

FACTUAL HISTORY

This case has previously been before the Board.³

On February 6, 2007 appellant, then a 34-year-old social services assistant, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury at work on February 4, 2007 when he slipped while walking up stairs covered with snow salt and felt pain in his right knee while recovering his balance. He stopped work on February 4, 2007. OWCP accepted appellant's claim for a tear of the medial meniscus of his right knee.

On May 9, 2007 Dr. Mark D. Russ, an attending Board-certified orthopedic surgeon, performed OWCP-authorized right knee arthroscopic surgery with medial shelf plica excision and minor synovectomy. During the operation, he found appellant's right medial meniscus to be intact. Appellant received disability compensation on the daily rolls beginning May 9, 2007 and on the periodic rolls on September 30, 2007.

In April 2009, OWCP expanded appellant's accepted conditions to include deep vein thrombosis of his right lower extremity due to the May 9, 2007 knee surgery.

To determine appellant's current work capacity, OWCP referred him for a second opinion examination, which was performed on December 3, 2013 by Dr. Nicholas Sotereanos, a Board-certified orthopedic surgeon. Dr. Sotereanos posited that appellant's work-related conditions had resolved and indicated that he had patellar tendinitis, which was not related to his February 4, 2007 injury or authorized surgery.

By decision dated March 5, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 9, 2014 because he no longer had any residuals from his accepted work injury. The termination action was based on the December 3, 2013 opinion of Dr. Sotereanos. Appellant requested a telephone hearing with an OWCP hearing representative regarding OWCP's termination action and a hearing was held on September 10, 2014. By decision dated November 3, 2014, the OWCP hearing representative denied modification of OWCP's March 5, 2014 decision.

On March 25, 2015 appellant filed a claim for compensation (Form CA-7) claiming schedule award compensation for permanent impairment due to his accepted work injuries. In an April 6, 2015 letter, OWCP requested that he submit medical evidence addressing whether he had permanent impairment of his right lower extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). Appellant was provided 30 days to submit such evidence, but he did not submit it within the allotted time.

³ In late 2009, appellant requested OWCP to approve a second right knee surgery and to accept the condition of arthrofibrosis as due to the February 4, 2007 work injury. In decisions dated November 16, 2010 and October 24, 2011, OWCP denied his requests for surgery and expansion of the accepted conditions. By decision dated June 25, 2012, the Board affirmed OWCP's October 24, 2011 decision. Docket No. 12-0302 (issued June 25, 2012).

By decision dated May 12, 2015, OWCP denied appellant's schedule award claim because he had failed to submit sufficient medical evidence establishing permanent impairment of his right lower extremity due to his work-related injury.

In May 2015, appellant, through counsel, requested a telephonic hearing with an OWCP hearing representative.

In September 2015, OWCP received a July 30, 2015 report from Dr. Catherine W. Campbell, an attending Board-certified orthopedic surgeon. Dr. Campbell concluded that appellant had 11 percent permanent impairment of his right lower extremity due to peripheral vascular disease in that extremity. In order to calculate this impairment, she referenced Table 4-12 on page 69 of the sixth edition of the A.M.A., *Guides*. Dr. Campbell posited that appellant had reached maximum medical improvement on January 1, 2009 a date she characterized as being approximately six months after he developed acute venous thrombus.

The OWCP hearing representative, in a November 30, 2015 decision, issued a decision prior to the requested telephonic hearing. She set aside OWCP's May 12, 2015 decision and remanded the case to OWCP for further development. The hearing representative noted that appellant had submitted a report from Dr. Campbell, which provided an impairment rating for his right lower extremity. She indicated that there was now sufficient evidence to warrant further development of appellant's schedule award claim and directed OWCP to carry out such development.

