



## **FACTUAL HISTORY**

OWCP accepted that on April 6, 2009 appellant, then a 54-year-old maintenance specialist, sustained a medial meniscus tear of his left knee and fracture of his right fibular head when he fell down from an elevator lift. On August 14, 2009 Dr. Robert J. Smolinski, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy of appellant's left knee and a medial femoral condyle chondroplasty. The procedures were authorized by OWCP. Appellant received compensation for periods of disability.

On January 4, 2011 appellant filed a claim for schedule award due to his accepted injuries.

In a June 28, 2011 letter, OWCP requested that appellant submit additional evidence in support of his schedule award claim. In a July 12, 2011 report, Dr. Smolinski indicated that on examination appellant's left knee exhibited mild effusion with medial and lateral tenderness, normal strength and stability and nearly full range of motion. He stated, without elaboration, that appellant had 15 percent temporary impairment.

In an August 17, 2011 decision, OWCP denied appellant's claim on the grounds that he had not submitted sufficient medical evidence to establish that he had permanent impairment entitling him to schedule award compensation. It noted that Dr. Smolinski's July 12, 2011 report did not contain a probative impairment rating.

On September 8, 2011 appellant was examined by both Dr. John R. West, an attending Board-certified orthopedic surgeon, and Dr. Smolinski. In the resultant September 8, 2011 report, Dr. West's signature appears after the physical examination findings and Dr. Smolinski indicated that he agreed with the findings as presented. Dr. West noted that range of knee motion was to 0 to 100 degrees on the left with guarding and 0 to 130 degrees on the right and indicated that there was 5/5 strength in all muscle groups. Appellant exhibited mild pain with patellar compression and sensation was intact through all the dermatomes. In the impairment rating portion of the report, Dr. Smolinski stated:

“Pertinent findings follow: Flexion limited to 100 [to] 110 [degrees] on the left knee with a mild effusion mild weakness and quadriceps atrophy. Scheduled loss is 20 percent for loss of flexion and 18 percent for meniscus loss joint defect and muscle atrophy. Total of 38 percent permanent loss of use of the left knee. [Appellant] most likely will have progression of his disease and has a high probability of requiring total joint replacement some point. At the present time he can continue working as his comfort allows.”

In a December 15, 2011 decision, an OWCP hearing representative set aside OWCP's August 17, 2011 decision and remanded the case to OWCP for further development. She noted that the September 8, 2011 report of Dr. West and Dr. Smolinski contained detailed examination findings but found that it was necessary for the medical adviser to review the report and provide a reasoned opinion on appellant's impairment in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009).

On remand, OWCP asked Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, to review the September 8, 2011 report of Dr. West and Dr. Smolinski and provide an opinion on appellant's impairment under the sixth edition of the A.M.A., *Guides*.

In a February 9, 2012 report, Dr. Magliato discussed appellant's work injuries, his surgery history and the findings on diagnostic testing of record. He noted that, in his September 8, 2011 impairment rating, Dr. Smolinski indicated that appellant had a 38 percent loss of his left knee. Dr. Magliato stated, "[Dr. Smolinski] does not indicate the [sixth edition of the A.M.A., *Guides*] was used nor did he give any calculation that would lead one to believe that he did use some edition of the [A.M.A., *Guides*]. [Dr. Smolinski] merely [stated] 20 percent loss of flexion and 18 percent for meniscal loss." Dr. Magliato posited that the report was of no value for schedule award purposes.

In an April 16, 2012 decision, OWCP denied appellant's claim on the grounds that he had not submitted sufficient medical evidence to establish that he had permanent impairment entitling him to schedule award compensation. It indicated that the impairment rating of Dr. Smolinski was of no probative value because it was not based on the standards of the sixth edition of the A.M.A., *Guides*.

