



reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The facts relevant to this appeal will be set forth.

On April 29, 2002 appellant, then a 59-year-old supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her head, left hand, left arm, and left leg when she tripped and fell. OWCP accepted the claim for a left knee strain, an exacerbation of left knee osteoarthritis, and long-term use of anticoagulants.

An OWCP medical adviser, in a report dated September 22, 2006, found that appellant had 50 percent permanent impairment of the left lower extremity due to left knee arthritis. He utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) in reaching his conclusion.

In a decision dated November 2, 2006, OWCP granted a schedule award for 50 percent permanent impairment of the left lower extremity. The period of the award ran for 144 weeks from June 23, 2006 to March 26, 2009.

On March 10, 2008 appellant underwent an authorized left knee total arthroplasty.<sup>3</sup> She filed a claim for an increase schedule award.

In a decision dated February 5, 2010, OWCP denied appellant's claim for an increased schedule award. It found that she had not submitted any evidence to establish that she had more than 50 percent permanent impairment of the left lower extremity.

On September 30, 2015 appellant filed a claim for an increased schedule award. By letter dated October 13, 2015, OWCP requested that she submit an impairment evaluation from her attending physician in accordance with the sixth edition of the A.M.A., *Guides*.

Appellant, on November 23, 2015, submitted an October 9, 2015 report from Dr. Thomas Branch, a Board-certified orthopedic surgeon. Dr. Branch discussed her complaints of a swollen and painful left knee. He noted that blood clot testing revealed deep vein thrombosis and venous insufficiency on the left side. On examination, Dr. Branch found moderate swelling, tenderness of the medial and lateral facet joint, mild patellofemoral crepitation and effusion, and no laxity. He measured 0 degrees extension, 90 degrees flexion, and a grade 1 anterior drawer at 90 degrees. Dr. Branch opined that a bone scan showed "no loosening or infection" of the left knee

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<sup>2</sup> Docket No. 12-1928 (issued March 13, 2013). By decision dated April 2, 2009, OWCP reduced appellant's compensation to zero after finding that her actual earnings as a modified attendance control supervisor effective November 7, 2008 fairly and reasonably represented her wage-earning capacity. In decisions dated April 8 and September 29, 2010, it denied her claim for compensation after January 30, 2009 as she had not established modification of its April 2, 2009 loss of wage-earning capacity determination. Appellant appealed to the Board on January 4, 2012. By order dated March 14, 2012, the Board dismissed her appeal as more than 180 days had elapsed from the last merit decision dated September 29, 2010.<sup>2</sup> *Order Dismissing Appeal*, Docket No. 12-0490 (issued March 14, 2012). On June 5, 2012 appellant requested reconsideration. In a decision dated August 15, 2012, OWCP denied her request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

<sup>3</sup> The operative report indicated that the physician was performing a right total knee arthroplasty, but this appears to be a typographical error.

prosthesis and that an x-ray showed that the components were “well fixed and in good position” with exaggeration of the lateral joint space. He diagnosed left knee ankyloses, and an embolism and fibrosis due to internal orthopedic devices.

In an impairment evaluation dated October 9, 2015, Dr. Branch diagnosed class 4 total knee replacement using Table 16-3, the knee regional grid, on page 511 of the A.M.A., *Guides*. He indicated that appellant had a poor result from her total knee replacement “with moderate[-]to[-]severe motion deficits, [and] residual mononeuritis without instability,” for 55 percent lower extremity impairment. Dr. Branch advised that her condition was permanent and stationary.

An OWCP medical adviser reviewed Dr. Branch’s report on February 21, 2016. He noted that appellant had 90 degrees flexion, 0 degrees extension, a grade 1 anterior drawer at 90 degrees, mild effusion, and mild crepitation. The medical adviser related that objective studies showed components of the total knee replacement in good position with no loosening. He diagnosed class 3 total knee replacement under Table 16-3 due to appellant’s mild loss of motion, which yielded a default value of 37 percent. The medical adviser applied a grade modifier of zero for functional history as she did not have an abnormal gait or use an assistive device, a grade modifier of two for moderate palpatory physical examination findings, and a grade modifier of one for clinical studies as x-rays verified the diagnosis. Applying the net adjustment formula moved the grade modifier two places to the left for 31 percent left lower extremity impairment. The medical adviser opined that appellant had reached maximum medical improvement. He explained that he disagreed with Dr. Branch’s characterization of her motion deficit as moderate or severe and also noted that Dr. Branch had not applied grade modifiers.

OWCP, by letter dated March 4, 2016, requested that Dr. Branch review and discuss the finding by its medical adviser that appellant did not have 55 percent permanent impairment of the left lower extremity. No response was received.

By decision dated April 25, 2016, OWCP denied appellant’s claim for an increased schedule award. It found that she had not submitted evidence showing more than the previously awarded 50 percent left leg impairment.

Appellant, on April 27, 2016, requested reconsideration. She related that she and her physician had reviewed OWCP’s medical adviser’s findings and agreed with his conclusion that she had 31 percent impairment of the left leg. Appellant argued that she was entitled to an award for an additional 31 percent impairment of the left lower extremity in addition to the 50 percent permanent impairment previously received. She noted that her knee condition adversely affected activities of daily living.

Appellant submitted progress reports dated March 10 and May 19, 2016 from Dr. Branch.<sup>4</sup>

By decision dated June 3, 2016, OWCP denied appellant’s request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further review of the merits under section 8128(a).

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<sup>4</sup> The record also contains an April 25, 2016 report from a physician assistant.

