



## **FACTUAL HISTORY**

On February 27, 2008 appellant, then a 30-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 16, 2008 she sustained an injury to both knees in the performance of duty. OWCP converted the claim to an occupational disease claim as she attributed her condition to events occurring over the course of more than one work shift.<sup>2</sup> It accepted the claim for bilateral chondromalacia patella and a right knee medial meniscus tear.

On February 26, 2008 Dr. Charles Mannis, a Board-certified orthopedic surgeon, diagnosed chondromalacia patella and mild degenerative arthritis of both knees. A July 8, 2008 magnetic resonance imaging (MRI) scan of the right knee showed intact menisci and ligaments with questionable early osteoarthritis of the medial femorotibial compartment and minimal chondromalacia, patella. In a report dated July 11, 2008, Dr. Richard C. Lehman, a Board-certified orthopedic surgeon, related that the MRI scan showed “breakdown in the patellofemoral joint and the femoral tibial joint.”

Dr. Lehman performed a debridement of the left knee on July 30, 2008 and a partial medial meniscectomy and a debridement of the patellofemoral joint and medial femur of the right knee on September 24, 2008.

An OWCP medical adviser reviewed the evidence of record on September 12, 2011 and opined that, according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had two percent permanent impairment of the right lower extremity due to her partial meniscectomy and two percent permanent impairment of the left lower extremity due to patellofemoral arthritis.

By decision dated October 21, 2011, OWCP granted appellant a schedule award for two percent permanent impairment of each lower extremity.<sup>3</sup> The period of the award ran for 11.52 weeks from August 30 to November 18, 2011.

A November 7, 2012 MRI scan of the left knee showed increased arthritis of the medial compartment and a developing subluxation of the medial meniscus with no medial or lateral tear.

An OWCP medical adviser, on May 14, 2013, recommended that OWCP authorize a left knee arthroscopy due to increased arthritis as demonstrated by the November 7, 2012 MRI scan.

On July 15, 2013 Dr. Lehman performed a left partial lateral meniscectomy and debridement of the patellofemoral articulation, trochlea, patella, femoral condyle, and lateral tibial plateau. In a report dated December 3, 2013, he found that appellant had good range of

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<sup>2</sup> A traumatic injury is defined as a “condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift.” 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.” 20 C.F.R. § 10.5(q).

<sup>3</sup> In a decision dated September 24, 2013, OWCP denied appellant’s claim for disability compensation on July 12, 2013.

motion without swelling or laxity. Dr. Lehman advised that she had reached maximum medical improvement.<sup>4</sup> Appellant requested an additional schedule award (Form CA-7)

By decision dated February 20, 2014, OWCP denied appellant's claim for an increased schedule award as she had not submitted an impairment evaluation in support of her claim.

Appellant, on December 30, 2014, filed another claim for an increased schedule award (Form CA-7).<sup>5</sup>

OWCP, on April 27, 2015, requested that its medical adviser review Dr. Lehman's December 3, 2013 impairment rating. In an April 30, 2015 response, the medical adviser reported that Dr. Lehman's report did not contain an impairment rating and opined that the report from Dr. Lehman was insufficient to support a schedule award and recommended a second opinion examination.

On May 14, 2015 OWCP referred appellant to Dr. Richard T. Katz, a Board-certified physiatrist, for a second opinion examination. In a report dated June 5, 2015, Dr. Katz reviewed her history of knee surgeries and the diagnostic studies. He discussed appellant's complaints of knee pain particularly with extensive walking, standing, or climbing stairs. Dr. Katz also reviewed the accepted conditions of bilateral chondromalacia patella and a right medial meniscus tear. On examination, he found pain at the medial patellar joint and crepitus bilaterally with negative drawer signs, but no vargus or vulgus, instability, or loss of motion. Dr. Katz noted that as chondromalacia patella was considered arthritis it required standing x-rays to rate the impairment under the A.M.A., *Guides*. In a June 29, 2015 report, he interpreted x-rays obtained on June 25, 2015 as showing bilaterally severe medial compartment narrowing, but noted that it was not an accepted condition. Dr. Katz found that appellant's patellofemoral arthritis narrowing as demonstrated by x-ray was not of sufficient severity to warrant an impairment rating as her joint intervals were more than the cartilage intervals required for a rating accord to Table 16-3 on page 511. He again noted that he was not rating medial compartment arthritis as it was not listed as an accepted condition. Dr. Katz, citing Table 16-3 on page 509 of the A.M.A., *Guides*, identified the diagnosis as a partial medial meniscectomy and applied a grade modifier of one for physical examination. He opined that appellant had two percent permanent impairment due to her partial medial meniscectomy.<sup>6</sup>

