

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

Q.D., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Philadelphia, PA, Employer**

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**Docket No. 14-1139
Issued: September 19, 2014**

Appearances:
Jeffrey P. Zeelander, 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 April 14, 2014 appellant, through her attorney, filed a timely appeal from a November 27, 2013 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. 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 established that she sustained more than a three percent permanent impairment of the right leg, for which she received a schedule award.

On appeal, counsel contends that OWCP failed to properly consider the evidence of record, specifically the records appellant provided to assess her preexisting condition under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and requests that the Board direct OWCP to adjudicate the preexisting impairment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 38-year-old correctional officer, sustained a medial meniscus tear of the right knee as a result of striking it on the floor while escorting a disruptive inmate on April 21, 2012. It authorized surgery for an arthroscopic partial medial meniscectomy with abrasion chondroplasty of the medial femoral condyle which she underwent on June 26, 2012. Appellant was subsequently placed on the periodic rolls. She returned to full-duty work effective December 21, 2012.

On April 19, 2013 appellant, through counsel, filed a claim for a schedule award. In a February 12, 2013 report from Dr. Arthur Becan, an orthopedic surgeon, who diagnosed chronic post-traumatic lumbosacral strain/sprain, herniated L5-S1 disc, right L5 radiculopathy and torn medial meniscus right knee. Upon examination, appellant complained of right knee and low back pain and stiffness which was constant and daily, radiating pain to her right lower extremity, numbness and tingling in her right lower extremity below the knee, coughing and sneezing that increased her low back pain and right knee pain increased by changes in the weather. Dr. Becan found that examination of her right knee revealed a mild effusion. He noted tenderness over the medial joint line and femoral condyle. A McMurray's test was positive for medial knee pain and range of motion of the right knee performed three times was restricted on flexion-extension. Dr. Becan placed appellant in class 1 based on his diagnosis of right knee partial medial meniscectomy according to Table 16-3,² page 509, of the A.M.A., *Guides*. He assigned grade modifiers of 2 for Functional History (GMFE), Physical Examination (GMPE) and Clinical Studies (GMCS). Using the net adjustment formula of (GMFH - diagnosed condition (CDX)) + (GMPE - CDX) + (GMCS - CDX), Dr. Becan found that (2-1) + (2-1) + (2-1) resulted in a net grade modifier of 3, equaling a three percent impairment of the right leg. He further found that appellant had an eight percent impairment based on his diagnosis of class 1 very severe sensory deficit right L5 nerve root and a five percent impairment based on his diagnosis of class 1 very severe sensory deficit right S1 nerve root, resulting in a 16 percent combined impairment of the right leg. Dr. Becan determined that she had reached maximum medical improvement as of February 12, 2013.

On July 27, 2013 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record. He determined that the date of maximum medical improvement was February 12, 2013. On review of Dr. Becan's February 12, 2013 report, Dr. Berman erroneously recommended a 16 percent combined impairment rating for the right lower extremity based on a lumbar spine disability involving the L5 and S1 nerve root. He stated that appellant did not have an accepted lumbar spine condition and, therefore, Dr. Becan's impairment ratings for L5 and S1 nerve root diagnoses could not be accepted. Dr. Berman agreed with Dr. Becan's assessment of appellant's impairment due to her meniscal injury and that his grade modifiers were acceptable. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), he found that (2-1) + (2-1) + (2-1) resulted in a net grade

² Table 16-3, pages 509-11 of the sixth edition of the A.M.A., *Guides* is entitled *Knee Regional Grid -- Lower Extremity Impairments*.

modifier of 3, resulting in an impairment class 1, grade E, equaling a three percent permanent impairment of the right lower extremity under Table 16-3,³ page 509, of the A.M.A., *Guides*.

By decision dated August 27, 2013, OWCP granted appellant a schedule award for three percent permanent impairment of the right leg. The award ran for 8.64 weeks for the period February 12 through April 13, 2013.

On August 29, 2013 appellant, through counsel, requested reconsideration.

In a November 15, 2013 memorandum, OWCP requested an evaluation of appellant's impairment rating, including any preexisting conditions that affected the right lower extremity. On November 19, 2013 Dr. Morley Slutsky, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record and a statement of accepted facts. He stated that "Dr. Becan apparently found decreased sensation in the right L5 and S1 distribution with Semmes Weinstein Testing, however, he did not document testing for sharp dull sensation and protective sensibility (as outlined in Table 16-11,⁴ page 533 of A.M.A., *Guides*." Dr. Slutsky found that the sensory deficient impairment Dr. Becan rated could not be used. He further indicated that Dr. Becan used the Pain Disability Questionnaire (PDQ) and sixth edition of the A.M.A., *Guides* to rate the lower extremities for right L5 and S1 nerve root deficits, although the correct methodology was to use *The Guides Newsletter* (July/August 2009).

By decision dated November 27, 2013, OWCP denied modification of its August 27, 2013 schedule award decision.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 a determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁷

³ *Id.*

⁴ Table 16-11, pages 533 of the sixth edition of the A.M.A., *Guides* is entitled *Sensory and Motor Severity*.