On appeal appellant argues that she had experienced additional loss of use of her left lower extremity since her prior schedule award for 50 percent permanent impairment. She asserts that she is entitled to an award for an additional 31 percent permanent impairment as found by OWCP's medical adviser.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA,<sup>5</sup> and its implementing federal regulations,<sup>6</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>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).<sup>9</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the 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>10</sup>

OWCP procedures provide that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained left knee strain, an exacerbation of left knee arthritis, and long-term use of anticoagulants due to an April 29, 2002 employment injury. On

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Id.* at § 10.404(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> A.M.A., *Guides* 494-531.

<sup>10</sup> *See supra* note 8 at Chapter 2.808.6(f) (February 2013).

<sup>11</sup> *Id.* at Chapter 2.808.7(a)(1) (February 2013); *see also* *L.G.*, Docket No. 15-1289 (issued January 21, 2016).

November 2, 2006 it granted 50 percent permanent impairment of the left lower extremity due to the accepted conditions.

Appellant underwent a total arthroplasty of the left knee on March 10, 2008. On February 5, 2010 OWCP denied her claim for an increased schedule award. Appellant filed a claim for an increased schedule award on September 30, 2015. She submitted an October 9, 2015 report from Dr. Branch in support of her request. On examination, Dr. Branch measured 95 degrees of flexion, 0 degrees extension, and a grade 1 anterior drawer at 90 degrees. He found moderate swelling, and mild patellofemoral crepitation and effusion without laxity. Dr. Branch identified the diagnosis as a class 4 total knee replacement with a poor result, or 55 percent lower extremity impairment using Table 16-3 on page 511 of the A.M.A., *Guides*. Table 16-3 provides that a class 4 impairment is appropriate for a poor result from a total knee replacement with “poor position, moderate[-]to[-]severe instability, and/or moderate[-]to[-]severe motion deficit.” Dr. Branch did not explain his rating of appellant’s total knee replacement as a class 4 poor result given his finding that she had no instability, good position, and range of motion measurements that did not identify the motion loss as moderate or severe. Additionally, he did not apply grade modifiers or the net adjustment formula to his finding and thus his opinion is not in accordance with the A.M.A., *Guides* and of little probative value.<sup>12</sup>

On February 21, 2016 an OWCP medical adviser reviewed Dr. Branch’s report and identified the diagnosis as a class 3 total knee replacement with a fair result from the surgery with a mild motion deficit. He applied grade modifiers and utilized the net adjustment formula to find that appellant had 31 percent permanent impairment. The maximum allowed for a class 3 impairment as a result of a total knee replacement is 43 percent, which is less than the previously awarded 50 percent permanent impairment. The Board finds that the report of OWCP’s medical adviser is in accordance with the A.M.A., *Guides* and thus constitutes the weight of the evidence and establishes that appellant has no more than 50 percent permanent impairment of the left leg for which she previously received a schedule award.

On appeal appellant contends that she is entitled to an award for an additional 31 percent permanent impairment as found by OWCP’s medical adviser. As discussed, however, the percentage already paid due to the work-related injury is subtracted from the total percentage of impairment.<sup>13</sup> The medical evidence is insufficient to support an increased schedule award as it does not establish that appellant has more than the 50 percent permanent impairment previously awarded for the left lower extremity.

Appellant also maintains on appeal that her current left lower extremity problems are more severe than when she received the 50 percent permanent impairment. She has the burden, however, to submit probative medical evidence establishing a greater extent of impairment.<sup>14</sup> Additionally, factors such as limitations on daily activities have no bearing on the calculation of a schedule award.<sup>15</sup>

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<sup>12</sup> See *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>13</sup> See *supra* note 11.

<sup>14</sup> See *D.E.*, Docket No. 16-0463 (issued May 17, 2016); *A.B.*, Docket No. 12-1392 (issued January 24, 2013).

<sup>15</sup> See *T.E.*, Docket No. 12-1691 (issued January 29, 2013); *Kimberly M. Held*, 56 ECAB 670 (2005).

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.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>16</sup> OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.<sup>17</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>18</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>19</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>20</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

By decision dated April 25, 2016, OWCP denied appellant's claim for an increased schedule award as the evidence established that she had no more than the previously awarded 50 percent permanent impairment of the left lower extremity. On April 27, 2016 appellant timely requested reconsideration of the April 25, 2016 decision. She maintained that she and her physician agreed with OWCP's medical adviser's finding that she had 31 percent left lower extremity impairment. Appellant contended that she was entitled to the additional 31 percent permanent impairment as an additional award. As discussed, however, a prior award for a work injury is subtracted from the total percentage of impairment.<sup>22</sup> Appellant's argument is not new and relevant and does not show that OWCP erred in applying a point of law. Consequently, it is insufficient to warrant reopening her case for further merit review.

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<sup>16</sup> *Supra* note 1. Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>17</sup> 20 C.F.R. § 10.606(b)(3).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(b).

<sup>20</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>21</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>22</sup> *See supra* note 11.

Appellant submitted progress reports dated March 10 and May 19, 2016 from Dr. Branch. The reports, however, do not contain an impairment rating and thus are irrelevant to the issue at hand. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>23</sup>

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit pertinent and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

### **CONCLUSION**

The Board finds that appellant has no more than 50 percent permanent impairment of the left lower extremity, for which she received a schedule award. The Board further finds that OWCP properly denied her request to reopen her case for further review of the merits under section 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 3 and April 25, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 23, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>23</sup> *Freddie Mosley*, 54 ECAB 255 (2002).