

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

L.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 14-1786
Issued: December 10, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 11, 2014 appellant, through counsel, filed a timely appeal from the May 28, 2014 merit 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 over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she has permanent impairment entitling her to schedule award compensation.

FACTUAL HISTORY

OWCP accepted that on March 31, 2005 appellant, then a 49-year-old letter carrier, sustained bilateral knee contusions due to a fall at work. She stopped work on April 1, 2005 and received disability compensation on the periodic rolls. Appellant was referred by OWCP to a vocational rehabilitation program in August 2008.

¹ 5 U.S.C. §§ 8101-8193.

In a December 11, 2009 decision, OWCP reduced appellant's compensation to zero effective December 20, 2009 under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that she had failed, without good cause, to undergo vocational rehabilitation as directed. In a May 11, 2010 decision, an OWCP hearing representative affirmed OWCP's December 11, 2009 decision.

In an April 21, 2010 report, Dr. Albert Graziosa, an attending Board-certified orthopedic surgeon, indicated that physical examination of appellant's knees showed full extension and flexion to 110 degrees bilaterally. He diagnosed "bilateral knee contusions with internal derangement in today for scheduled losses" and stated that, based on the medical guidelines of the New York State Workmen's Compensation Board, appellant had a scheduled loss of approximately 10 percent for a lack of full flexion, as well as an additional 10 percent for chondromalacia of the patellas which was evident clinically. Therefore, she had a 20 percent scheduled loss to both knees.²

On August 5, 2010 an OWCP medical adviser reviewed the April 21, 2010 report of Dr. Graziosa and indicated that it had limited probative value regarding appellant's claimed permanent impairment because it did not contain an impairment rating that was carried out in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*).

On December 20, 2010 Dr. Graziosa noted that physical examination revealed tenderness diffusely around portions of the medial joint lines of appellant's knees bilaterally. He stated, in the impression portion of the report, "Bilateral knee contusions, internal derangement with 20 percent scheduled loss of use."

By decision dated May 11, 2011,³ the Board affirmed OWCP's reduction of appellant's compensation to zero effective December 20, 2009 to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

In a June 7, 2011 report, Dr. David E. Lent, an attending Board-certified orthopedic surgeon, stated that appellant had point tenderness over the medial joint line and patellar facet tenderness on physical examination and diagnosed "left medial meniscus tear, still symptomatic six years after the injury." He indicated that appellant needed further treatment for her knees and stated, "I cannot do an impairment rating as I do not believe the patient has reached her [maximum medical improvement]."

In a July 19, 2011 report, Dr. Graziosa stated that appellant presented on that date for reevaluation of ongoing bilateral knee pain secondary to a work-related injury from March 2005. Appellant reported that she continued to have pain and discomfort which was worse at the extremes and that her left knee was "really painful." Dr. Graziosa stated that physical examination on July 19, 2011 revealed a significant amount of tenderness around portions of the

² An impairment form was signed by Dr. Graziosa on an unspecified date and received by OWCP on July 7, 2010. The form was not completed and contained the notation "refer to medical note."

³ Docket No. 10-1707 (issued May 11, 2011).

medial joint lines of her knees, that there was severe crepitus on the left side and that she was able to fully extend and flex to about 120 degrees. He indicated that appellant's disability was "total" and stated in the impression portion of the report, "Bilateral knee contusions with internal derangement, issued a 20 percent scheduled loss of use to both knees."

On January 3, 2012 appellant filed a claim for a schedule award due to her March 31, 2005 work injury.

In a letter dated March 13, 2013, OWCP advised appellant that she needed to submit a medical report which evaluated her claimed permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. It enclosed an impairment rating worksheet for her attending physician to complete and provided her 30 days to submit the requested evidence.

Counsel, on behalf of appellant, resubmitted a copy of the July 19, 2011 report of Dr. Graziosa. In a cover sheet, he indicated that the July 19, 2011 report included a worksheet but no such worksheet is in the record. On April 15, 2013 appellant contacted OWCP by telephone and advised that her attending physician was unable to complete the impairment rating worksheet it had provided.

In a September 20, 2013 decision, OWCP denied appellant's schedule award claim on the grounds that she did not submit sufficient medical evidence to show that she has permanent impairment entitling her to schedule award compensation. It indicated that appellant had not submitted a medical report that evaluated her claimed impairment under the standards of the sixth edition of the A.M.A., *Guides*.⁴

Appellant requested a telephonic hearing with an OWCP hearing representative. During the March 13, 2014 hearing, counsel indicated that appellant was in the process of obtaining an impairment rating evaluation. He argued that the submission of the July 19, 2011 report of Dr. Graziosa should have led to further development of the evidence by OWCP. OWCP hearing representative indicated that the record would be held open for 30 days for the submission of additional evidence.

