

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

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**P.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Boston, MA, Employer**

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**Docket No. 15-1782  
Issued: August 12, 2016**

*Appearances:*  
*Daniel B. Shapiro, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 25, 2015 appellant, through counsel, filed a timely appeal from an April 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Appellant filed a timely request for oral argument, pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, the Board, by a February 10, 2016 order, denied appellant's request for an oral argument before the Board, noting that his arguments on appeal, made through counsel, could be adequately addressed in a Board decision based on a review of the case record as submitted. *Order Denying Request for Oral Argument*, Docket No. 15-1782 (issued February 10, 2016).

## ISSUE

The issue is whether appellant has more than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of his left lower extremity, for which he received schedule awards.

## FACTUAL HISTORY

On April 19, 2013 appellant, then a 60-year-old letter carrier, filed an occupational disease claim (Form CA-2) claiming injury to his right knee due to performing his overtime, including walking, standing, and driving a vehicle for extended periods. He indicated that he first became aware of his claimed condition on February 7, 2013 and that he first realized on February 7, 2013 that it was caused or aggravated by his employment. Appellant did not stop work around the time he filed his claim, but he continued working in a light-duty position without wage loss.

At the time he filed the present claim, appellant had a significant prior history of knee surgeries. These surgeries included a May 7, 2003 right knee arthroscopy, October 30, 2003 left knee anterior cruciate ligament reconstruction and left high tibial osteotomy, and February 8, 2005 left tibial revision surgery. On February 19, 2008 appellant underwent total left knee replacement surgery with hardware removal and, on June 3, 2005, he had total right knee replacement surgery with hardware removal.<sup>4</sup>

OWCP accepted work-related aggravation of preexisting osteoarthritis of both knees.

In a February 7, 2013 report, Dr. David C. Morley, Jr., an attending Board-certified orthopedic surgeon, described appellant's factual and medical history and detailed the findings of his physical examination of appellant. He indicated that appellant reported bilateral knee symptoms of pain, discomfort, stiffness, and swelling associated with functional restrictions. Dr. Morley noted that appellant completed an American Academy of Orthopedic Surgery (AAOS) Lower Limb Questionnaire from Appendix 16A of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009) and that the results showed that his "functional history is consistent with a severe or [g]rade [m]odifier 3 problem."<sup>5</sup> He observed that appellant ambulated slowly, but without a significant limp and that he was able to get on and off the examining table without a significant problem. Dr. Morley noted that appellant had decreased sensation in each knee associated with the subsartorial branch of the saphenous nerve. Appellant exhibited 94 degrees of extension/flexion in his right knee and 96 degrees of extension/flexion in his left knee. Measurement of his knees showed that his right knee was 1.5 centimeters smaller than his left

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<sup>4</sup> These surgical procedures were authorized by OWCP as related to left knee injuries sustained on July 15, 1999 due to a work-related vehicular accident (OWCP File No. xxxxxx586) and right knee injuries sustained on January 31, 2001 due to a work-related slip and fall (OWCP File No. xxxxxx028).

<sup>5</sup> Dr. Morley noted that appellant described his knees as being very stiff and swollen in the last week. Walking on flat surfaces was moderately painful, while stair climbing and lying in bed at night were very painful. Appellant had not used a cane or assistive support in the last week. He related that putting on his socks was moderately difficult.

knee. Dr. Morley diagnosed advanced bilateral knee arthritis causally related to the physical demands of working as a letter carrier for the employing establishment.<sup>6</sup>

In his February 7, 2013 report, Dr. Morley noted that, with respect to appellant's right leg, his impairment was best calculated utilizing Table 16-3 (Knee Regional Grid) on page 511 of the sixth edition of the A.M.A., *Guides*. Appellant's diagnosis-based impairment was represented by his total right knee replacement which fell under class 3 with a grade C default value of 37 percent.<sup>7</sup> Dr. Morley noted that, for the right lower extremity, appellant had a grade modifier for functional history of 3 and he determined that the grade modifier for physical examination and the grade modifier for clinical studies were not applicable because physical examination findings and clinical studies were used to establish the diagnosis. Applying the net adjustment formula to the right lower extremity meant that appellant did not move from the class 3, grade C default value of 37 percent on Table 16-3. Therefore, appellant had 37 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*.

