



## **FACTUAL HISTORY**

OWCP accepted that on February 6, 2012 appellant, then a 39-year-old federal air marshal, sustained a lateral collateral ligament sprain of his left knee and a tear of the medial meniscus of his left knee during defensive measures training at work. On February 6, 2012 he underwent left knee surgery, including a partial medial meniscectomy. The surgery was authorized by OWCP.

In a June 27, 2012 report, Dr. Robert Macht, an attending Board-certified general surgeon, determined that appellant had a two percent permanent impairment of his left leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009). He referenced a diagnosis-based impairment under the category of partial medial meniscectomy in Table 16-3 (Knee Regional Grid) on page 509.

In July 2012, counsel submitted medical evidence regarding an injury that appellant sustained in early 1991, a fractured left lateral malleolus and partial disruption of the deltoid ligament with subluxation of the left ankle joint. On April 1, 1991 appellant underwent open reduction and internal fixation of the fracture subluxation of his left ankle. On February 24, 1992 the hardware from the April 1, 1991 surgery was removed. The medical records also discussed appellant's treatment after these surgeries.

OWCP requested that Dr. Macht provide a supplemental report regarding appellant's left leg impairment. On September 27, 2012 Dr. Macht provided the results of his examination of appellant. He stated that appellant had a left ankle injury in 1991 and was diagnosed by x-rays as having a lateral malleolar fracture with spread of the left ankle mortise. Dr. Macht stated:

“As noted in my recent report he has a two percent permanent partial impairment of his left lower extremity due to his left knee condition. Based on the Ankle Regional Grid, Table 16-2, page 503, he has a class 1 impairment of his ankle due to his malleolar fracture with mild motion deficit. Column C is selected based on his functional history, physical examination and clinical studies. [Appellant] therefore is assigned a 10 percent impairment of the left lower extremity due to his ankle condition. This combined with the figure for his knee condition to yield a total 12 percent permanent partial impairment of his left lower extremity.”

In an October 17, 2012 report, Dr. Lawrence Manning, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, discussed Dr. Macht's reports and stated, with respect to appellant's left ankle impairment rating, “The fracture was not a part of this accepted condition and as such this impairment is disregarded in my review.” Dr. Manning indicated that he concurred with Dr. Macht that appellant had two percent impairment of the left leg based on the left medial meniscus tear and stated, “The knee region grid in the [sixth edition of the A.M.A., *Guides*] confirms this rating for this diagnosis. The total of 12 percent impairment was disregarded as it included impairment for the ankle fracture. Date of [maximum medical improvement] is June 27, 2012, the date of Dr. Macht's initial impairment rating.”

In a December 31, 2012 decision, OWCP granted appellant a schedule award for a two percent permanent impairment of his left leg. The award ran for 5.76 weeks from June 27 to

August 6, 2012 and was based on Dr. Manning's impairment rating as derived from the findings of Dr. Macht.

On January 7, 2013 appellant requested reconsideration of his claim and, through counsel, argued that his schedule award should have included the preexisting impairment from his left ankle injury.

In an April 1, 2013 decision, OWCP affirmed its December 31, 2012 schedule award decision finding that appellant only had two percent permanent impairment of his left leg. It noted that his left ankle fracture was not included in the impairment rating because it was "unrelated" to his accepted left knee injuries. OWCP did not discuss the legal precedent relating to inclusion of preexisting impairments in impairment ratings.

On April 4, 2013 appellant requested reconsideration of his claim and, through counsel, again argued that his schedule award should have included the preexisting impairment from his left ankle injury.

In an April 16, 2013 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) noting that the evidence and argument he submitted was repetitious.

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

The schedule award provision of FECA<sup>2</sup> and its implementing regulations<sup>3</sup> 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.<sup>4</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>5</sup>

The Board has held that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.<sup>6</sup>

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Id.*

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

<sup>6</sup> See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of OWCP procedures provide that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>7</sup>

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

OWCP accepted that on February 6, 2012 appellant sustained a lateral collateral ligament sprain of his left knee and a tear of the medial meniscus of his left knee during defensive measures training at work. On February 6, 2012 appellant underwent OWCP-authorized left knee surgery, including a partial medial meniscectomy.

In July 2012, counsel submitted medical evidence regarding an injury appellant sustained in early 1991, a fractured left lateral malleolus and partial disruption of the deltoid ligament with subluxation of the left ankle joint. On April 1, 1991 and February 24, 1992 appellant underwent left ankle surgery.

In a December 31, 2012 decision, OWCP granted appellant a schedule award for a two percent permanent impairment of his left leg. The award was based on an impairment rating calculated by Dr. Manning, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, and solely involved a diagnosis-based impairment rating of appellant's left knee. The rating was as derived from the findings of Dr. Macht, an attending Board-certified hand surgeon.

The Board notes, however, that Dr. Manning did not adequately explain why appellant's preexisting left ankle condition was not included in the impairment rating for his left leg. As noted above, the Board has held that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.<sup>8</sup> Dr. Manning did not provide a medical discussion of whether the left ankle condition constituted a preexisting impairment that should be included in the impairment rating, but rather dismissed its inclusion by stating, "The fracture was not a part of this accepted condition and as such this impairment is disregarded in my review." In its April 1, 2013 decision affirming the schedule award for a two percent left leg impairment, OWCP did not provide any further clarification of the matter and merely noted that the left ankle condition was not included because it was "unrelated."

For these reasons, additional development is needed to determine whether appellant's preexisting left ankle condition should be included in the calculation of the permanent impairment of his left leg, for which he had received an award for two percent impairment. The case shall be remanded to OWCP for this purpose and, after such development it deems necessary, OWCP shall issue an appropriate decision regarding his left leg impairment.<sup>9</sup>

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<sup>7</sup> *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>8</sup> *See supra* note 6.

<sup>9</sup> Given the Board's disposition of the merit issue of this case, it is not necessary for it to consider the nonmerit issue. *See* 20 C.F.R. § 10.126.

**CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant has more than a two percent permanent impairment of his left leg, for which he received a schedule award. The case is remanded to OWCP for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 12, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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