



## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. Appellant, then a 46-year-old clerk, filed a claim on February 16, 1995 alleging that she sustained knee injuries in the performance of duty. OWCP accepted her claim for right knee contusion and torn medial meniscus. Appellant underwent a magnetic resonance imaging (MRI) scan on June 16, 1998 which demonstrated degenerative changes within the patellofemoral and medial femoral tibial compartments and degenerative changes of the lateral and medial menisci with findings suspicious for a tear. She underwent a meniscectomy of the right knee and debridement of the right knee joint on February 24, 2000. Appellant received a diagnosis of degenerative arthritis of the right knee and tear of the medial meniscal cartilage.

Appellant requested a schedule award. She submitted a report from Dr. David Weiss, an osteopath, dated December 8, 2003, who found that she had 15 percent impairment of the right lower extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>2</sup> (A.M.A., *Guides*) due to motor strength deficit of the right quadriceps of 12 percent and 3 percent for pain. OWCP's medical adviser reviewed this report and determined that appellant had five percent impairment of the right lower extremity, two percent impairment for partial medial meniscectomy and three percent for pain-related impairment. OWCP granted her a schedule award for five percent impairment of her right lower extremity on July 7, 2005. The Board reviewed this appeal on November 15, 2006<sup>3</sup> and found a conflict of medical opinion between an OWCP medical adviser and Dr. Weiss. The Board remanded the case for proper referral to an impartial medical examiner. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's November 15, 2006 decision, OWCP referred appellant to Dr. John R. Donahue, a Board-certified orthopedic surgeon. In a report dated January 15, 2007, Dr. Donahue noted appellant's history of injury and found that appellant's right knee had full range of motion, no swelling and no instability with no objective findings. He found that appellant had no motor strength deficit with only subjective indication of pain over the medial side of her right knee. Dr. Donahue found that she had three percent impairment.

By decision dated February 12, 2007, OWCP denied appellant's claim for an increased schedule award.

Counsel requested an oral hearing before an OWCP hearing representative. By decision dated August 1, 2007, the hearing representative set aside the February 12, 2007 decision and remanded the case for additional development of the medical evidence.

OWCP requested additional information from Dr. Donahue on August 2, 2007. Dr. Donahue responded on August 22, 2007 and stated that he reached his impairment rating through application of the fifth edition of the A.M.A., *Guides*. As he did not clearly address the issues, OWCP referred appellant for a second impartial medical examination with Dr. Elliot

---

<sup>2</sup> A.M.A., *Guides*, 5<sup>th</sup> ed. (2001).

<sup>3</sup> Docket No. 06-1165 (issued November 15, 2006).

Menkowitz, a Board-certified orthopedic surgeon. Appellant did not appear for this appointment.

By separate decisions dated February 27, 2008, OWCP suspended her compensation benefits and denied her claim for an additional schedule award in another decision of the same date.

Counsel requested an oral hearing. By decision dated June 25, 2008, the hearing representative set aside OWCP's February 27, 2008 decisions and determined that Dr. Menkowitz was improperly selected as the impartial medical specialist. He remanded the case for referral to an appropriate impartial medical specialist.

On July 25, 2008 OWCP referred appellant to Dr. William Spellman, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Spellman examined her on September 10, 2008 and described her employment injury. He found that both knees demonstrated valgus morphology with no atrophy of either quadriceps and equal measurements of both thighs. Dr. Spellman found medial joint line tenderness and crepitus increased in both knees with patellofemoral compression. He noted that appellant had full motor strength and a normal gait. Dr. Spellman reviewed appellant's medical records and stated that a relevant factor in computing knee impairment is the remaining cartilage space in a standing x-ray. He noted that he did not review recent x-rays and estimated that appellant had three millimeters of cartilage space remaining. Based on the fifth edition of the A.M.A., *Guides*, Dr. Spellman estimated that appellant had four percent impairment of her right lower extremity. He stated that to make a better determination, a recent standing weight-bearing x-ray of both knees was necessary. OWCP's medical adviser reviewed this report and stated that supplemental information was required from Dr. Spellman.

