

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

G.C., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, SPACE)
& MISSILE SYSTEMS CENTER, LOS)
ANGELES AIR FORCE BASE, El Segundo, CA,)
Employer)

**Docket No. 14-1247
Issued: February 12, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2014 appellant timely appealed an April 17, 2014 nonmerit decision and a November 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether appellant has greater than 51 percent permanent impairment of the right leg; and (2) whether the Branch of Hearings and Review properly denied his March 19, 2014 request for a hearing.

¹ 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 62-year-old police officer, injured his right knee on January 29, 2004 while participating in work-related physical training.² OWCP initially accepted the claim for right medial meniscus tear. On April 6, 2004 appellant underwent a right knee partial medial meniscectomy and chondroplasty. In March 2008 OWCP expanded the claim to include left medial meniscus tear as a consequential injury. On October 27, 2011 appellant underwent a left knee partial medial and lateral meniscectomy, synovectomy, and chondroplasty. Between November 2005 and May 2012, OWCP issued multiple schedule awards for both the left and right lower extremities. As of May 8, 2012, it granted a combined 51 percent impairment of the right leg and 35 percent for the left leg.³

On April 23, 2013 appellant underwent a right partial knee replacement, which OWCP authorized.

In an August 21, 2013 report, Dr. Harbinder S. Chadha indicated that appellant reached maximum medical improvement following his latest right knee surgery.⁴ He found 21 percent impairment of the right leg was based on a good result from the April 2013 knee replacement surgery. Dr. Chadha referenced the A.M.A., *Guides* (6th ed. 2008) as the basis for the latest impairment rating.⁵

In November 2013, appellant filed a claim for an additional schedule award based on Dr. Chadha's August 21, 2013 impairment rating.

By decision dated November 14, 2013, OWCP denied appellant's claim for an additional RLE schedule award. It noted that he had previously received awards totaling 51 percent right leg impairment, and Dr. Chadha's latest rating found only 21 percent impairment. As such, appellant was not entitled to an additional schedule award.

² Appellant's injury occurred at the Federal Law Enforcement Training Center in Artesia, NM. He was running with classmates when his right knee began to swell and became very painful.

³ On November 18, 2005 appellant received a schedule award for seven percent impairment of the right leg under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). On August 13, 2008 he received an award for 5 percent impairment of the left leg and an additional 44 percent impairment for the right leg under the A.M.A., *Guides* (5th ed. 2001). OWCP awarded an additional 15 percent left leg impairment on May 13, 2011. On May 8, 2012 appellant received an award for an additional 15 percent left leg impairment. The May 13, 2011 and May 8, 2012 left leg awards were pursuant to the sixth edition of the A.M.A., *Guides* (2008).

⁴ Dr. Chadha is a Board-certified orthopedic surgeon, who performed both the 2004 and 2013 right knee surgical procedures.

⁵ Although Dr. Chadha did not cite Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509, 511 (6th ed. 2008), he appears to have relied upon this table and the diagnosis of "status post knee replacement" as a basis for his 21 percent right leg impairment rating.

Approximately four months after the November 14, 2013 decision, appellant requested an oral hearing. He submitted the appeal request form that accompanied OWCP's November 14, 2013 decision. Appellant's request was dated March 19, 2014, and postmarked March 20, 2014.

In an April 17, 2014 nonmerit decision, the Branch of Hearings and Review denied the hearing request as untimely. The hearing representative also denied a discretionary hearing, noting that appellant could instead file a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁸

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same schedule member.⁹ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁰

If a claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence.¹¹ In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement (MMI), percent of impairment, and period of award.¹² This may occur if the claimant sustains additional impairment due to the original work factors with no intervening or additional exposure to those same work factors.¹³

⁶ For complete loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

⁷ 20 C.F.R. § 10.404 (2014).

⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

⁹ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

¹⁰ 20 C.F.R. § 10.404(c)(1), (c)(2).

¹¹ *Supra* note 8 at Chapter 2.808.9b (February 2013).

¹² *Id.*

¹³ *Id.*

If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the sixth edition.¹⁴ Should the subsequent calculation result in a percentage of impairment lower than the original award, as sometimes occurs, a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment, and that OWCP has no basis for declaring an overpayment.¹⁵

ANALYSIS -- ISSUE 1

OWCP previously awarded a combined 51 percent right leg impairment and the most recent prior award is dated August 13, 2008. This schedule award was largely based on impairment due to right knee arthritis under Table 17-31, A.M.A., *Guides* 544 (5th ed. 2001). Since then appellant has undergone a right partial knee replacement involving the medial compartment.

In an August 21, 2013 report, Dr. Chadha rated appellant based on the diagnosis of “status post knee replacement.” Appellant had a good result from the April 23, 2013 knee replacement surgery, which Dr. Chadha identified as class 2 Class of Diagnosis (CDX 2) impairment, with a default lower extremity rating of 25 percent.¹⁶ Dr. Chadha then calculated a net adjustment of -5 based on grade modifiers for Functional History (GMFH 0), Physical Examination (GMPE 1), and Clinical Studies (GMCS 0).¹⁷ Based on the negative net adjustment, he adjusted appellant’s rating downward to 21 percent right leg impairment.

Appellant has not demonstrated a greater impairment than the prior right leg schedule awards totaling 51 percent and is not entitled to an additional schedule award for his right leg.

LEGAL PRECEDENT -- ISSUE 2

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision.¹⁸ The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.¹⁹ The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same

¹⁴ *Id.* at Chapter 2.808.9d.

¹⁵ *Id.*

¹⁶ See Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 509, 511 (6th ed. 2008). Dr. Chadha rated appellant based on a total knee replacement; however, he only performed a partial knee replacement involving the medial compartment.

¹⁷ Net Adjustment (-5) = (GMFH 0 - CDX 2) + (GMPE 1 - CDX 2) + (GMCS 0 - CDX 2). See Section 16.3d, A.M.A., *Guides* 521 (6th ed. 2008).

¹⁸ 20 C.F.R. § 10.616(a).

¹⁹ *Id.*

decision.²⁰ If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.²¹

ANALYSIS -- ISSUE 2

OWCP issued its latest merit decision on November 14, 2013. Appellant had 30 days to request a hearing, but the hearing request was postmarked March 20, 2014. The regulations provide that “[t]he hearing request must be sent within 30 days ... of the date of the decision for which a hearing is sought.”²² Because appellant’s March 20, 2014 request was untimely, he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review also denied appellant’s hearing request because it found that his claim for an additional schedule award could be equally well-addressed by requesting reconsideration before OWCP. The Board finds that the hearing representative properly exercised her discretionary authority in denying appellant’s request for a hearing.²³

CONCLUSION

Appellant failed to establish that he has greater than 51 percent impairment of the right leg. The Board also finds that the Branch of Hearings and Review properly denied appellant’s hearing request.

²⁰ *Id.*

²¹ 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

²² 20 C.F.R. § 10.616(a).

²³ *Mary B. Moss*, 40 ECAB 640, 647 (1989). Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. See *André Thyratron*, 54 ECAB 257, 261 (2002).

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2014 and November 14, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.²⁴

Issued: February 12, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

²⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015 and did not participate in the preparation of this order.