



permanent impairment of the right leg and a June 4, 2009 decision denying his request for reconsideration under FECA 5 U.S.C. § 8128.<sup>2</sup> The Board found that the opinion of Dr. David H. Trotter, a Board-certified orthopedic surgeon and second opinion physician, represented the weight of the evidence and established that he did not have an impairment of either lower extremity. The Board affirmed OWCP's finding that appellant had no more than the nine percent permanent impairment of the right lower extremity previously awarded. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On October 5, 2010 appellant filed a claim for an increased schedule award. In a letter dated October 19, 2010, OWCP requested that his attending physician, Dr. Z. Mark Hongs, a physiatrist, provide an impairment evaluation using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*).

In a report dated March 8, 2011, Dr. William N. Grant, a Board-certified internist, diagnosed lumbago, a lumbosacral sprain, a sprain of the left collateral ligament, lumbosacral neuritis and lumbar disc displacement. Using Table 16-12 of the sixth edition of the A.M.A., *Guides*, he identified the diagnosis as class 2 sciatica. After applying grade modifiers, Dr. Grant concluded that appellant had 25 percent permanent impairment of each lower extremity.

On April 11, 2011 an OWCP medical adviser reviewed Dr. Grant's clinical findings. He found that appellant had a mild motor impairment of the sciatic nerve which yielded a nine percent permanent impairment of each lower extremity under Table 16-12 on page 535 of the A.M.A., *Guides*.

OWCP determined that a conflict in medical opinion existed between Dr. Grant and OWCP's medical adviser regarding the extent of permanent impairment. It referred appellant to Dr. Jay L. Levin, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 27, 2011 impairment evaluation, Dr. Levin reviewed appellant's history of an April 23, 1990 work injury and discussed his current complaints of bilateral knee pain and weakness and low back pain. He noted that x-rays revealed arthritis of both knees. In a follow-up report dated August 19, 2011, Dr. Levin reviewed in detail the medical evidence of record. He diagnosed lumbar osteoarthritis at L4-5 and L5-S1 and bilateral arthritis of the knees. Dr. Levin found that the diagnosed conditions were not related to the April 23, 1990 work injury. He explained that appellant had undergone surgery on both knees prior to the employment injury. Dr. Levin stated, "My record review demonstrates that, following that occurrence,

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<sup>2</sup> Docket No. 09-1951 (issued May 14, 2010). OWCP accepted that on April 23, 1990 appellant, then a 44-year-old housekeeping aide, sustained left knee strain, lumbar strain and a herniated nucleus pulposus at L5-S1 in the performance of duty. In a decision dated September 11, 2008, it granted him a schedule award for a nine percent permanent impairment of the right lower extremity. The period of the award ran from August 21, 2007 to February 18, 2008. In its decision, OWCP noted that appellant had received total disability compensation from August 21, 2007 to February 18, 2008 and thus was not owed compensation for the schedule award. On December 10, 2008 a hearing representative set aside the September 11, 2008 decision after finding that the medical evidence was insufficient to establish the extent of any permanent impairment. OWCP referred appellant for a second opinion examination with Dr. Trotter, who determined that appellant had no ratable impairment of the lower extremity. By decision dated March 26, 2009, it found that he had no more than the previously awarded nine percent impairment of the right lower extremity.

[appellant] had sporadic medical treatment. And, after February of 2006, there are no comments that any of his complaints were related to a previous injury on April 23, 1990.” He found that appellant sustained a possible mild sprain of the left knee due to the work injury but advised, “[appellant’s] underlying complaints are related to the degenerative changes of both his knees and his neck referable to the aging process, some genetic factors and previous knee arthroscopies.” Dr. Levin found that appellant had not sustained a herniated disc due to his April 23, 1990 work injury and that it was “certainly not the cause of his current complaints.” He further opined that his lumbar osteoarthritis was not employment related. Dr. Levin stated:

“Although there have been some comments in other reports about a sensory deficit in [appellant’s] lower extremities, and that was actually the basis of a permanent disability percentage rating, his orthopedic physical examination of July 27, 2011 showed that sensation to tuning fork was intact in both lower extremities and no significant motor deficit was present. It is my opinion that the changes referable to degenerative arthritis in his knees and lumbar spine are not related to the occurrence being discussed.”

Dr. Levin asserted that the accepted conditions resolved within three to six months of the work injury.