Dr. Morley then conducted an assessment of appellant's left leg. He utilized Table 16-3 on page 511 and found that the diagnosis-based impairment for appellant's left lower extremity was represented by his total left knee replacement and fell under class 3 with a grade C default value of 37 percent. For the left lower extremity, Dr. Morley calculated a grade modifier for functional history of 3 and determined that the grade modifier for physical examination and the grade modifier for clinical studies were not applicable because physical examination findings and clinical studies were used to establish the diagnosis. Applying the net adjustment formula for the left lower extremity meant that appellant did not move from the class 3, grade C default value of 37 percent on Table 16-3. Therefore, appellant had 37 percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides*.

On October 4, 2013 appellant filed a claim for schedule award (Form CA-7) due to the accepted work injury.

In April 2014, OWCP referred appellant for a second opinion evaluation of his lower extremity impairment to Dr. Frank A. Graf. In a May 7, 2014 report, Dr. Graf detailed appellant's factual and medical history and reported the findings of his physical examination of appellant. He used Table 16-3 on page 511 of the sixth edition of the A.M.A., *Guides* and found that the diagnosis-based impairments for appellant's right and left legs were represented by his total knee replacement surgeries and fell under class 2 with a grade C default value of 25 percent for each lower extremity. Dr. Graf determined for each lower extremity that appellant had a grade modifier for functional history of 2, grade modifier for physical examination of 2, and grade modifier for clinical studies of 2. Applying the net adjustment formula for each lower extremity meant that appellant did not move from the class 2, grade C default value of 25 percent

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<sup>6</sup> Dr. Morley found that appellant reached maximum medical improvement with respect to his left knee in February 2009 and with respect to his right knee in June 2009.

<sup>7</sup> In finding that appellant's right lower extremity condition fell under class 3, Dr. Morley considered Table 16-23 and Table 16-25 on pages 549 and 550 and determined that appellant had mild motion impairment of his right knee. He made a similar determination for appellant's left lower extremity.

for either lower extremity. Therefore, he had 25 percent permanent impairment of each lower extremity under the sixth edition of the A.M.A., *Guides*.

In October 2014, OWCP referred the case record, including Dr. Morley's February 7, 2013 assessment, to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, and requested that he provide an impairment rating for appellant's lower extremities.

On October 21, 2014 Dr. Slutsky determined that appellant had 31 percent permanent impairment of his right leg and 31 percent permanent impairment of his left leg. He noted that he had reviewed the findings contained in the February 7, 2013 report of Dr. Morley. Dr. Slutsky explained that, under Table 16-3 on page 511 of the sixth edition of the A.M.A., *Guides*, appellant had a diagnosis-based impairment due to his total right knee replacement which fell under class 3 with a grade C default value of 37 percent impairment.<sup>8</sup> He indicated that, for the right lower extremity, appellant had a grade modifier for functional history of 1,<sup>9</sup> and grade modifier for physical examination of 1.<sup>10</sup> Dr. Slutsky determined that the grade modifier for clinical studies was not applicable because clinical studies were used to establish the diagnosis. Applying the net adjustment formula for the right leg requires movement two spaces to the left from the class 3, grade C default value of 37 percent on Table 16-3. Therefore, appellant had 31 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*.

Dr. Slutsky then conducted an assessment of appellant's left lower extremity. He utilized Table 16-3 on page 511 and found that the diagnosis-based impairment for appellant's left lower extremity was represented by his total left knee replacement and fell under class 3 with a grade C default value of 37 percent. For the left lower extremity, Dr. Slutsky calculated a grade modifier for functional history of 1, and a grade modifier for physical examination of 0.<sup>11</sup> He determined that the grade modifier for clinical studies was not applicable because clinical studies were used to establish the diagnosis. Applying the net adjustment formula for the left leg required movement two spaces to the left from the class 3, grade C default value of 37 percent on Table 16-3. Therefore, appellant had 31 percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides*.

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<sup>8</sup> Dr. Slutsky consulted Table 16-23 and Table 16-25 on pages 549 and 550 and determined that appellant had mild motion impairment of his right knee. He made a similar determination for appellant's left lower extremity.