An OWCP medical adviser reviewed Dr. Katz' impairment evaluation on July 17, 2015. He found that appellant had two percent permanent impairment of the right lower extremity due to the accepted partial medial meniscectomy and no impairment of the left lower extremity due to the accepted left knee condition of chondromalacia patella.

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<sup>4</sup> On November 18, 2014 Dr. Lehman related that appellant originally injured her knees in 2008 carrying mail and sustained an additional injury from a fall in 2009. He advised that she had preexisting bilateral degenerative patellofemoral joint arthritis, but that a portion of the arthritis was due to her employment injury.

<sup>5</sup> On March 13, 2015 OWCP terminated appellant's compensation and authorization for medical benefits, as she had no residuals or disability causally related to her accepted employment injury.

<sup>6</sup> Dr. Katz did not specify the side that he was rating for the medial meniscal tear; however, OWCP has not accepted that appellant sustained a tear of the left medial meniscus.

By decision dated July 23, 2015, OWCP denied appellant's claim for an increased schedule award.

In a memorandum dated July 28, 2015, OWCP calculated that appellant received a schedule award of \$8,256.88 for two percent permanent impairment of each lower extremity when she was only entitled to two percent permanent impairment of the right lower extremity, which yielded an overpayment of \$4,128.44.

On July 29, 2015 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$4,128.44 for the period August 30 to November 18, 2011 because it overpaid her for a schedule award. It further advised her of its preliminary determination that she was not at fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant, on August 4, 2015, challenged the existence of the overpayment and requested waiver. She noted that in July 2013 she had additional arthroscopic surgery on her left knee.<sup>7</sup> Appellant returned an incomplete overpayment recovery questionnaire.

In a September 3, 2015 telephone call, appellant requested a prerecoupment hearing. On February 18, 2016 OWCP again requested that she complete an overpayment recovery questionnaire and allotted her an additional 30 days for its submission.

OWCP advised appellant on February 18, 2016 that it had scheduled a telephone hearing for April 4, 2016 at 2:15 p.m. Eastern Standard Time. The notice was addressed to appellant's address of record.

In a decision dated April 19, 2016, an OWCP hearing representative determined that appellant had abandoned her request for a prerecoupment hearing as she had not telephoned at the appointed time or contacted OWCP either before or after to explain her failure to appear. She found that appellant had received an overpayment of compensation in the amount of \$4,128.44 because OWCP paid appellant two percent for each lower extremity when she was only entitled to two percent for the right lower extremity. The hearing representative further determined that appellant was not entitled to wavier as she failed to submit any financial information and that the overpayment was due in full.

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<sup>7</sup> An MRI scan arthrogram of the left knee dated February 24, 2016 revealed moderate chondrosis of the patella and medial compartment, minimal chondrosis of the lateral compartment, and mild fraying of the medial meniscus at the posterior horn. An MRI scan arthrogram of the right knee obtained February 24, 2016 showed mild patellofemoral compartment and medial compartment chondrosis with no meniscal tear. In a February 11, 2016 report, Dr. Lehman diagnosed chondromalacia of the patellofemoral joints bilaterally. He advised that x-rays revealed "[p]atellofemoral breakdown" and recommended further objective tests.

## LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,<sup>8</sup> and its implementing federal regulations,<sup>9</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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>10</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>11</sup>

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created. Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.<sup>12</sup>

When OWCP makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must properly resolve the schedule award issue. Before the amount of the overpayment can be determined, the evidence must establish the degree of permanent impairment.<sup>13</sup>

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral chondromalacia patella and a medial meniscus tear of the right knee causally related to factors of her federal employment. Appellant underwent a left knee debridement in July 2008 and a partial medial meniscectomy and debridement of the patellofemoral joint and medial femur of the right knee on September 24, 2008.

