

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 14-1640
Issued: December 8, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2014 appellant filed a timely appeal from a June 3, 2014 merit decision and a July 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a 25 percent impairment of his right lower extremity, for which he previously received a schedule award; and (2) whether OWCP properly denied a review of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 1, 2006 appellant, then a 47-year-old carrier, sustained a traumatic injury in the performance of duty when he failed to notice a step down on the sidewalk and twisted his right knee. OWCP accepted his claim for a right medial meniscus tear.

In June 2006, appellant underwent a partial medial meniscectomy. In December 2006, he underwent a medial unicompartmental arthroplasty.

On May 29, 2007 OWCP issued a schedule award for a 25 percent impairment of appellant's right lower extremity.

In January 2013, appellant underwent a total knee arthroplasty with a postoperative diagnosis of failed unicompartmental arthroplasty, right knee.

Appellant filed a claim for an additional schedule award in February 2014.

Dr. E. Jean Dabezies, Jr., the attending Board-certified orthopedic surgeon, examined appellant in January 2014, one year after his total knee arthroplasty. Appellant's pain scale was zero, but he indicated that his knee ached on and off and that walking "too much" was an aggravating factor, while resting gave relief. On examination, gait and station were normal, as was general joint mobility and strength. Dr. Dabezies interpreted radiographic findings. He offered the following summary: "[Appellant] is doing well post total knee arthroplasty at one year. Follow-up in another year for routine follow-up with x-rays."

Dr. Dabezies offered an impairment rating on April 21, 2014. He believed that appellant had a good result from his total knee arthroscopy. Based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), Dr. Dabezies found that appellant had a 50 percent impairment of the right lower extremity.²

An OWCP medical adviser reviewed Dr. Dabezies' evaluation and found that it was not referenced or explained in any way. He noted that appellant was doing well with a pain scale of zero. Applying Table 16-3, page 511 of the A.M.A., *Guides* (6th ed. 2009), the medical adviser found that appellant's good result represented a 25 percent impairment of the right lower extremity.

In a decision dated June 3, 2014, OWCP denied appellant's claim for an additional schedule award, as he had already received an award for a 25 percent impairment of his right lower extremity.

On July 7, 2014 OWCP received appellant's request for reconsideration. Appellant submitted a copy of Dr. Dabezies' April 21, 2014 impairment rating and advised that Dr. Dabezies would have a conference call with OWCP to discuss how he came up with his findings. He added that he was okay when he received his schedule award in 2007, but the partial knee replacement failed, and he required a total knee replacement. Appellant indicated

² Table 17-33, page 547.

that nursing his right knee had started wearing out his left knee. He blamed the employing establishment for exceeding his doctor's release for sedentary work only. Having had three surgeries, appellant stated that "the pain and suffering of the last seven years should count for something."

In a decision dated July 10, 2014, OWCP denied appellant's reconsideration request. It found that the evidence submitted was repetitious and previously considered. Further, appellant did not set forth any legal argument and did not show that OWCP erroneously applied or interpreted a specific point of law.

On appeal, appellant points to his three surgeries, which caused pain from 2006 to 2013.

LEGAL PRECEDENT -- ISSUE 1

The burden is upon the employee to establish by evidence that he is entitled to compensation.³

The schedule award provision of FECA⁴ and the implementing regulations⁵ 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 shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁶

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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

ANALYSIS -- ISSUE 1

In 2007, OWCP granted a schedule award for a 25 percent impairment of appellant's right lower extremity. Appellant now claims an additional schedule award. The question for determination, therefore, is whether he has established that he currently has more than a 25 percent impairment of his right lower extremity.

³ *Harold Hendrix*, 1 ECAB 54 (1947).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁷ *Supra* note 5; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010).

Diagnosis-based impairment is the primary method of evaluating the lower limb. Impairment is determined first by identifying the relevant regional diagnosis, then by selecting the class of the impairment (no objective problem, mild problem, moderate problem, severe problem, very severe problem approaching total function loss), which will provide a default impairment rating. This may be adjusted slightly based on functional history, physical examination and clinical studies.⁹

Table 16-3, the Knee Regional Grid, shows the impairment values for a total knee replacement on page 511. A good result is characterized by good position, stability, and functionality. This is indicative of a moderate problem and has a default impairment value of 25 percent. Indeed, 25 percent is the highest rating anyone can receive for a good result. A fair result is characterized by fair position, mild instability and/or mild motion deficit. It is indicative of a severe problem and has a default impairment value of 37 percent.

Dr. Dabezies, the attending orthopedic surgeon, did not apply the sixth edition of the A.M.A., *Guides*. It is apparent that he applied the older fifth edition, in which a fair result from a total knee replacement, determined by an involved point system, represented a 50 percent impairment of the lower extremity. A rating not based on the proper edition of the A.M.A., *Guides* is of little probative value.¹⁰ Because Dr. Dabezies did not follow the protocols of the applicable sixth edition of the A.M.A., *Guides*, his impairment rating has little, if any, probative value in determining the extent of appellant's impairment. In other words, his rating does not support that appellant has had only a fair result from his total knee arthroplasty.

The medical adviser noted that Dr. Dabezies had examined appellant one year after surgery and found that he was doing well. Appellant's pain scale was zero. Rather, Dr. Dabezies found gait and station were normal, as were general mobility and strength. For this reason, the examination does not demonstrate a good result under Table 16-3, page 511.

As the medical evidence does not show that appellant has more than a 25 percent impairment of his right lower extremity, for which he previously received a schedule award, the Board finds that he has not met his burden of proof to establish additional impairment. The Board will, therefore, affirm OWCP's June 3, 2014 decision denying an additional schedule award.

On appeal, appellant points to his three surgeries, which caused a lot of pain from 2006 to 2013. The rating he received for permanent physical impairment under Table 16-3 makes allowance for most of the functional losses accompanying pain.¹¹ To the extent that injury-related pain caused disability for work, appellant received compensation for the resulting wage loss.

⁹ A.M.A., *Guides* 497.

¹⁰ *James Kennedy, Jr.*, 40 ECAB 620, 627 (1989) (an opinion that is not based upon 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 permanent impairment).

¹¹ A.M.A., *Guides* 25 (Pain and Suffering).

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

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.¹² An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁴ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁵

ANALYSIS -- ISSUE 2

OWCP received appellant's reconsideration request within one year of its June 3, 2014 decision, which was the most recent merit decision in his case. Appellant's request is therefore timely. The question for determination is whether that request met at least one of the standards for obtaining a merit review of his case.

Appellant's request did not show that OWCP erroneously applied or interpreted a specific point of law. The request did not advance a relevant legal argument not previously considered by OWCP. Appellant simply informed OWCP that Dr. Dabezies was willing to discuss his rating in a conference call. He added that nursing his right knee had affected his left knee, that the employing establishment exceeded his limitations, and that he had suffered with pain for seven years. None of these things represented a legal argument relevant to OWCP's denial of an additional schedule award. Further, the request did not contain evidence that constituted relevant and pertinent new evidence not previously considered by OWCP. Appellant submitted a copy of Dr. Dabezies' April 21, 2014 report, which of course was previously submitted and considered.

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.606.

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608.

Accordingly, as appellant's reconsideration request did not meet any of the requirements for reopening his case, the Board finds that OWCP properly denied a merit review. The Board will affirm its July 10, 2014 decision.

CONCLUSION

The Board finds that appellant has not met his burden to establish more than a 25 percent impairment of his right lower extremity, for which he previously received a schedule award. The Board also finds that OWCP properly denied appellant's reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the July 10 and June 3, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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