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

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| **E.A., Appellant** | ) | |
| **and** | ) | **Docket No. 14-834** |
| | ) | **Issued: September 16, 2014** |
| **U.S. POSTAL SERVICE, CHANDLER POST OFFICE, North Hollywood, CA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On March 5, 2014 appellant, through his attorney, filed a timely appeal of a January 16, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

### ***ISSUE***

The issue is whether appellant has more than 34 percent impairment of his right leg, for which he received a schedule award.

On appeal, counsel argued a conflict of medical evidence exists between Dr. Michael E. Hebrard, appellant's attending Board-certified physiatrist, and the medical adviser regarding the extent of permanent impairment.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

On August 25, 2003 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging a right knee condition including swelling and pain. OWCP accepted his claim for a right knee strain, derangement and meniscus tear on November 26, 2003. Appellant underwent right knee arthroscopic surgery on January 27, 2004 for a lateral meniscectomy due to a large cleavage tear and chondroplasty due to grade 3 chondromalacia of the trochlear groove, medial femoral condyle and lateral femoral condyle. He returned to light-duty work on February 17, 2004. On October 5, 2005 appellant reached maximum medical improvement with a rating of two percent impairment of right lower extremity.

Appellant underwent a magnetic resonance imaging (MRI) scan on May 24, 2005, which demonstrated subchondral sclerosis, osteophytes in all three compartments and a degenerative tear of lateral meniscus. He underwent an MRI scan on January 2, 2007, which demonstrated a tear in the anterior horn of the medial meniscus as well as early degenerative changes in the medial and lateral compartments of the right knee. On August 20, 2007 Dr. Marc Friedman, a Board-certified orthopedic surgeon, performed arthroscopic surgery for a cleavage tear of the anterior horn of the lateral meniscus and grade 3 or 4 chondromalacia throughout appellant's knee.

By decision dated January 23, 2008, OWCP granted appellant a schedule award for 34 percent impairment of the right lower extremity.

Dr. Friedman recommended that appellant undergo a total knee replacement on July 24, 2008 due to tricompartmental arthritis. On September 25, 2009 the medical adviser recommended that OWCP accept right knee osteoarthritis and stated that a total knee arthroplasty was medically necessary and reasonable. On March 3, 2010 Dr. Friedman performed a total right knee replacement surgery. On April 5, 2011 appellant's March 30, 2011 bone scan showed increased uptake about the medial tibia. His knee replacement exhibited loosening on May 10, 2011.

Dr. Jaime Hernandez, a Board-certified orthopedic surgeon, performed a revision of appellant's right total knee arthroplasty on September 12, 2011. On May 1, 2012 he found that appellant's condition was permanent and stationary. Dr. Hernandez noted that appellant had a healed anterior incision with keloid and that his range of motion was 0 to 120 degrees. He found no instability to varus, valgus or AP stress. Dr. Hernandez stated that x-rays did not demonstrate loosing, component migration or subsidence. On June 19, 2012 he noted that appellant had mild right knee pain with stiffness and swelling. Appellant's thigh circumference on the right measured 23 inches and on the left 24 inches. His calves were 16½ inches on the right and 16¾ inches on the left. Dr. Hernandez noted that appellant had significant keloid formation in his incision scar. He found flexion from 0 to 125 degrees on the right with no obvious instability medially, laterally or anterior posteriorly. Dr. Hernandez stated that appellant's gait was normal and that he could walk on his heels and toes. He stated that x-rays on May 1, 2012 showed the total knee replacement. Dr. Hernandez provided an impairment rating based on the fifth edition of the A.M.A., *Guides*. He noted that appellant had a good result for his total knee replacement and a 13 percent whole person impairment.

Appellant requested an additional schedule award on December 20, 2012. Dr. Leonard A. Simpson, a medical adviser, reviewed appellant's claim on January 16, 2013 and evaluated permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.[2] He found that appellant had a good result following a total knee replacement in accordance with Table 16-3 with a default rating of 25 percent.[3] Dr. Simpson noted that appellant's functional history adjustment resulted in a grade modifier 1 or -1 net adjustment; the physical examination adjustment resulted in a grade modifier 0 or a -2 net adjustment; and the clinical studies grade modifier was not applicable as it was utilized for class placement. He applied the net adjustment formula to determine that the adjustment was -3, thereby moving the impairment to a class 2, grade A or 21 percent impairment of the right lower extremity. Dr. Simpson stated that the date of maximum medical improvement was June 19, 2012.

In a January 29, 2013 decision, OWCP found that appellant had no additional impairment of his right leg.

Counsel requested an oral hearing before an OWCP hearing representative on February 4, 2013. Appellant appeared at the May 15, 2013 oral hearing and testified that he had two replacements of the same knee. He stated that his right leg was longer than his left due to the revision of the knee replacement. Counsel requested an additional 30 days to submit additional medical evidence.

By decision dated July 23, 2013, the hearing representative found that appellant had no more than 34 percent impairment of his right lower extremity for which he received schedule awards. The hearing representative found that Dr. Hernandez' report was of limited probative value as it was not based on the appropriate edition of the A.M.A., *Guides.* Therefore Dr. Simpson's report was entitled to the weight of the medical evidence.