On September 12, 2011 an OWCP medical adviser found that appellant had two percent right lower extremity impairment due to her partial meniscectomy and two percent left lower extremity impairment due to her patellofemoral arthritis. OWCP granted her a schedule award for two percent permanent impairment of each lower extremity.

Dr. Lehman performed a partial left lateral meniscectomy and debridement of the left knee on July 15, 2013. On December 3, 2013 he found that appellant had no swelling or laxity

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<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.* at § 10.404(a).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>12</sup> *See W.M.*, Docket No. 13-291 (issued June 12, 2013); *id.*, Chapter 2.808.9(e) (February 2013).

<sup>13</sup> *See L.S.*, Docket No. 08-1247 (issued December 12, 2008); *Richard Saldibar*, 51 ECAB 585 (2000).

and good motion. Dr. Lehman determined that she had reached maximum medical improvement.

OWCP referred appellant to Dr. Katz for a second opinion examination to determine the extent of any permanent impairment. Dr. Katz noted that the accepted conditions were bilateral chondromalacia and right medial meniscal tear. He found that appellant had two percent impairment due to the meniscal tear. Dr. Katz obtained x-rays of the knees bilaterally and found that the patellofemoral arthritis, which he identified as the impairment due to chondromalacia, was not severe enough to be ratable. He advised that appellant had bilateral medial compartment arthritis that had not been accepted and thus did not rate this condition.

On July 17, 2015 an OWCP medical adviser reviewed Dr. Katz' opinion and determined that appellant had only two percent permanent impairment of the right lower extremity and no impairment of the left knee as a result of the accepted conditions.

When OWCP makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must first properly calculate the schedule award.<sup>14</sup> The Board finds that the overpayment issue is not in posture for decision as OWCP has not properly resolved the underline issue of appellant's entitlement to a schedule award. Dr. Katz found that she had medial compartment arthritis which he did not rate because it was not an accepted condition. If medial compartment arthritis is a preexisting condition, it should have been considered in determining the extent of any permanent impairment.<sup>15</sup> OWCP's procedures provide that, in evaluating the loss of use of a scheduled member due to an employment injury, the percentage includes both employment-related impairments and "any preexisting permanent impairment of the same member or function."<sup>16</sup> Dr. Mannis diagnosed chondromalacia patella and mild degenerative arthritis of both knees in a report dated February 26, 2008. An MRI scan of the right knee obtained July 8, 2008 revealed possible early osteoarthritis of the medial femorotibial compartment and minimal chondromalacia patella. Dr. Lehman interpreted the MRI scan as showing a breakdown in the femoral tibial and patellofemoral joint.

On remand, prior to determining whether appellant received an overpayment of compensation, OWCP should refer the case to Dr. Katz for a supplemental opinion as to whether she had preexisting medial compartment arthritis and, if so, whether she has more than a two percent permanent impairment of the right lower extremity.<sup>17</sup> After such further development as it deemed necessary, it should issue an appropriate decision.

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<sup>14</sup> See *L.S.*, *supra* note 12.

<sup>15</sup> See *Clary J. Cleary*, 57 ECAB 563 (2006); *Mike E. Reid*, 51 ECAB 543 (2000).

<sup>16</sup> *Supra* note 11 Chapter 2.808.5(d) (February 2013).

<sup>17</sup> Appellant must establish impairment to a scheduled member caused by the accepted condition before impairment due to a preexisting condition can be assessed. See *K.H.* Docket No. 13-0501 (issued January 28, 2014). As the medical evidence does not show a permanent impairment of the left lower extremity, the claim is not ripe for consideration of any preexisting impairment. See *Thomas P. Lavin*, 57 ECAB 353 (2006).

**CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation.<sup>18</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 19, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 14, 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

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<sup>18</sup> In view of the Board's determination on the fact and amount overpayment, the issues of whether OWCP properly denied waiver and properly found that appellant abandoned her request for a prerecoument hearing are moot.