On December 2, 2015 OWCP referred the case to an OWCP medical adviser for evaluation of whether the medical evidence of record, including the July 30, 2015 impairment evaluation of Dr. Campbell, showed that appellant had permanent impairment of his right lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.⁴

In a December 22, 2015 decision, OWCP denied appellant's claim for a schedule award due to permanent impairment of his right lower extremity. It discussed the July 30, 2015 impairment evaluation of Dr. Campbell and indicated that "the weight of the medical evidence continues to lie with the opinion of Dr. Sotereanos who concluded that the claimant no longer demonstrated residuals or disability causally related to his February 4, 2007 work injury or OWCP-approved surgery. The new medical evidence submitted fails to address the issue at hand." OWCP did not mention that appellant's case had been referred to an OWCP medical adviser on December 2, 2015 for evaluation of whether he had a permanent impairment of his right lower extremity.

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

⁴ In particular, OWCP asked the OWCP medical adviser to consider whether it was appropriate for Dr. Campbell to choose a retroactive date of maximum medical improvement for appellant's right lower extremity condition.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

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

OWCP 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 under the relevant standards of the A.M.A., *Guides*.⁹ As a matter of course, the OWCP medical adviser should provide rationale for the percentage of impairment specified. When more than one evaluation of the impairment is present, it will be especially important for the OWCP medical adviser to provide such medical reasoning.¹⁰

OWCP procedures provide that termination of a claim for all benefits due to a finding of no residuals of work-related condition does not automatically bar a subsequent schedule award. Rather, OWCP should consider the schedule award matter separately from the termination of benefits. If a claimant applies for a schedule award after termination, and submits medical evidence reflecting permanent impairment as a result of the work-related injury or exposure, OWCP should develop the claim further, even if a finding of no residuals has previously been made.¹¹

ANALYSIS

OWCP accepted that on February 4, 2007 appellant sustained a tear of the medial meniscus of his right knee. On May 9, 2007 appellant underwent OWCP-authorized right knee arthroscopic surgery with medial shelf plica excision and minor synovectomy. OWCP expanded his accepted conditions to include deep vein thrombosis of his right lower extremity due to the May 9, 2007 knee surgery.¹² On March 25, 2015 appellant filed a claim for a schedule award due to his accepted work injuries. OWCP denied his schedule award claim in decisions dated May 12 and December 22, 2015.

⁷ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); *id.*, at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

⁸ *Id.*, at Chapter 2.808.5a (February 2013); see also *id.*, at Chapter 3.700, Exhibit 1 (January 2010).

⁹ *Id.*, at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6f (February 2013).

¹⁰ *Id.*, at Chapter 2.808.6f(1) (February 2013).

¹¹ *Id.*, at Chapter 2.808.11 (February 2013).

¹² By decision dated March 5, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective March 9, 2014 based on the December 3, 2013 opinion of Dr. Sotereanos, an OWCP referral physician. In a November 3, 2014 decision, an OWCP hearing representative denied modification of OWCP's March 5, 2014 decision.

The Board notes that, on December 2, 2015, the hearing representative referred appellant's case to an OWCP medical adviser for evaluation of the medical records, including the July 30, 2015 impairment rating report from Dr. Campbell, to determine whether appellant had permanent impairment of his right lower extremity.

While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹³ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁴

The Board finds that OWCP began developing appellant's schedule award claim through referral to an OWCP medical adviser on December 2, 2015, but did not complete such development prior to issuing its decision denying his claim on December 22, 2015.¹⁵ Upon return of the case file, OWCP shall prepare a statement of accepted facts and forward it along with the relevant medical records, including the July 30, 2015 impairment rating report of Dr. Campbell, to an OWCP medical adviser for consideration. The OWCP medical adviser should consider all relevant aspects of appellant's schedule award claim and provide an impairment rating in accordance with the standards of the sixth edition of the A.M.A., *Guides*. After carrying out this development, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim for his right lower extremity.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly denied appellant's claim for a schedule award.

¹³ *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹⁴ *Robert F. Hart*, 36 ECAB 186 (1984).

¹⁵ The Board notes that the termination of appellant's wage-loss compensation and medical benefits effective March 9, 2014 would not serve as an automatic bar to appellant receiving schedule award compensation. *See supra* note 11; *R.L.*, Docket No. 09-1948 (issued June 29, 2010).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2015 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: August 3, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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