OWCP requested a supplemental report from Dr. Spellman on October 7, 2008. On October 14, 2008 Dr. Spellman stated that he had not reviewed the necessary x-rays and that his impairment rating was based on estimates from his physical examination.

By decision dated October 22, 2008, OWCP denied appellant's claim for an additional schedule award. Counsel requested an oral hearing and by decision dated February 3, 2009, the hearing representative set aside the October 22, 2008 decision and remanded the case to OWCP for x-rays and a supplemental report from Dr. Spellman.

Appellant underwent right knee x-rays on February 24, 2009. These x-rays were taken supine and demonstrated moderate medial compartment osteoarthritis and mild patellofemoral and lateral compartment osteoarthritis. Dr. Spellman reviewed these x-rays on March 13, 2009 and stated that the x-rays were not weight-bearing as appellant was supine and therefore he could not give an accurate assessment of the remaining cartilage space in the right knee. He requested additional weight-bearing x-rays.

In a letter dated March 30, 2009, OWCP instructed appellant to obtain three views of weight-bearing x-rays on her right knee. Appellant underwent additional x-rays on April 9, 2009. These studies demonstrated degenerative changes in the medial compartment

with narrowing of the medial femorotibial joint space and marginal spurring medially as well as the level of the patella.

Dr. Spellman reviewed appellant's April 9, 2009 x-rays on May 7, 2009. He stated that he was unable to make an accurate reading from the images as he was provided with photocopies which had been reduced rather than the original x-rays. On May 21, 2009 OWCP informed Dr. Spellman that impairment ratings were to be completed under the sixth edition of the A.M.A., *Guides*. In a report dated October 8, 2009, Dr. Spellman applied the sixth edition of the A.M.A., *Guides* to appellant's findings and determined that her diagnostic category was primary knee joint arthritis. He reviewed the x-rays of appellant's right knee and found that a three millimeter cartilage interval space was present. Dr. Spellman concluded that appellant had a class 1 primary knee joint arthritis in accordance with Table 16-3 of the A.M.A., *Guides*.<sup>4</sup> He found a -1 functional history grade modifier, a physical examination adjustment of 0 and that clinical studies grade modifier was not applicable. Dr. Spellman applied the formula of the A.M.A., *Guides* and determined that appellant had grade B or six percent impairment of the right lower extremity.

OWCP's medical adviser reviewed this report on October 17, 2009 and found that appellant had a right lower extremity impairment of seven percent or grade C of primary knee joint arthritis with cartilage interval of three millimeters. He stated that appellant had a functional history modifier of 1 due to appellant's history of knee pain. The medical adviser found a physical examination modifier of 1 due to valgus morphology and medial joint line tenderness as well as increased crepitus with patellofemoral compression. He also found that clinical studies modifiers were not appropriate. The medical adviser determined that appellant had seven percent impairment of her right lower extremity.

By decision dated October 20, 2009, OWCP granted appellant an additional schedule award of two percent for a total impairment rating of seven percent of the right lower extremity. Counsel requested an oral hearing on October 23, 2009.

Counsel appeared at the oral hearing on February 23, 2010 and alleged that Dr. Spellman could not be designated as a second opinion specialist for a schedule award issued under the sixth edition of the A.M.A., *Guides* as his familiarity was only with the fifth edition of the A.M.A., *Guides*. Appellant submitted a report dated March 2, 2010 from Dr. Weiss, who reviewed the standing x-rays and determined that, while normal knees demonstrated a cartilage interval of four millimeters for both the lateral and medial joint space, she had one millimeter of medial joint space with normal lateral joint space. Applying the A.M.A., *Guides* to this finding, Dr. Weiss determined that appellant had class 3 impairment due to primary knee joint arthritis with 30 percent impairment of the right lower extremity.<sup>5</sup> He completed a supplemental report on February 19, 2010 and found that appellant had a functional history grade modifier of 1, physical examination grade modifier of 1, that clinical studies grade modifier was not appropriate and that, after applying the formula of the A.M.A., *Guides*, appellant had a net adjustment of -1 for a final right lower extremity impairment of 26 percent.