In a report dated June 26, 2013, received by OWCP on July 25, 2013, Dr. Hebrard evaluated appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. He noted appellant's history of injury and medical treatment. Dr. Hebrard reviewed appellant's pain and functional status questionnaire which demonstrated that he experienced achy radiating, cramping, sharp, shooting, nagging, burning and throbbing pain. Appellant reported numbness, tingling and weakness in his calf and to his foot. He also reported moderate difficulty with cleaning, driving, sexual activity and shopping. Dr. Hebrard found that appellant's right knee demonstrated 20 degrees of extension and 80 degrees of flexion. He found hypoesthesia's with light touch along the medial aspect of the legs bilaterally and the dorsal aspect of the right foot as well as the anterior scar region of the right knee. Dr. Hebrard stated that appellant's motor strength testing revealed severe weakness in knee extension and flexion. He also found moderate laxity with varus and valgus stress of the right knee and that appellant's gait was mildly antalgic on the right. Dr. Hebrard measured appellant's leg length and found umbilicus to medial malleolus was 99 centimeters on the right and 101 on the left. He further found that

[2] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[3] A.M.A., *Guides* 511, Table 16-3.

anterior superior iliac spine to the medial malleolus was 92 centimeters on the right and 94 centimeters on the left. In regard to appellant's leg circumference, Dr. Hebrard found that the mid patella measured 43 centimeters on the right and 40 on the left while appellant's calves measured 39.5 on the right and 40 centimeters on the left.

Dr. Hebrard diagnosed localized primary osteoarthritis of the right lower leg, derangement of the anterior horn of the right medial meniscus, tear of the right lateral meniscus and sprain of the right knee. He stated that appellant had ongoing weakness with right knee flexion and extension and right ankle and toes dorsiflexion. Dr. Hebrard found that appellant had impaired sensation on the lateral aspect of his right calf and dorsal aspect of his right foot in the superficial peroneal nerve distribution. He noted that appellant has a two centimeter leg length discrepancy. Dr. Hebrard stated, "[Appellant] has had to make significant compensatory movements to adjust for the discrepancy which causes him to externally rotate the hip, especially the piriformis muscle resulting in significant muscle spasms and sciatic nerve pain." He attributed the aggravation of the sciatic nerve to a consequence of appellant's functional adjustments to his leg length discrepancies. Dr. Hebrard found that appellant had sciatic nerve neuropathy and rated this condition under Table 16-12 of the A.M.A., *Guides*[4] as a mild-to-moderate sensory deficit of the sciatic nerve, class 1 impairment, four percent impairment and mild motor deficit class 1, nine percent impairment. He concluded that appellant had 13 percent impairment due to sciatica on the right side.

As to appellant's knee replacement, Dr. Hebrard stated that appellant had a total knee replacement with poor results under Table 16-3 of the A.M.A., *Guides*[5] a class 4 default impairment of 67 percent impairment of the lower extremity. He found that appellant's functional history grade modifier was 2 due to an antalgic gait. Dr. Hebrard stated that physical examination was grade modifier 3 with swelling of the knee, leg length discrepancy of 2 centimeters, swelling and atrophy greater than 2 centimeters. He found moderate to serious instability grade modifier 3 and tenderness, swelling of grade 4 with significant keloid scaring. Dr. Hebrard found that the net adjustment was -1 and that appellant had grade B, 63 percent impairment of his right lower extremity.

Appellant underwent an electromyogram (EMG) and nerve conduction study on June 26, 2013. It demonstrated right sciatic neuropathy affecting the peroneal branch of the nerve. Counsel requested reconsideration on October 18, 2013 based on Dr. Hebrard's report.

In a report dated October 22, 2013, Dr. Hernandez described appellant's moderate-to-severe right medial pain and intermittent swelling in his right knee. He stated that appellant denied any weakness, numbness or tingling down the right lower extremity. Dr. Hernandez found that appellant's range of motion was 0 to 110 degrees in the right knee. He reported no tenderness to palpation over the medial and lateral joint lines. Dr. Hernandez noted hypertrophic scarring over the incision site. X-rays demonstrated a stable right total knee arthroplasty revision with no loosening, migration of subsidence.

[4] A.M.A., *Guides* 535, Table 16-12.

[5] *Id*. at 511, Table 16-3.

Appellant requested an additional schedule award on December 10, 2013.

On January 15, 2014 Dr. Simpson reviewed Dr. Hebrard's report which noted findings in excess of those reported by Dr. Hernandez. The medical adviser noted that OWCP had not accepted a back condition. He found that appellant's schedule award should be based on his total knee replacement and that there were discrepancies in the medical evidence.

By decision dated January 16, 2014, OWCP denied modification of its July 23, 2013 decision. It found that appellant had no more than 34 percent impairment of his lower extremity.