By decision dated May 28, 2014, OWCP hearing representative affirmed its September 20, 2013 decision denying appellant's schedule award claim noting that she had not submitted medical evidence showing that she has permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

⁴ With respect to the July 19, 2011 report of Dr. Graziosa, OWCP stated:

"Dr. Graziosa did not provide a description of any restriction of movement in terms of degrees of retained active. [He] did not provide a description of all other pertinent objective findings -- decrease of strength, atrophy, ankylosis, sensory changes, or other, as applicable. Dr. Graziosa did not provide the description of subjective complaints causing impairment -- pain, discomfort, etc. [He] did not show how he arrived at the figure using applicable tables in the [A.M.A., *Guides*]. Dr. Graziosa did not identify the specific sections and pages of the [A.M.A., *Guides*] he used to arrive at your final percentage. [He] did not complete a *QuickDASH* worksheet. Dr. Graziosa did not provide the date when maximum medical improvement was reached."

LEGAL PRECEDENT

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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 appropriate standard for evaluating schedule losses.⁷ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸ It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.⁹ There is no basis for including subsequently acquired conditions.¹⁰

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.¹¹ After the Class of Diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹²

ANALYSIS

OWCP accepted that on March 31, 2005 appellant sustained bilateral knee contusions due to a fall at work. Appellant filed a claim for a schedule award due to her March 31, 2005 work injury.

The Board finds that appellant did not submit sufficient medical evidence to meet her burden of proof to establish that she has permanent impairment entitling her to schedule award compensation. Although appellant's treating physician attempting to provide a rating of her

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ *D.F.*, 59 ECAB 288 (2007); *Kenneth E. Leone*, 46 ECAB 133 (1994).

¹⁰ *R.G.*, Docket No. 13-220 (issued May 9, 2013).

¹¹ See A.M.A., *Guides* 509-11 (6th ed. 2009).

¹² *Id.* at 515-22.

permanent functional impairment, he failed to provide a rating under the sixth edition of the A.M.A., *Guides* in accordance with OWCP regulations.

In an April 21, 2010 report, Dr. Graziosa, an attending Board-certified orthopedic surgeon, indicated that physical examination of appellant's knees showed full extension and flexion to 110 degrees bilaterally. He diagnosed "bilateral knee contusions with internal derangement in today for scheduled losses" and stated that, based on the medical guidelines of the New York State Workmen's Compensation Board, appellant had a 20 percent impairment in each knee based on lack of full flexion and chondromalacia of the patellas. On December 20, 2010 Dr. Graziosa stated, in the impression portion of the report, "Bilateral knee contusions, internal derangement with 20 percent scheduled loss of use." In a July 19, 2011 report, he indicated that physical examination on that date revealed a significant amount of tenderness around portions of the medial joint lines of appellant's knees, that there was severe crepitus on the left side and, that she was able to fully extend and flex to about 120 degrees. Dr. Graziosa noted in the impression portion of the report, "Bilateral knee contusions with internal derangement, issued a 20 percent scheduled loss of use to both knees."

Although Dr. Graziosa provided an opinion that appellant had a 20 percent permanent impairment in each knee, this opinion is of limited probative value because he did not explain how this rating was derived under the relevant standards for evaluating such impairment in this case, *i.e.*, the sixth edition of the A.M.A., *Guides*.¹³ The Board has held that an opinion on permanent impairment is of limited probative value if it is not derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.¹⁴ The sixth edition of the A.M.A., *Guides* provides specific and detailed methods for evaluating permanent impairment stemming from injury to the knee, including identifying a diagnosis-based impairment and calculating grade modifiers for functional history, physical examination and clinical studies. Clearly, Dr. Graziosa did not carry out any such evaluation under the A.M.A., *Guides* for the reasons he specified. He did, however, note a diagnosis and define his functional loss in narrative terms and consistent with state-based impairment rating guidelines.¹⁵

Appellant did not submit medical evidence from any other physician showing that she had permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. In a June 7, 2011 report, Dr. Lent, an attending Board-certified orthopedic surgeon, diagnosed "left medial meniscus tear, still symptomatic six years after the injury." He did not provide an impairment rating in that he stated, "I cannot do an impairment rating as I do not believe the

¹³ See *supra* notes 5 through 8.

¹⁴ 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).

¹⁵ See *supra* note 12. It is also noted that on August 5, 2010 an OWCP medical adviser reviewed the April 21, 2010 report of Dr. Graziosa and indicated that it had limited probative value regarding appellant's claimed permanent impairment because it did not contain an impairment rating that was carried out in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

patient has reached her [maximum medical improvement].”¹⁶ During a March 13, 2014 telephonic hearing with an OWCP hearing representative, counsel argued that OWCP did not adequately develop the medical evidence with respect to appellant’s claimed permanent impairment. The Board notes that appellant was provided multiple opportunities to provide a physician’s impairment rating derived under the relevant standards, but that she failed to provide such evidence for the reasons set forth herein.

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.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has permanent impairment entitling her to schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT May 28, 2014 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: December 10, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ The Board notes that it has not been accepted that appellant sustained a work-related left medial meniscus tear or that this condition preexisted her March 31, 2005 work injury.