



appellant filed a claim for a schedule award (Form CA-7). His claim was accompanied by a July 31, 2008 impairment rating from Dr. Nicholas P. Diamond, an osteopath, who found 37 percent impairment of each lower extremity based on the outcome of appellant's 2006 bilateral total knee replacement surgery.<sup>2</sup> Dr. Diamond applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). OWCP subsequently requested an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* (2008). In a supplemental report dated September 24, 2009, Dr. Diamond found 67 percent impairment of the right lower extremity and 22 percent impairment of the left lower extremity pursuant to the sixth edition of the A.M.A., *Guides* (2008).

On April 22, 2010 the district medical adviser (DMA) reviewed Dr. Diamond's supplemental report and noted his disagreement with the right lower extremity impairment rating. Instead of 67 percent impairment as noted by Dr. Diamond, he found only 25 percent impairment of the right lower extremity. The DMA disagreed with Dr. Diamond's assignment of a class 4 impairment under Table 16-3 (Knee Regional Grid), A.M.A., *Guides* 511 (6<sup>th</sup> ed. 2008). He rated appellant based on a class 2 impairment. The DMA noted that Dr. Diamond's July 31, 2008 examination of the right knee revealed "no instability ... and good range of motion." However, he agreed with the 22 percent rating for the left lower extremity.

On August 23, 2010 OWCP granted a schedule award for 22 percent impairment of the left lower extremity and 25 percent impairment of the right lower extremity. The award covered a period of 135.36 weeks from July 31, 2008 through March 5, 2011. OWCP based the award on the DMA's April 22, 2010 report, noting that Dr. Diamond's application of the A.M.A., *Guides* was "erroneous."<sup>3</sup>

Appellant requested a hearing, which was held on December 17, 2010. At the hearing he testified that his right knee gave out five to ten times a day. Appellant stated that he usually caught himself before falling, but he had fallen at least two to three times because of his right knee instability. His counsel argued that the disagreement between Dr. Diamond and the DMA regarding right knee instability warranted referral to an impartial medical examiner.

On January 3, 2011 OWCP received another supplemental report from Dr. Diamond who continued to find a class 4 impairment, but adjusted appellant's right lower extremity impairment downward to 59 percent.<sup>4</sup> Under subjective disability factors, Dr. Diamond noted "instability involving [appellant's] right knee on a daily basis." As an objective disability factor, he reported "restricted" right knee range of motion at "0-105/140 degrees."

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<sup>2</sup> Dr. Diamond is Board-certified in pain management.

<sup>3</sup> On appeal appellant, through counsel, does not dispute the schedule award for the left lower extremity. It is noted that all of the medical evidence of record concurs with the award of 22 percent permanent impairment of the left lower extremity. Dr. Diamond's evaluation of the left lower extremity impairment, on September 24, 2009, pursuant to the sixth edition of the A.M.A., *Guides* concluded that appellant had a 22 percent permanent impairment. OWCP's medical adviser concurred with this finding on April 22, 2010.

<sup>4</sup> Dr. Diamond had previously neglected to calculate a net adjustment with respect to the right lower extremity. In his latest report, he found a -6 net adjustment, which resulted in a downward adjustment from the default grade C of 67 percent to a class 4, grade A impairment of 59 percent pursuant to Table 16-3, A.M.A., *Guides* 511 (6<sup>th</sup> ed. 2008).

By decision dated February 28, 2011, the Branch of Hearings & Review affirmed the August 23, 2010 schedule award. The hearing representative deferred to the DMA's finding, noting that he had provided "excellent analysis and rationale for the opinion rendered."

### **LEGAL PRECEDENT**

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>5</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>6</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>7</sup>

FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>8</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>9</sup> Where OWCP has referred the employee to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion. Whereas appellant's physician found 59 percent impairment of the right lower extremity, the DMA found 25 percent impairment. He disagreed with Dr. Diamond's designation of a class 4 impairment under Table 16-3, A.M.A., *Guides* 511 (6<sup>th</sup> ed. 2008). The current disagreement does not stem from an "erroneous" application of the A.M.A., *Guides* as OWCP indicated in its August 23, 2010 schedule award. The DMA merely disagreed with Dr. Diamond's interpretation of the subjective and objective findings he described in his July 31, 2008 report. Dr. Diamond identified evidence of both right knee instability and loss of motion, which he believed supported a class 4 designation. Moreover, appellant testified that his right

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

<sup>6</sup> 20 C.F.R. § 10.404 (2011).

<sup>7</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>8</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). The DMA, acting on behalf of OWCP, may create a conflict in medical opinion. 20 C.F.R. § 10.321(b).

<sup>9</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>10</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

knee gave out five to ten times a day. The DMA's belief that appellant's right knee condition represented a class 2 impairment is a matter of interpretation, not an indication that Dr. Diamond erroneously applied the A.M.A., *Guides*. The Board finds the reports of Dr. Diamond and the DMA are of virtually equal weight and rationale.<sup>11</sup> Because there is an unresolved conflict in medical opinion, the case will be remanded to OWCP for referral to an impartial medical examiner. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

**CONCLUSION**

The case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 28, 2011 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: February 8, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> See *Darlene R. Kennedy*, *supra* note 9.