<sup>9</sup> Dr. Slutsky noted that appellant fell under this level of grade modifier for functional history because he still had symptoms in his right knee, but his antalgic gait did not require use of a single gait aid/external orthotic device and there was no documentation of a positive Trendelenburg test. He provided a similar assessment for the grade modifier for functional history of appellant's left lower extremity.

<sup>10</sup> Dr. Slutsky indicated that range of motion and stability were used to place appellant into the correct diagnostic class and therefore may not be used to assign a grade modifier for physical examination. However, he noted that the fact that appellant's right knee was 1.5 centimeters smaller than his left knee, a finding which was not used to place appellant into the correct diagnostic class, meant that he had a grade modifier for physical examination of 1.

<sup>11</sup> Dr. Slutsky indicated that range of motion and stability were used to place appellant into the correct diagnostic class and therefore may not be used to assign a grade modifier for physical examination. No other objective deficits were documented.

By decision dated April 20, 2015, OWCP granted appellant a schedule award for 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of his left lower extremity. The award ran for 178.56 weeks from May 7, 2014 to October 7, 2017 and was based on Dr. Slutsky's impairment rating calculation.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>12</sup> and its implementing regulations<sup>13</sup> 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.<sup>14</sup>

The A.M.A., *Guides* provides a diagnosis-based method for evaluating permanent impairment.<sup>15</sup> For lower extremity impairments, the evaluator identifies the impairment class for the diagnosed condition Class of Diagnosis (CDX) which is then adjusted by the grade modifier Functional History (GMFH), grade modifier Physical Examination (GMPE), and grade modifier Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>16</sup> Under Chapter 2.3 of the A.M.A., *Guides*, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>17</sup>

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.<sup>18</sup>

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<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404 (1999).

<sup>14</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2009). For OWCP decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

<sup>15</sup> A.M.A., *Guides* 493-531.

<sup>16</sup> *Id.* at 515-22.

<sup>17</sup> *Id.* at 23-28.

<sup>18</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6d-f (February 2013).

## ANALYSIS

OWCP accepted that appellant sustained work-related aggravation of preexisting osteoarthritis of both knees. Appellant had a significant prior history of bilateral knee surgery, including undergoing total left knee replacement surgery on February 19, 2008 and total right knee replacement surgery on June 3, 2008.<sup>19</sup> On October 4, 2013 he filed a claim for compensation alleging permanent impairment due to the accepted work injuries. By decision dated April 20, 2015, OWCP granted appellant a schedule award for 31 percent permanent impairment of his left leg and 31 percent permanent impairment of his right leg. The award was based on an October 21, 2014 impairment rating calculation of Dr. Slutsky, an OWCP medical adviser who reviewed the medical evidence of record, including findings contained in the February 7, 2013 report of Dr. Morley, the attending physician.

The Board finds that appellant failed to establish more than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of his left lower extremity, for which he received a schedule award.

In his October 21, 2014 report, Dr. Slutsky properly provided rationale for his opinion that, under Table 16-3 on page 511 of the sixth edition of the A.M.A., *Guides*, appellant had a diagnosis-based impairment due to his total right knee replacement which fell under class 3 with a grade C default value of 37 percent.<sup>20</sup> He provided valid reasons for indicating that, for the right lower extremity, appellant had a grade modifier for functional history of 1,<sup>21</sup> and grade modifier for physical examination of 1.<sup>22</sup> Dr. Slutsky determined that the grade modifier for clinical studies was not applicable because clinical studies were used to establish the diagnosis. Applying the net adjustment formula for the right lower extremity requires movement two spaces to the left from the class 3, grade C default value of 37 percent on Table 16-3. Therefore, Dr. Slutsky properly determined that appellant had a 31 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*. He then conducted an assessment of appellant's left lower extremity. Dr. Slutsky utilized Table 16-3 on page 511 and found that the

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<sup>19</sup> These surgical procedures were authorized by OWCP as related to left knee injuries sustained on July 15, 1999 due to a work-related vehicular accident and right knee injuries sustained on January 31, 2001 due to work-related slip and fall.

<sup>20</sup> Dr. Slutsky consulted Table 16-23 and Table 16-25 on pages 549 and 550 and determined that appellant had mild motion impairment of his right knee. He made a similar determination for appellant's left lower extremity. *See supra* note 14 at 511, 549-50.

