

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

G.R., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
NATIONAL GUARD, Saint Paul, MN, Employer**

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**Docket No. 14-91
Issued: March 13, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 21, 2013 appellant filed a timely appeal from the September 23, 2013 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 his burden of proof to establish that he has more than a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg.

FACTUAL HISTORY

In May 2001, OWCP accepted that appellant, then a 42-year-old heavy mobile equipment repairer, sustained aggravation of preexisting degenerative arthritis in both knees due to his work duties, including engaging in walking, kneeling and climbing stairs and ladders. He continued to work for the employing establishment on a full-time basis.

¹ 5 U.S.C. §§ 8101-8193.

On January 17, 2005 appellant filed a claim for a schedule award due to his accepted work-related condition.

On June 15, 2007 OWCP requested that appellant obtain an impairment rating from his attending physician which was based on a current physical examination.

In a June 28, 2007 report, Dr. Bruce E. Piatt, an attending Board-certified orthopedic surgeon, reported the findings of June 28, 2007 x-rays of appellant's knees which showed patellofemoral and medial compartment degenerative arthritic changes (including cartilage intervals of two millimeters in both knees). He detailed the findings of the physical examination noting that appellant had 1+ effusion in his right knee, no effusion in his left knee and flexion in both knees of about 125 to 130 degrees. Appellant had 5/5 strength in both legs upon manual testing and there was no significant varus, valgus, anterior or posterior laxity. Dr. Piatt indicated that appellant had reached maximum medical improvement and stated that, under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he would give appellant "an impairment rating of eight percent whole body for each knee based on the fact that his arthritis (Table 62, page 83) shows that cartilage interval is only about [two millimeters] in both knees."

No further documents were added to the record until August 15, 2013 when OWCP produced a letter in which it requested that an OWCP medical adviser review the medical record, including Dr. Piatt's June 28, 2007 findings and impairment rating, and provide an impairment rating of appellant's legs based on the sixth edition of the A.M.A., *Guides*.

On August 19, 2013 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant had a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*. Dr. Piatt detailed the June 28, 2007 examination findings of Dr. Garelick and the June 28, 2007 x-ray findings and stated that, under Table 16-3 of the sixth edition of the A.M.A., *Guides*, appellant would have a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg due to the two millimeter cartilage interval in each knee. He stated, "There would be no change to this award with use of the net adjustment formula. The date of [maximum medical improvement] would have occurred as of the date of Dr. Piatt's examination, June 28, 2007."²

In a September 23, 2013 decision, OWCP granted appellant a schedule award for a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg. The award ran for 115.2 weeks from June 28, 2007 to September 11, 2009. It was based on the August 19, 2013 impairment calculations of Dr. Garelick which used the June 28, 2007 findings of Dr. Piatt.

² Dr. Garelick indicated that he was disregarding the June 2007 impairment rating of Dr. Piatt because it was based on an edition of the A.M.A., *Guides* that was no longer in effect.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶ The Board has held that an impairment rating that is not based on reasonably current examination findings is of little probative value.⁷

While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁸ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.⁹

ANALYSIS

In May 2001, OWCP accepted that appellant sustained aggravation of preexisting degenerative arthritis in both knees due to his work duties. On January 17, 2005 appellant filed a claim for a schedule award due to his accepted work-related condition.

On August 19, 2013 Dr. Garelick determined that appellant had a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*. In reaching this determination, he used examination findings that were obtained on June 28, 2007 by Dr. Piatt, an attending Board-certified orthopedic surgeon.

The Board finds that, in August 2013, it was inappropriate for Dr. Garelick to base his impairment rating on the June 2007 findings of Dr. Piatt, findings which were more than six years old at the time of Dr. Garelick's impairment calculations. The June 2007 findings constituted stale medical evidence and would not represent the type of reasonably current medical evidence to be used in calculating permanent impairment.¹⁰ In August 2013, OWCP developed the medical

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ See *W.M.*, Docket No. 12-773 (issued March 29, 2013) (where a physician sought in June 2011 to update a prior impairment rating, but the Board found that the May 2004 findings which served as the basis for the updated rating constituted stale medical evidence); *P.S.*, Docket No. 12-649 (issued February 14, 2013) (the Board found that a physician's January 2010 impairment rating was of reduced probative value because the physician relied on October 2007 findings as the basis for this updated impairment rating).

⁸ *Russell F. Polhemus*, 32 ECAB 1066 (1981).

⁹ See *Robert F. Hart*, 36 ECAB 186 (1984).

¹⁰ See *supra* note 7.

evidence by referring the case to an OWCP medical adviser. After undertaking such development, OWCP had a responsibility to do so in the proper manner.¹¹

Therefore, the case should be remanded to OWCP for further development of the medical evidence, to include an attempt to obtain reasonably current medical evidence for the purpose of evaluating the permanent impairment of appellant's legs. After such development as deemed necessary, OWCP shall issue an appropriate decision regarding appellant's entitlement to schedule award compensation.

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant has more than a 20 percent permanent impairment of his left leg and a 20 percent permanent impairment of his right leg.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 13, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ See *supra* note 9.