## ***LEGAL PRECEDENT***

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

The Board notes that the A.M.A., *Guides* provide that the diagnosis-based impairments is the method of choice for calculating impairment.[9] In addressing lower extremity impairments, the sixth edition requires identifying 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).[10]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[11]

[6] 5 U.S.C. §§ 8101-8193, 8107.

[7] 20 C.F.R. § 10.404.

[8] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, *see supra* note 2; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] A.M.A., *Guides* 461.

[10] *Id*. at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[11] *Tommy R. Martin*, 56 ECAB 273 (2005).

## ***ANALYSIS***

OWCP accepted appellant's claim for right knee strain, right knee derangement and right knee tear as well arthritis and two total knee replacement surgeries. It granted him schedule awards for 34 percent impairment of his right lower extremity. Dr. Simpson found that appellant had a good result following a total knee replacement in accordance with Table 16-3 of that A.M.A., *Guides*[12] with a default rating of 25 percent. He noted that appellant's functional history adjustment would be grade modifier 1 or a -1 net adjustment, that physical examination adjustment resulted in a grade modifier 0 or -2 net adjustment and that clinical studies grade modifier was not applicable as it was utilized for class placement. Dr. Simpson found a -3 net adjustment when applying the formula and determined that appellant had a class 2, grade A or 21 percent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*.

Appellant requested an additional schedule award on December 10, 2013. Dr. Hebrard provided a report on June 26, 2013. He found that appellant's right knee demonstrated 20 degrees of extension and 80 degrees of flexion. Dr. Hebrard found hypoesthesia's with light touch along the medial aspect of the legs bilaterally and the dorsal aspect of the right foot as well as the anterior scar region of the right knee. He stated that appellant's motor strength testing revealed severe weakness in knee extension and flexion. Dr. Hebrard also found moderate laxity with varus and valgus stress of the right knee and that appellant's gait was mildly antalgic on the right. He measured appellant's leg length and found umbilicus to medial malleolus was 99 centimeters on the right and 101 on the left. Dr. Hebrard further found that anterior superior iliac spine to the medial malleolus was 92 centimeters on the right and 94 centimeters on the left. In regard to appellant's leg circumference, he found that the mid patella measured 43 centimeters on the right and 40 on the left while appellant's calves measured 39.5 on the right and 40 centimeters on the left.

Dr. Hebrard concluded that appellant had a total knee replacement with poor results under Table 16-3 of the A.M.A., *Guides*[13] a class 4 default impairment of 67 percent impairment of the lower extremity. He found that appellant's functional history grade modifier was 2 due to an antalgic gait. Dr. Hebrard stated that physical examination was grade modifier 3 with swelling of the knee, leg length discrepancy of 2 centimeters, swelling and atrophy greater than 2 centimeters. He found moderate to serious instability grade modifier 3 and tenderness, swelling of grade 4 with significant keloid scaring. Dr. Hebrard found that the net adjustment was -1 and that appellant had grade B, 63 percent impairment of his right lower extremity.

Dr. Hernandez described appellant's moderate-to-severe right medial pain and intermittent swelling in his right knee. He stated that appellant denied any weakness, numbness or tingling down the right lower extremity. Dr. Hernandez found that appellant's range of motion was 0 to 110 degrees in the right knee. He reported no tenderness to palpation over the medial and lateral joint lines. Dr. Hernandez noted hypertrophic scarring over the incision site. X-rays demonstrated a stable right total knee arthroplasty revision with no loosening, migration or subsidence.

[12] A.M.A., *Guides* 511, Table 16-3.

[13] *Id*.

The Board finds that appellant's physicians have submitted medical evidence that is not sufficient to support an increased schedule award. Drs. Hebrard and Hernandez reported different ranges of motion. Dr. Hernandez stated that appellant denied weakness, numbness or tingling in the lower extremity, while Dr. Hebrard found hypoesthesias and severe motor weakness on examination. Dr. Hebrard reported moderate laxity with varus and valgus stress of the right knee and noted that appellant's gait was mildly antalgic on the right. Dr. Hernandez stated that appellant had a stable right total knee replacement with no loosening, migration of subsidence. Dr. Simpson reviewed the record on January 13, 2014 and found that Dr. Hebrard's report noted physical findings in excess of those reported by Dr. Hernandez. He reiterated that appellant's schedule award should be based on his total knee replacement as there were discrepancies in the medical evidence. Dr. Hebrard's findings in support of his impairment rating of 63 percent are not supported by appellant's attending physician, Dr. Hernandez. The Board finds that appellant has not submitted the sufficient probative and reliable medical evidence to support any additional permanent impairment.

The Board finds that appellant has not submitted sufficient medical opinion evidence to establish greater impairment of his right lower extremity due to the varying physical findings reported by his attending physicians. As the difference of opinion is between appellant's attending physicians rather than between appellant's physician and an OWCP physician, there is no conflict of medical opinion as argued by counsel.

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 failed to submit the necessary probative medical evidence to establish additional impairment of his right lower extremity. Thus, appellant has no more than the 34 percent impairment of the right lower extremity for which he received a schedule award.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2014
Washington, DC

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

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

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