

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

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O.S., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Bellmawr, NJ, Employer )

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**Docket No. 13-1554  
Issued: December 4, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On June 18, 2013 appellant, through his attorney, filed a timely appeal from a March 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a schedule award decision. 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 sustained more than a two percent permanent impairment of the left lower extremity for which he received a schedule award.

**FACTUAL HISTORY**

On December 29, 2003 appellant, then a 58-year-old expeditor, sustained an aggravation of left knee bakers cyst and a left medial meniscus tear in the performance of duty. He filed a schedule award claim on October 10, 2008.

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

On June 12, 2008 Dr. Nicholas Diamond, a doctor of osteopathic medicine, performed an independent medical evaluation and calculated 30 percent impairment of the lower left extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On December 17, 2008 a district medical adviser (DMA) confirmed an impairment rating of 30 percent of the left lower extremity and noted the date of maximum medical improvement (MMI) as June 12, 2008.

On June 12, 2009 and January 11, 2010, OWCP requested that Dr. Diamond provide a new impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.<sup>2</sup> Dr. Diamond did not respond.

Appellant was referred to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of permanent partial impairment according to the sixth edition of the A.M.A., *Guides*. In a June 1, 2010 report, Dr. Askin reported that he could not assign a permanent impairment rating because appellant had not reached MMI.

On August 16, 2010 the case was reviewed by Dr. Henry J. Magliato, a DMA, who disagreed with Dr. Askin and noted that permanent impairment had been reached.

On February 2, 2011 appellant was evaluated by Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a referee examination in order to resolve the conflict between Dr. Askin and Dr. Magliato. Dr. Stark reported that MMI had been reached on June 12, 2008 and calculated two percent partial permanent impairment of the lower left extremity.

On January 22, 2012 Dr. Stark's referee report and the case file was reviewed by Dr. Andrew A. Merola, a DMA, who determined that MMI had been reached on February 1, 2011 and that appellant had a two percent permanent impairment of the left lower extremity.

By decision dated October 11, 2012, OWCP granted appellant a schedule award claim for two percent permanent impairment of the left lower extremity. The date of maximum medical improvement was noted as February 1, 2011. The award covered a period of 5.76 weeks from February 1 to March 13, 2011.

On November 26, 2012 appellant, through counsel, requested reconsideration of the October 11, 2012 decision.

In support of his request, appellant submitted an updated November 16, 2010 report from Dr. Diamond. Using the sixth edition of the A.M.A., *Guides*, Dr. Diamond calculated a three percent impairment to the left lower extremity and noted the MMI date as June 12, 2008.<sup>3</sup>

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<sup>2</sup> A.M.A., *Guides* (2009). On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*. The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of MMI or when the claim for such award was filed.

<sup>3</sup> Table 16-3, 509, Table 16-6, 516, Table 16-7, 517 and Table 16-8, 519.

The case file was referred to Dr. Magliato for review and a determination on the date of MMI and percentage of permanent partial impairment. In a December 26, 2012 report, Dr. Magliato agreed with Dr. Diamond's finding of three percent permanent impairment of the left lower extremity and an MMI date of June 12, 2008.

On February 13, 2013 OWCP requested clarification of the DMA's report.

In a February 19, 2013 report, Dr. Magliato reported that Dr. Askin's June 1, 2010 report was of no value because he opined that MMI had not been reached. He noted that Dr. Stark's second opinion was more current than Dr. Diamond's and agreed with Dr. Stark's calculation of two percent permanent impairment of the left lower extremity. Dr. Magliato further stated that MMI would have been reached on February 1, 2011, the date of Dr. Stark's examination.

On February 25, 2013 appellant, through counsel, submitted an addendum report from Dr. Diamond dated January 28, 2013.

In his January 28, 2013 report, Dr. Diamond reported that review of appellant's January 2, 2013 x-ray films revealed severe joint space narrowing in the left knee which was subject to a class 2 primary left knee joint arthritis rating. Thus, he calculated 22 percent permanent impairment of the left lower extremity and an MMI of June 12, 2008.<sup>4</sup>

By decision dated March 11, 2013, OWCP affirmed the October 11, 2012 decision finding that appellant was entitled to an award of no more than two percent permanent impairment of the left lower extremity.

### **LEGAL PRECEDENT**

The schedule award provision of FECA and its implementing regulations 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.<sup>5</sup> 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>6</sup>

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, the evaluator identifies the impairment class for the CDX, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is GMFH -

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<sup>4</sup> *Id.* at Table 16-3, 511.

<sup>5</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

<sup>6</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

CDX + GMPE - CDX + GMCS - CDX. Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>7</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant filed a claim for a schedule award on October 10, 2008. By decision dated October 11, 2012, OWCP granted a schedule award for two percent permanent impairment according to the sixth edition of the A.M.A., *Guides*. Appellant requested an appeal of OWCP's decision and on March 11, 2013, OWCP affirmed the October 11, 2012 decision finding that he was entitled to an award of no more than two percent permanent impairment of the left lower extremity. The decision indicated that appellant's schedule award was based on review of Dr. Diamond's June 12, 2008 report, Dr. Askin's June 1, 2010 report, Dr. Stark's February 1, 2011 report, Dr. Merola's January 22, 2012 report and Dr. Magliato's February 19, 2013 report.

Under cover letter dated February 25, 2013, counsel submitted a January 28, 2013 addendum report from Dr. Diamond providing a new impairment rating of the left lower extremity based on more recent diagnostic tests. Dr. Diamond provided findings and calculations to explain how appellant reached 22 percent permanent impairment of the left lower extremity. OWCP received his impairment rating on March 8, 2013, prior to the March 11, 2013 schedule award decision. Despite the timely submission of Dr. Diamond's report, OWCP's March 11, 2013 decision did not specifically reference this evidence.<sup>8</sup> OWCP's schedule award impairment rating was based on Dr. Magliato's February 19, 2013 DMA report, who failed to review Dr. Diamond's January 28, 2013 report, the most recent report from a treating physician addressing permanent impairment.<sup>9</sup> Thus, the Board finds that OWCP, in its March 11, 2013 decision, did not review Dr. Diamond's January 28, 2013 medical report which was received prior to the issuance of the March 11, 2013 decision.

As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.<sup>10</sup> In this instance, OWCP failed to consider relevant medical evidence it received prior to the issuance of the March 11, 2013 schedule award. Whether OWCP receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.<sup>11</sup> As OWCP failed to

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<sup>7</sup> *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>8</sup> *R.I.*, Docket No. 11-1086 (issued November 25, 2011).

<sup>9</sup> *M.F.*, Docket No. 13-417 (issued April 25, 2013).

<sup>10</sup> See *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); see *Linda Johnson*, 45 ECAB 439 (1994).

<sup>11</sup> *Willard McKennon*, 51 ECAB 145 (1999).

address all relevant evidence before it at the time of its decision, the case is remanded for a proper review of the evidence and issuance of an appropriate *de novo* final decision.

On remand, OWCP shall have its DMA evaluate Dr. Diamond's January 28, 2013 report as well as provide a detailed and rationalized opinion concerning the extent of appellant's impairment in accordance with the A.M.A., *Guides*. After conducting such further development as may be necessary, it shall render an appropriate decision on appellant's entitlement to an additional award.

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 11, 2013 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: December 4, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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