairment under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008). Furthermore, he raised no legal argument relevant to the issue of whether he had reached MMI following his August 17, 2011 right knee surgery. The Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(2).<sup>13</sup>

Appellant also failed to submit any "relevant and pertinent new evidence" with his September 27, 2011 request for reconsideration. OWCP did in fact receive various postoperative treatment records after the hearing representative's September 22, 2011 decision; however, this evidence did not specifically address the relevant issue on reconsideration. Appellant did not submit any relevant and pertinent new evidence regarding whether he had reached MMI since his latest OWCP-approved right knee surgery. Also, a number of the records received were duplicates of previously submitted evidence. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.<sup>14</sup> Consequently, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).<sup>15</sup>

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<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Id.* at § 10.606(b)(2)(i) and (ii).

<sup>14</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>15</sup> 20 C.F.R. § 10.606(b)(2)(iii).

**CONCLUSION**

OWCP properly denied appellant's claim for a schedule award because the medical evidence did not establish that he had reached MMI following his latest surgery.<sup>16</sup> The Board further finds that OWCP properly denied his September 27, 2011 request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 11, 2012 and September 22, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 23, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>16</sup> 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.