<sup>21</sup> Dr. Slutsky noted that appellant fell under this level of grade modifier for functional history because he still had symptoms in his right knee, but his antalgic gait did not require use of a single gait aid/external orthotic device and there was no documentation of a positive Trendelenburg test. He provided a similar assessment for the grade modifier for functional history of appellant's left lower extremity. *See supra* note 14 at 516.

<sup>22</sup> Dr. Slutsky indicated that range of motion and stability were used to place appellant into the correct diagnostic class and thus may not be used to assign a grade modifier for physical examination. However, the fact that appellant's right knee was 1.5 centimeters smaller than his left knee, a finding which was not used to place appellant into the correct diagnostic class, justified Dr. Slutsky's finding that appellant had a grade modifier for physical examination of 1. The A.M.A., *Guides* explains that only the specific examination findings that are actually used to derive the correct diagnostic class are rendered as nonapplicable findings. *See supra* note 14 at 515-16.

diagnosis-based impairment for appellant's left lower extremity was represented by his total left knee replacement and fell under class 3 with a grade C default value of 37 percent. For the left lower extremity, Dr. Slutsky calculated a grade modifier for functional history of 1 and determined that the grade modifier for clinical studies was not applicable because clinical studies were used to establish the diagnosis. Dr. Slutsky calculated a grade modifier for physical examination of 0. Applying the net adjustment formula for the left lower extremity, requires movement two spaces to the left from the class 3, grade C default value such that appellant has 31 percent permanent impairment of his left leg.

In his February 7, 2013 report, Dr. Morley determined that appellant had 37 percent permanent impairment of each lower extremity under the sixth edition of the A.M.A., *Guides*. The Board finds, however, that Dr. Morley did not provide sufficient explanation of how his impairment rating was conducted in accordance with the standards of the sixth edition of the A.M.A., *Guides*. Therefore, Dr. Morley's report does not show that appellant is entitled to additional schedule award compensation. 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.<sup>23</sup>

Both Dr. Morley and Dr. Slutsky determined that appellant's diagnosis-based impairment in each leg was represented by his total knee replacement surgeries which fell under class 3, grade C. However, the aspect of Dr. Morley's impairment rating that resulted in a 37 percent impairment rating for each leg was his finding that appellant had a grade modifier for functional history of 3 in each lower extremity. The Board finds that Dr. Morley did not adequately support this finding as valid under the sixth edition of the A.M.A., *Guides*. He suggested that a grade modifier for functional history of 3 in each leg was justified by the results of an AAOS Lower Limb Questionnaire (Appendix 16A of the sixth edition of the A.M.A., *Guides*) that was completed by appellant. However, reference to Table 16-6 and accompanying text regarding calculation of the grade modifier for functional history reveals that the Lower Limb Questionnaire is only meant to serve as an optional supplemental source for deriving the grade modifier for functional history and not as a sole source.<sup>24</sup> Dr. Morley failed to apply the primary source of Table 16-6 for evaluating the grade modifier for functional history, *i.e.*, the "Gait Derangement" portion of Table 16-6 which places individuals in various grades based on whether gait derangement exists and, or so, the level of such derangement.<sup>25</sup>

The record also contains a May 7, 2014 report in which Dr. Graf, an OWCP referral physician, determined that appellant had 25 percent permanent impairment of each leg under the

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<sup>23</sup> See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

<sup>24</sup> Section 16.3a of the sixth edition provides, "The evaluating physician may use outcome instruments and inventories as part of the process of evaluating functional symptoms.... The [AAOS] Lower Limb Instrument is 1 inventory that may be used.... An inventory is used only to assist the examiner in defining the grade for functional history and does not serve as a basis for defining further impairment nor does the score reflect an impairment percentage...." See *supra* note 15 at 516.

<sup>25</sup> As noted above, Dr. Slutsky properly found that appellant's level of gait derangement meant that he had a grade modifier for functional history of 1 in each leg. On appeal, counsel generally argued that the impairment rating of Dr. Morley should be accepted, but the Board has explained the deficiencies of his impairment rating.

standards of the sixth edition of the A.M.A., *Guides*. However, this report does not provide any support for a finding that appellant has more than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of left right lower extremity.

For these reasons, appellant did not meet his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of left right lower extremity. He 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 his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity and 31 percent permanent impairment of left right lower extremity, for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board