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁶ *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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).⁸ Under the sixth edition, the evaluator identifies the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that diagnosis-based impairment is “the primary method of calculation for the lower limb” and that most impairments are based on the diagnosis-based impairment where impairment class is determined by the diagnosis and specific criteria as adjusted by the grade modifiers for functional history, physical examination and clinical studies. Chapter 16 further provides:

“Alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation and range of motion. Range of motion is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment.”¹¹

ANALYSIS

OWCP accepted that on April 21, 2012 appellant sustained a medial meniscus tear of the right knee. On June 26, 2012 appellant underwent authorized surgery. In an August 27, 2013 decision, OWCP granted her a schedule award for three percent permanent impairment of the right lower extremity. The award was based on the February 12, 2013 report of Dr. Becan and the July 27, 2013 report of Dr. Berman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser. It is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment.¹²

In his February 12, 2013 report, Dr. Becan diagnosed a torn medial meniscus right knee and found that examination of appellant's right knee revealed a mild effusion. He noted tenderness over the medial joint line and femoral condyle. A McMurray's test was positive for medial knee pain and range of motion of the right knee performed three times was restricted on flexion-extension. Dr. Becan placed appellant in class 1 based on his diagnosis of right knee partial medial meniscectomy according to Table 16-3,¹³ page 509, of the A.M.A., *Guides*. He

⁸ A.M.A., *Guides* page 3, section 1.3, *The ICF: A Contemporary Model of Disablement*.

⁹ *Id.* at 494-531.

¹⁰ See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹¹ A.M.A., *Guides* 497, 544-53.

¹² See *Annette M. Dent*, 44 ECAB 403 (1993).

¹³ Table 16-3, pages 509-11 of the sixth edition of the A.M.A., *Guides* is entitled *Knee Regional Grid -- Lower Extremity Impairments*.

assigned grade modifiers of 2 for functional history, physical examination and clinical studies. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Becan found that (2-1) + (2-1) + (2-1) resulted in a net grade modifier of 3, equaling a three percent permanent impairment of the right lower extremity. He further rated an 8 percent impairment based on his diagnosis of class 1 very severe sensory deficit right L5 nerve root and a 5 percent impairment based on his diagnosis of class 1 very severe sensory deficit right S1 nerve root, resulting in a 16 percent combined permanent impairment of the right lower extremity. Dr. Becan determined that appellant had reached maximum medical improvement as of February 12, 2013.

In accordance with its procedures, OWCP properly referred the evidence to Dr. Berman for review. Dr. Berman explained that Dr. Becan erroneously recommended a 16 percent impairment rating for the right lower extremity based in part on a lumbar spine disability calculation involving the L5 and S1 nerve root. He noted that appellant did not have an accepted lumbar spine condition therefore the ratings for L5 and S1 nerve root diagnoses were incorrect and could not be accepted. Dr. Berman concurred with Dr. Becan's assessment of appellant's impairment due to her meniscal injury and agreed that his grade modifiers were acceptable. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), he found that (2-1) + (2-1) + (2-1) resulted in a net grade modifier of 3, resulting in an impairment class 1, grade E, equaling a three percent permanent impairment of the right lower extremity under Table 16-3,¹⁴ page 509, of the A.M.A., *Guides*.

The Board finds that Dr. Berman applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Becan's clinical findings. The rating of three percent impairment based on the accepted meniscus injury is proper. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Dr. Berman excluded Dr. Becan's ratings of impairment based on the L5 and S1 sensory deficits because OWCP has not accepted a spinal condition in this case. Therefore, OWCP properly relied on the medical adviser's assessment of a three percent permanent impairment of the right lower extremity.

On appeal, counsel contends that OWCP failed to properly consider the evidence of record, as it failed to consider preexisting conditions and requests that the Board direct OWCP to adjudicate the preexisting impairment. In a November 15, 2013 memorandum, OWCP requested an evaluation of appellant's impairment rating, including any "preexisting conditions that affect the right lower extremity." On November 19, 2013 Dr. Slutsky, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical record and a statement of accepted facts. He indicated that "Dr. Becan apparently found decreased sensation in the right L5 and S1 distribution with Semmes-Weinstein Testing, however, he did not document testing for sharp dull sensation and protective sensibility (as outlined in Table 16-11,¹⁵ page 533 of A.M.A., *Guides*)." Dr. Slutsky found that the impairment rating Dr. Becan made could not be justified. He further indicated that Dr. Becan used the PDQ and sixth edition of the A.M.A., *Guides* to rate the lower extremities for right L5 and S1 nerve root deficits, although the correct methodology

¹⁴ *Id.*

¹⁵ Table 16-11, pages 533 of the sixth edition of the A.M.A., *Guides* is entitled *Sensory and Motor Severity*.

was to use *The Guides Newsletter* (July/August 2009). The Board notes further that the medical record does not clearly establish any lumbar sensory loss as a preexisting condition. The Board finds that there is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than a three percent permanent impairment of the right lower extremity. Accordingly, appellant has not established that she has greater impairment.¹⁶

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 has not established that she sustained more than a three percent permanent impairment of the right lower extremity, for which she received a schedule award.

¹⁶ FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 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