On October 3, 2011 an OWCP medical adviser reviewed Dr. Levin’s report and found that appellant had no impairment of either lower extremity due to his employment injury. He noted that Dr. Levin did not attribute the lumbar and knee osteoarthritis to the April 23, 1990 work injury and further determined that “sensation and motor strength were intact in both lower extremities.” The medical adviser concluded that there was no change from the prior award and advised that the date of maximum medical improvement was May 18, 2006.

By decision dated October 11, 2011, OWCP denied appellant’s claim for an additional schedule award for the right lower extremity and denied a schedule award for the left lower extremity.

On October 19, 2011 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative. At the telephonic hearing, held on February 9, 2012, counsel argued that appellant did not receive the prior award for a nine percent permanent impairment as the period of the schedule award covered a time when OWCP was paying him for temporary total disability. He argued that OWCP should have waited until it stopped paying appellant for temporary total disability before it began schedule award payments.

In a decision dated May 8, 2012, the hearing representative affirmed the October 11, 2011 decision. She noted that the 2008 schedule award, which was affirmed by the Board, was not within her jurisdiction.<sup>3</sup> The hearing representative determined that Dr. Levin’s opinion represented the weight of the evidence and established that appellant had no ratable impairment.

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<sup>3</sup> The hearing representative noted, however, that the Board had found that “the fact that a schedule award will be absorbed by a period of total disability does not automatically entitle the claimant to an award beginning after total disability compensation ceases.”

## LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>4</sup> Not all conditions accepted by OWCP result in a permanent impairment to a scheduled member.<sup>5</sup> It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.<sup>6</sup>

Section 8123(a) provides that, if there is 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.<sup>7</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.<sup>8</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup>

## ANALYSIS

OWCP accepted that on April 23, 1990 appellant sustained left knee strain, lumbar strain and a herniated disc at L5-S1. The Board previously affirmed a March 26, 2009 schedule award finding that he had no more than a nine percent permanent impairment of the right leg. The Board determined that the weight of the evidence established that appellant had no impairment of either lower extremity.

On October 5, 2010 appellant requested an additional schedule award. OWCP properly determined that a conflict existed between Dr. Grant, his attending physician, and the medical adviser regarding the extent of any permanent impairment of the lower extremities. It referred appellant to Dr. Levin for resolution of the conflict.

The Board finds that Dr. Levin's opinion is thorough and well rationalized. It represents the weight of the medical evidence.<sup>10</sup> In a report dated July 27, 2011, Dr. Levin reviewed the history of injury and the diagnostic studies. On August 19, 2011 he discussed the medical

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<sup>4</sup> See *Bobbie F. Cowart*, 55 ECAB 476 (2004).

<sup>5</sup> See *Thomas P. Lavin*, 57 ECAB 353 (2006).

<sup>6</sup> See *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>7</sup> 5 U.S.C. § 8123(a).

<sup>8</sup> 20 C.F.R. § 10.321.

<sup>9</sup> *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>10</sup> *Id.*

evidence of record. Dr. Levin diagnosed lumbar osteoarthritis at L4-5 and L5-S1 and bilateral knee arthritis. He indicated that appellant had a preexisting knee condition for which he had undergone surgery prior to his April 23, 1990 employment injury. Dr. Levin found that the diagnosed conditions were not related to the April 23, 1990 work injury. He noted that appellant had undergone surgery on both knees prior to the employment injury. Dr. Levin determined that appellant's current complaints were due to degenerative change of the knees due to prior knee surgeries, aging and genetics. He further found that the herniated disc did not cause any current symptoms and that the osteoarthritis of the lumbar spine was not work related. Dr. Levin concluded that appellant had no sensory loss or significant motor deficit in his lower extremities. He advised that the accepted work injuries had resolved within six months of injury.

The Board has carefully reviewed the opinion of Dr. Levin and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Levin's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history and accurately summarized the relevant medical evidence.<sup>11</sup> He provided medical rationale for his opinion by explaining that appellant did not show any further signs of his accepted work injury and that he had no sensory or motor impairment of the lower extremities. Dr. Levin's opinion is consequently entitled to special weight as the impartial medical examiner and establishes that appellant has no lower extremity impairment due to his April 23, 1990 employment injury.<sup>12</sup>

### **CONCLUSION**

The Board finds that appellant has no more than a nine percent permanent impairment of the right lower extremity or any permanent impairment of the left lower extremity.

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<sup>11</sup> See *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>12</sup> See *R.C.*, 58 ECAB 238 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2012  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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