

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

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**R.M., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 13-285  
Issued: May 10, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 19, 2012 appellant filed a timely appeal of an August 2, 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 the case.

**ISSUE**

The issue is whether appellant sustained more than an additional 26 percent permanent impairment of the right leg, for which he received a schedule award.

**FACTUAL HISTORY**

On August 6, 1991 appellant, then a 39-year-old woodworker, injured his right knee while in the performance of duty. OWCP accepted his traumatic injury claim for right knee contusion. By decision dated November 24, 1992, it granted a schedule award for seven percent

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

permanent impairment of the right leg due to lost range of knee motion for the period May 26 to October 14, 1992. OWCP later expanded the claim to include right medial meniscus tear. On January 7, 1997 appellant filed a claim for recurrence of disability arising on August 13, 1996. OWCP accepted the claim for acceleration of right knee degenerative joint disease resulting from partial removal of the medial meniscus on April 7, 1992.<sup>2</sup> Appellant retired in 1999. He subsequently filed a claim for an additional schedule award on April 22, 2009.<sup>3</sup>

Multiple right knee x-rays obtained by Dr. Jon H. Swenson, a Board-certified orthopedic surgeon, on January 24, April 3 and May 24, 2012 exhibited tibial femoral joint space narrowing measuring one to two millimeters medially and four millimeters laterally as well as patellofemoral joint space narrowing measuring three millimeters.

OWCP referred appellant to Dr. David E. Lannik, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 28, 2012 report, Dr. Lannik reviewed the April 17, 2012 statement of accepted facts and medical file, pointing out that the radiographs objectively confirmed articular surface and medial knee joint loss. On examination, he observed limited range of motion and elicited posterior knee pain during extension maneuvers and medial joint line pain during varus and valgus stress tests. Dr. Lannik also noted varus deformity in the upright position. He diagnosed post-traumatic right knee arthritis secondary to torn medial meniscus. Dr. Lannik opined that appellant's joint space narrowing was due to the medial meniscus tear and chondromalacia patellae. Applying Table 16-3 (Knee Regional Grid -- Lower Extremity Impairments) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>4</sup> (hereinafter A.M.A., *Guides*), he assigned an impairment class (CDX) of three with an adjusted grade of A, amounting to 26 percent permanent impairment of the right leg on account of primary knee joint arthritis with a one-millimeter cartilage interval.<sup>5</sup> Dr. Lannik remarked that appellant had not yet reached maximum medical improvement (MMI) because his condition could be further stabilized by total knee replacement surgery.

On June 30, 2012 Dr. Lawrence A. Manning, an OWCP medical adviser and orthopedic surgeon, reviewed Dr. Lannik's June 28, 2012 report and concurred with the 26 percent impairment rating for arthritis.<sup>6</sup> He noted that appellant underwent arthroscopy and partial medial meniscectomy on March 3, 1997 and identified March 3, 1998 as the date of MMI.<sup>7</sup>

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<sup>2</sup> This information was incorporated into statements of accepted fact dated November 26, 1991; February 26, 1997; September 27, 2010 and April 17, 2012.

<sup>3</sup> OWCP originally denied this claim by decision dated March 2, 2011. This decision, however, was vacated on December 14, 2011.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>5</sup> *Id.* at 511.

<sup>6</sup> The medical adviser noted that appellant previously received a 7 percent right leg schedule award attributable to the knee and indicated that this award should be subtracted from the 26 percent if the prior award was for arthritis.

<sup>7</sup> The case record substantiates that appellant underwent surgery on March 3, 1997.

By decision dated July 30, 2012, OWCP accepted the following right knee injuries: contusion, torn medial meniscus, chondromalacia patellae and post-traumatic arthritis.

By decision dated August 2, 2012, OWCP granted an additional schedule award for 26 percent permanent impairment of the right lower extremity for the period March 3, 1998 to August 9, 1999. The award was based on his pay rate as of August 13, 1996.

### **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>8</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>9</sup>

The A.M.A., *Guides* provides 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 diagnosed condition (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 - 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>10</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained right knee contusion, torn medial meniscus, chondromalacia patellae and post-traumatic arthritis while in the performance of duty and granted a schedule award for seven percent permanent impairment of the right lower extremity for the period May 26 to October 14, 1992. Appellant filed a claim for an additional schedule award. In a June 28, 2012 second opinion examination report, Dr. Lannik reviewed the April 17, 2012 statement of accepted facts and medical file, conducted a physical examination, and determined that appellant sustained an additional 26 percent permanent impairment of the right lower extremity. Applying Table 16-3 of the A.M.A., *Guides*, he assigned a CDX of three with an adjusted grade of A for primary knee joint arthritis with a one-millimeter cartilage interval, amounting to 26 percent permanent impairment. Dr. Manning, a medical adviser, reviewed the report and agreed with Dr. Lannik's rating. The case record does not contain any other medical

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<sup>8</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404. No schedule award is payable for a member, function or organ of the body not specified under FECA or the implementing regulations. *J.Q.*, 59 ECAB 366 (2008).

<sup>9</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2011).

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

evidence that supports a greater percentage of impairment in conformance with the A.M.A., *Guides*. The Board finds that OWCP properly determined that appellant has no more than 26 percent additional permanent impairment, or 33 percent total right leg impairment, due to his right knee condition.

According to OWCP procedures, before a schedule award may be made, it must be medically determined that no further improvement can be anticipated and that the impairment reached a fixed and permanent state.<sup>11</sup> In particular, the file must contain competent medical evidence that shows that the impairment has reached MMI and indicates the date on which this occurred.<sup>12</sup> The period of a schedule award commences on the date of MMI, which is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.<sup>13</sup> The Board has noted a reluctance to find a date of MMI that is retroactive to the award, which often results in payment of less compensation benefits, and requires persuasive evidence of MMI for selection of a retroactive date.<sup>14</sup>

In the instant case, the medical evidence does not sufficiently support OWCP's finding that the date of MMI was reached on March 3, 1998. Dr. Lannik specified that appellant had not yet reached MMI because his right knee condition could be further stabilized by total knee replacement surgery. On the other hand, Dr. Manning opined that appellant reached MMI more than 14 years earlier on March 3, 1998, or exactly one year following right knee arthroscopy and partial medial meniscectomy. This fact does not constitute the persuasive evidence necessary to support his selection of a retroactive date of MMI. Therefore, the Board finds that the period of appellant's additional schedule award should have commenced on June 28, 2012, the date of Dr. Lannik's evaluation that was accepted as definitive by OWCP. The case will be remanded for OWCP to determine whether this change in date modifies the pay rate applicable to the award.<sup>15</sup>

### **CONCLUSION**

The Board finds that appellant sustained no more than an additional 26 percent permanent impairment of the right lower extremity.

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (January 2010).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(b)(1) (February 2013). *See also R.I.*, Docket No. 09-1559 (issued August 23, 2010) (the determination of whether MMI has been reached is based on probative medical evidence).

<sup>13</sup> *Mark A. Holloway*, 55 ECAB 321 (2004).

<sup>14</sup> *D.R.*, 57 ECAB 720 (2006).

<sup>15</sup> *See id.* Appellant also asks for an explanation regarding the use of his pay rate effective August 13, 1996 as the basis of the additional schedule award. OWCP should clarify this outstanding matter on remand.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 2, 2012 decision of the Office of Workers' Compensation Programs be affirmed in part and set aside in part. The case shall be remanded for further action consistent with this decision of the Board.

Issued: May 10, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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