

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

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**M.S., Appellant**

**and**

**DEPARTMENT OF THE ARMY,  
FORT DIX, NJ, Employer**

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**Docket No. 13-233  
Issued: April 25, 2013**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 18, 2012 appellant, through his attorney, filed a timely appeal from a July 18, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has more than a 31 percent permanent impairment to his right leg.

**FACTUAL HISTORY**

On May 23, 2001 appellant, then a 49-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury on May 15, 2001 while replacing tile in the performance of duty. OWCP accepted the claim for a right knee sprain and torn medial

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

meniscus. Appellant underwent arthroscopic right knee surgery on August 8, 2002. On March 27, 2004 he underwent a right knee tibial osteotomy.

On October 15, 2009 appellant submitted a claim for compensation (Form CA-7) indicating that he was claiming a schedule award. By decision dated November 23, 2009, OWCP found him not entitled to a schedule award.

On March 17, 2010 appellant submitted a report dated July 9, 2009 from Dr. David Weiss, an osteopath, who provided a history and results on examination. Dr. Weiss opined that, under Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) sixth edition, appellant had a 34 percent right leg impairment. He found that the impairment was based on a poor result from the tibial osteotomy.

By decision dated June 1, 2010, an OWCP hearing representative set aside the November 23, 2009 OWCP decision and remanded the case for additional development. The hearing representative directed OWCP to refer the case to an OWCP medical adviser.

In a report dated June 7, 2010, an OWCP medical adviser opined that appellant had a two percent right leg impairment based on the diagnosis of a partial medial meniscectomy under Table 16-3. The medical adviser found that the arthritic changes which necessitated the tibial osteotomy were not employment related.

OWCP found a conflict in the medical evidence and selected Dr. Howard Zeidman, a Board-certified orthopedic surgeon, as a referee physician.<sup>2</sup> In a report dated July 22, 2010, Dr. Zeidman provided a history and results on examination. As to permanent impairment, he opined that appellant had a class 3 impairment of 37 percent for a poor result from the tibial osteotomy. Dr. Zeidman found no adjustment to the default impairment of 37 percent, after finding a grade modifier 2 for functional history and 1 for physical examination.

In a report dated October 4, 2010, an OWCP medical adviser opined that Dr. Zeidman did not calculate the impairment correctly. The medical adviser stated that the grade modifiers identified by Dr. Zeidman would result in a 43 percent impairment. He also stated that he disagreed with Dr. Zeidman as to the finding of a class 3 impairment.

OWCP requested that Dr. Zeidman provide a report clarifying his findings as to the permanent impairment. In a report dated November 14, 2010, Dr. Zeidman stated that the evidence indicated that the impairment was a class 3 based on a poor result from the tibial osteotomy. As to any adjustment, he stated that the figures were to be used as guides rather than absolute decisions and he selected the midpoint of the available impairments.

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<sup>2</sup> FECA 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 the examination. 5 U.S.C. § 8123(a). 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

In a report dated December 13, 2010, an OWCP medical adviser opined that Dr. Zeidman did not properly answer the previous questions regarding his medical report. The medical adviser recommended referral to a new referee physician. Appellant was referred to Dr. Gregory Maslow, a Board-certified orthopedic surgeon selected as a referee physician.

By report dated March 8, 2011, Dr. Maslow provided a history and results on examination. He identified Table 16-3 and a class 3 impairment for a poor result from the tibial osteotomy. Dr. Maslow found grade modifier 2 for physical examination and functional history and grade modifier 3 for clinical studies, resulting in a net adjustment of -2 or a 31 percent right leg impairment. In a report dated May 29, 2011, an OWCP medical adviser stated that the date of maximum medical improvement was March 8, 2011.

In a decision dated January 26, 2012, OWCP issued a schedule award for a 31 percent right leg impairment. The period of the award was 89.29 weeks from March 8, 2011.

Appellant requested a hearing before an OWCP hearing representative, which was held on May 15, 2012. By decision dated July 18, 2012, the hearing representative affirmed the schedule award decision based on the evidence of record.