In a form postmarked as sent on June 5, 2012 and received by OWCP on June 7, 2012 appellant requested a hearing with an OWCP hearing representative.<sup>2</sup>

In an August 3, 2012 decision, OWCP denied appellant's request for a hearing with an OWCP hearing representative. It found that his request was untimely as it was not filed within 30 days of the issuance of OWCP's April 16, 2012 merit decision. OWCP indicated that, in its discretion, it had carefully considered appellant's request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional medical evidence to establish entitlement to a schedule award.

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

The schedule award provision of FECA<sup>3</sup> and its implementing regulations<sup>4</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

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<sup>2</sup> Appellant also submitted a May 15, 2012 report of Dr. Smolinski.

<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404 (1999).

appropriate standard for evaluating schedule losses.<sup>5</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>6</sup>

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

OWCP accepted that on April 6, 2009 appellant sustained a medial meniscus tear of his left knee and fracture of his right fibular head when he fell down from an elevator lift. On August 14, 2009 Dr. Smolinski, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy of appellant's left knee and a medial femoral condyle chondroplasty. Appellant filed a claim for schedule award due to his accepted injuries and OWCP determined that he did not submit sufficient medical evidence to establish entitlement to schedule award compensation.

Appellant submitted a September 8, 2011 report, which contained examination findings provided by Dr. Smolinski and Dr. West, an attending Board-certified orthopedic surgeon and an impairment rating provided by Dr. Smolinski. In the impairment rating portion of the report, Dr. Smolinski stated that appellant had flexion which was limited to 100 to 110 degrees in the left knee as well as mild effusion mild weakness and quadriceps atrophy. He noted, "Scheduled loss is 20 percent for loss of flexion and 18 percent for meniscus loss joint defect and muscle atrophy. Total of 38 percent permanent loss of use of the left knee."

The Board finds, however, that the impairment rating opinion of Dr. Smolinski is of limited probative value in that he failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.<sup>7</sup> Dr. Smolinski did not provide any indication that he applied the standards of the sixth edition of the A.M.A., *Guides* and the Board is not able to determine from his brief report that he applied such standards. He merely indicated, without elaboration, that appellant had 20 percent impairment for loss of flexion and 18 percent impairment for meniscus loss joint defect and muscle atrophy.<sup>8</sup> In a February 9, 2012 report, Dr. Magliato, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, properly found that Dr. Smolinski's September 8, 2011 impairment rating did not show that appellant had a permanent impairment entitling him to schedule award compensation.

On appeal, appellant discussed his difficulties in obtaining an impairment rating from his attending physician in a timely manner and he submitted a copy of Dr. Smolinski's May 15,

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<sup>5</sup> *Id.*

<sup>6</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>7</sup> See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

<sup>8</sup> In a July 12, 2011 report, Dr. Smolinski indicated that appellant had a 15 percent temporary impairment, but he did not provide a rating of permanent impairment for a scheduled body member.

2012 report. The Board cannot consider such evidence for the first time on appeal,<sup>9</sup> but appellant may wish to resubmit such evidence to OWCP.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>10</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>11</sup>

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.<sup>12</sup> Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,<sup>13</sup> when the request is made after the 30-day period for requesting a hearing<sup>14</sup> and when the request is for a second hearing on the same issue.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, appellant's June 5, 2012 hearing request was made more than 30 days after the date of issuance of OWCP's prior decision dated April 16, 2012 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an OWCP representative in a letter postmarked as sent on June 5, 2012 and received by OWCP on June 7, 2012. Hence, OWCP was correct in stating in its August 3, 2012 decision that he was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of OWCP's April 16, 2012 decision.

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<sup>9</sup> See 20 C.F.R. § 501.2(c).

<sup>10</sup> 5 U.S.C. § 8124(b)(1).

<sup>11</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>12</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>13</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>14</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>15</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its August 3, 2012 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that he had permanent impairment entitling him to a schedule award. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>16</sup> In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish entitlement to schedule award compensation. The Board further finds that OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 3 and April 16, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 12, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).