---

<sup>4</sup> A.M.A., *Guides*, 509-11, Table 16-3.

<sup>5</sup> *Id.* at 511, Table 16-3.

By decision dated May 5, 2010, the hearing representative set aside OWCP's October 20, 2009 decision and remanded the case for an OWCP medical adviser to review Dr. Weiss' reports.

OWCP medical adviser reviewed the impairment ratings and x-rays on July 7, 2010 and stated that appellant had 3.75 millimeters of medial joint space and 7.75 millimeters of lateral joint space, such that appellant had a class 1 default rating of seven percent impairment of the right lower extremity.

By decision dated July 8, 2010, OWCP denied appellant's claim for an additional schedule award. Counsel requested reconsideration and alleged that there was a conflict of medical opinion evidence between an OWCP medical adviser and Dr. Weiss regarding the extent of appellant's permanent impairment.

OWCP issued a decision dated September 9, 2011 denying modification of the July 8, 2010 decision.

Counsel requested reconsideration on November 17, 2011 and submitted a new medical report. In a report dated July 1, 2011, Dr. Weiss stated that he reviewed weight-bearing x-rays of appellant's right knee taken on June 21, 2011 which demonstrated lateral joint space of four millimeters and medial joint space of one millimeter. He concluded that his prior impairment rating of 26 percent of appellant's right lower extremity was appropriate.

OWCP's medical adviser received Dr. Weiss' report on February 17, 2012 and the accompanying x-rays. The medical adviser stated that the two physicians who reviewed appellant's x-rays found 3 to 3.75 millimeters of joint space resulting in seven percent impairment of the right lower extremity.

By decision dated February 21, 2012, OWCP denied modification of its prior decisions.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>6</sup> and its implementing regulations<sup>7</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the

---

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>8</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

Appellant has received schedule awards totaling seven percent of her right lower extremity due to loss of cartilage intervals in her right knee under the sixth edition of the A.M.A., *Guides*. In support of her most recent request for reconsideration, she submitted additional x-rays and a report from Dr. Weiss dated July 1, 2011 finding on examination of the June 21, 2011 x-rays that she had lateral joint space measurements of four millimeters and medial joint space measurements of one millimeter in her right knee on weight-bearing x-rays. An OWCP medical adviser reviewed Dr. Weiss' report and concluded that appellant had 3 to 3.75 millimeters of joint space resulting in seven percent impairment of the right lower extremity.

Appellant has requested an increased schedule award and submitted additional objective evidence which was reviewed by Dr. Weiss. OWCP properly referred this evidence and report to an OWCP medical adviser for review.<sup>11</sup> The medical adviser disagreed with Dr. Weiss' review of x-rays and found that appellant had only 3 to 3.75 millimeters of joint space, rather than the 4 millimeters found by Dr. Weiss.

Due to this disagreement regarding the extent of appellant's permanent impairment for schedule award purposes, the Board finds that there is an unresolved conflict of medical opinion evidence regarding the extent of appellant's right knee impairment due to arthritis. On remand, OWCP should refer appellant, her most recent diagnostic studies, a statement of accepted facts and a list of specific questions to an appropriate Board-certified specialist for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a), to determine the extent of her permanent

---

<sup>8</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6<sup>th</sup> ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>9</sup> 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>10</sup> *R.C.*, 58 ECAB 238 (2006).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6d (December 2007).

impairment in accordance with the sixth edition of the A.M.A., *Guides*. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

**CONCLUSION**

The Board finds that the case requires additional development of the medical evidence on the part of OWCP regarding the right lower extremity impairment due to an unresolved conflict of medical opinion evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: March 22, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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