### **LEGAL PRECEDENT**

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>5</sup>

With respect to a knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3.<sup>6</sup> The class of impairment (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH), Table 16-6, Physical Examination (GMPE), Table 16-7 and Clinical Studies (GMCS), Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>7</sup>

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<sup>3</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>4</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>5</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>6</sup> A.M.A., *Guides* 509, Table 16-3.

<sup>7</sup> The net adjustment is up to +2 (grade E) or -2 (grade A).

It is well established that when a case is referred to a referee physician 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.<sup>8</sup>

### ANALYSIS

In the present case, OWCP found a conflict under 5 U.S.C. § 8123(a) on the issue of an employment-related permanent impairment to the right leg. Attending osteopath Dr. Weiss found a 34 percent impairment under the A.M.A., *Guides*, while an OWCP medical adviser opined that appellant had a 2 percent impairment.

The case was initially referred to Dr. Zeidman for a referee opinion resolving the conflict. Dr. Zeidman identified Table 16-3, with the diagnosis of status post tibial osteotomy. He noted that a “poor result” for that surgery is a class (CDX) 3 impairment with a grade C default leg impairment of 37 percent. The next step in the calculation is to determine the appropriate grade modifiers and apply the adjustment formula noted above. Dr. Zeidman found grade modifier 2 for functional history and clinical studies and 1 for physical examination. Applying the formula results in a -4 adjustment as  $(2-3) + (1-3) + (2-3) = -4$ . According to the A.M.A., *Guides*, the net adjustment is to the lowest grade (A) within the identified class, which in this case is 31 percent for status post tibial osteotomy.<sup>9</sup>

The deficiency in Dr. Zeidman’s report was his failure to properly apply the adjustment formula. He did not explain how he had applied the grade modifiers he identified to conclude appellant had no adjustment from the grade C impairment under Table 16-3. The Board notes the medical adviser also incorrectly applied the adjustment formula in his October 4, 2010 report. The adjustment under Dr. Zeidman’s findings would have been to 31 percent, not the 43 percent (grade E) reported by the medical adviser.

OWCP attempted to have Dr. Zeidman clarify his calculation, but his November 4, 2010 report also failed to properly apply the adjustment. Dr. Zeidman stated that he chose the midpoint impairment, without explaining how he applied the adjustment formula. OWCP then referred appellant to Dr. Maslow as a referee physician.

The March 8, 2011 report from Dr. Maslow provides a rationalized medical opinion as to a permanent impairment. Dr. Maslow identified Table 16-3 and a class 3 impairment for status post tibial osteotomy. With respect to grade modifiers, he reported 2 for functional history and physical examination and 3 for clinical studies. Unlike previous physicians of record, Dr. Maslow properly applied the adjustment formula:  $(2-3) + (2-3) + (3-3) = -2$ . The final impairment is the grade A impairment of 31 percent.<sup>10</sup>

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<sup>8</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>9</sup> A.M.A., *Guides* 511, 521. Since a net adjustment of -2 is assigned the lowest grade (grade A) for the identified class, there is no further adjustment for -3 or -4.

<sup>10</sup> A.M.A., *Guides* 521.

The Board finds that the opinion of Dr. Maslow represents the weight of the medical evidence. As noted above, a rationalized opinion from a referee physician is entitled to special weight.

On appeal, appellant argues that the report of Dr. Zeidman should represent the weight of the medical evidence. As the Board has explained, Dr. Zeidman's opinion of 37 percent was not in accord with his own findings as applied to Table 16-3 and the adjustment formula. Based on a proper application of the adjustment formula, Dr. Zeidman's findings would also have resulted in a 31 percent right leg impairment. Appellant may request an increased schedule award based on medical evidence showing a progression of an employment-related condition resulting in increased impairment.

**CONCLUSION**

The Board finds that the evidence does not establish more than a 31 percent right leg permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 18, 2012 is affirmed.

Issued: April 25, 2013  
Washington, DC

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

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

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