

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

M.P., Appellant	)	
	)	
and	)	<b>Docket No. 13-1225</b>
	)	<b>Issued: October 23, 2013</b>
DEPARTMENT OF HOMELAND SECURITY,	)	
CUSTOMS & BORDER PROTECION,	)	
Pembroke Pines, FL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 24, 2011 appellant filed a timely appeal from a March 13, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied an additional schedule award. 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 has more than seven percent impairment of the lower right extremity for which he received a schedule award.

**FACTUAL HISTORY**

On July 23, 2011 appellant, then a 33-year-old air enforcement agent, filed a traumatic injury claim alleging that on July 19, 2011 he sustained a right knee injury when he did a

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<sup>1</sup>5 U.S.C. § 8101 *et seq.*

maximum vertical jump as part of a physical fitness test. OWCP accepted his claim for tear of the medial meniscus and other internal derangement of the right knee.

On August 23, 2011 appellant underwent an arthroscopy, partial lateral meniscectomy and anterior cruciate ligament (ACL) reconstruction of the right knee. He stopped work and received temporary total disability compensation. Appellant returned to light duty on October 11, 2011.

On January 15, 2013 appellant filed a claim for schedule award. In a November 26, 2012 report, Dr. Harlan Selesnick, a Board-certified orthopedic surgeon, stated that appellant had resumed full activities without limitation. Upon examination, he observed trace Lachman and anterior drawer with a firm endpoint. No joint line tenderness or effusion was noted. Dr. Selesnick reported that x-rays showed excellent position of the graft with excellent incorporation of the graft. He opined that, according to the *Florida Impairment Rating Guidelines*, appellant had 15 percent permanent impairment of the lower extremity, which translated to 6 percent permanent impairment to the whole person.

OWCP referred appellant's schedule award claim to a district medical adviser to provide an impairment rating for loss of use of the right leg under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and date of maximum medical improvement. In a January 23, 2013 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and an OWCP medical adviser, noted a date of maximum medical improvement as of November 26, 2012, the date of Dr. Selesnick's report. He related that appellant underwent partial lateral meniscectomy and ACL reconstruction on August 23, 2011 and stated that the results were satisfactory. According to the sixth edition of the A.M.A., *Guides*, Dr. Hogshead opined that, under Table 16-3, page 510, appellant had class 1, grade C impairment or 10 percent impairment of the right lower extremity. Grade modifiers of 0 were given for functional history, physical examination and clinical studies, which resulted in a net adjustment of minus 2. The medical adviser subtracted the net adjustment from the default 10 percent to rate 7 percent impairment of the right leg.

By decision dated March 13, 2013, OWCP granted appellant a schedule award for seven percent permanent impairment of the right lower extremity based on the district medical advisers' report. The award ran for a period November 26, 2012 to April 16, 2013, or 20.16 weeks.

### **LEGAL PRECEDENT**

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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.404.

OWCP.<sup>4</sup> 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. The A.M.A., *Guides* has been adopted by OWCP as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>6</sup>

The sixth edition of 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).<sup>7</sup> In determining impairment for lower extremity impairments under the sixth edition, an 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).<sup>8</sup> The net adjustment formula is (GMFH-CDX) + (GMPE - CDX) + (GMCS-CDX).<sup>9</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.<sup>10</sup>

### ANALYSIS

Appellant's claim was accepted for tear of the medial meniscus and other internal derangement of the right knee for which surgery was performed. On January 15, 2013 he filed a claim for schedule award. The Board finds that the medical evidence of record establishes no more than seven percent impairment for appellant's right leg.

Appellant submitted a November 26, 2012 report from Dr. Selesnick. Upon examination, he observed trace Lachman and anterior drawer with a firm endpoint. No joint line tenderness or effusion was noted. Dr. Selesnick opined that according to the *Florida Impairment Rating Guidelines* appellant had 15 percent impairment of the right lower extremity, which translated to 6 percent permanent impairment to the whole person. The Board finds, however, that Dr. Selesnick's report fails to address permanent impairment under the standards applicable to FECA. The Board has found that, when an attending physician fails to provide a rating that

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<sup>4</sup>*Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

<sup>5</sup>*R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

<sup>7</sup>A.M.A., *Guides* 3, 6 (6<sup>th</sup> ed. 2008).

<sup>8</sup>*Id.* at 494-531.

<sup>9</sup>*Id.* at 521.

<sup>10</sup>*See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

conforms to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment.<sup>11</sup> In this case, Dr. Selesnick did not utilize the sixth edition of the A.M.A., *Guides* to calculate his impairment rating. Rather, he relied on the *Florida Impairment Rating Guidelines*. Because Dr. Selesnick's report does not conform to the A.M.A., *Guides* it cannot be used as a basis for appellant's impairment rating.

In a January 23, 2013 medical adviser report, Dr. Hogshead, determined that appellant had seven percent impairment of the right lower extremity. He related that appellant underwent partial lateral meniscectomy and ACL reconstruction on August 23, 2011 and stated that the results were satisfactory. Utilizing Table 16-3, page 510, of the sixth edition of the A.M.A., *Guides*, Dr. Hogshead determined that appellant had class 1, grade C impairment or 10 percent impairment of the right lower extremity. Grade modifiers of 0 were given for functional history, physical examination and clinical studies, which resulted in a net adjustment of minus 2, for a total of seven percent impairment of the right lower extremity. The Board notes that for meniscal injury or cruciate ligament injury under Table 16-3 of the A.M.A., *Guides*, a class 1 impairment has a default grade of 10 percent impairment. If the default grade of 10 is modified once, the result is an eight percent impairment, if modified twice, the grade of impairment is seven percent.<sup>12</sup>

The Board finds that the medical adviser properly applied the sixth edition of the A.M.A., *Guides* to rate impairment to appellant's right lower extremity. Dr. Hogshead reviewed the medical evidence and determined that appellant had no more than seven percent impairment for the right lower extremity under the sixth edition of the A.M.A., *Guides*. His rating is in accordance with the protocols pertaining to lower extremity impairment determinations and represents the weight of medical opinion. Appellant did not submit any other medical evidence, which conformed to the A.M.A., *Guides*, to establish that he sustained greater impairment.

On appeal, appellant contends that a surgeon used the guidelines from the sixth edition of the A.M.A., *Guides* and found his impairment rating to be nine percent. The Board's jurisdiction, however, is limited to evidence that was before OWCP at the time it issued its final decision.<sup>13</sup> Because this report was not submitted for review to OWCP prior to its March 13, 2013 decision, the Board may not consider this evidence for the first time on appeal. Appellant may submit that evidence to OWCP along with a request for reconsideration.

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.

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<sup>11</sup>Linda Beale, 57 ECAB 429, 434 (2006). See also James Kennedy, Jr., 40 ECAB 620, 627 (1989).

<sup>12</sup>A.M.A., *Guides* 509-10.

<sup>13</sup>See 20 C.F.R. § 501.2(c); Sandra D. Pruitt, 57 ECAB 126 (2005).

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he has more than seven percent impairment of the right lower extremity for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2013  
Washington, DC

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

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

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