

FACTUAL HISTORY

On April 3, 2013 appellant, then a 66-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that on December 11, 2012 he sustained a left knee injury in the performance of duty. He indicated that twice he slipped on ice in the employing establishment parking lot. There is no indication that appellant stopped work or received wage-loss compensation. In an attending physician's form report (Form CA-20) dated January 10, 2013, a physician noted a history of the December 11, 2012 incidents and diagnosed left knee degeneration.²

The record indicates that appellant underwent a left knee magnetic resonance imaging (MRI) scan on April 10, 2013. In a report of that date Dr. Knut Eberhardt, a radiologist, indicated that the results showed arthrosis of the medial compartment, "after former meniscectomy degeneration of the posterior horn," focal cartilage lesion of the lateral femoral condyle, "after partial tear of the [acromioclavicular ligament] with a secondary atrophy of the ligament," signs of arthrosis of the patellar bone, and joint effusion.

In a report dated November 14, 2013, Dr. Stefan Reinsdorf, an orthopedic surgeon, reported that the April 10, 2013 MRI scan showed joint effusion, a meniscus tear in the dorsal/posterior part of the lateral meniscus, and a cartilage lesion. He indicated that appellant needed arthroscopic surgery and removal of the damaged meniscus and cartilage. On January 24, 2014 OWCP accepted the claim for a left knee medial meniscus tear.

Appellant underwent left knee surgery on March 24, 2014. The record does not contain a copy of the surgical report.

On February 2, 2015 OWCP received a claim for compensation (Form CA-7) indicating that appellant was claiming a schedule award. In support of his claim, appellant submitted a December 4, 2014 report from Dr. Jacob Tauber, a Board-certified orthopedic surgeon. Dr. Tauber provided a history and results on examination. He reported that x-rays of the left knee revealed tricompartmental arthritis and a collapse of the medial compartment. Dr. Tauber opined that under Table 16-3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (sixth edition), appellant had 50 percent permanent impairment of the left leg based on severe arthritis and no cartilage interval.

OWCP referred the medical record to Dr. Leonard Simpson, an OWCP medical adviser, for review. In a report dated March 28, 2015, Dr. Simpson opined that the left leg impairment for the accepted meniscal injury was three percent under Table 16-3. He noted that there was no indication that OWCP had accepted left knee osteoarthritis. The medical adviser further noted that the net adjustment under Table 16-3 for the meniscal injury resulted in a grade E impairment of three percent. Dr. Simpson noted that, if OWCP were to accept left knee osteoarthritis as employment related, the impairment would be 50 percent. The date of maximum medical improvement was reported as December 4, 2014.

² The signature of the physician is illegible.

By decision dated April 29, 2015, OWCP issued a schedule award for three percent permanent impairment of the left leg. The period of the award was 8.64 weeks commencing December 4, 2014.

On June 15, 2015 appellant, through counsel, requested reconsideration. He argued that OWCP should consider preexisting conditions in a schedule award. On July 7, 2015 appellant submitted a June 18, 2015 report from Dr. Tauber, who noted his prior examination of appellant on December 4, 2014 and his impairment rating. Dr. Tauber diagnosed degenerative arthritis of the left knee. He opined that the “arthritis was clearly permanently aggravated by the incident of December 11, 2012.” Dr. Tauber also indicated that appellant’s repetitive job activities contributed to his arthritis as well. He concluded that his prior opinions remained unchanged. In a report dated June 15, 2015, Dr. Reinsdorf opined that the impairment rating of three percent was too low since over the years there had been more or less constantly arthritis of the knee.

By decision dated September 9, 2015, OWCP found that the evidence was insufficient to warrant merit review of the claim. It indicated that osteoarthritis had not been accepted as employment related.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁵

With respect to a knee impairment, the A.M.A., *Guides* provide a regional grid at Table 16-3. The class of impairment Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH), Table 16-6, Physical Examination (GMPE), Table 16-7, and Clinical Studies (GMCS), Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁶ The permanent impairment must be causally related to an accepted employment injury.⁷

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁴ A. George Lampo, 45 ECAB 441 (1994).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁷ Rosa Whitfield Swain, 38 ECAB 368 (1987).

ANALYSIS -- ISSUE 1

In the present case, OWCP issued a schedule award for three percent permanent impairment of the left leg on April 29, 2015. An attending physician, Dr. Tauber, had opined in a December 4, 2014 report that appellant had 50 percent impairment based on a diagnosis of severe left knee arthritis, but Dr. Tauber did not provide a history of the diagnosed arthritis condition or offer an opinion as to the relationship between the arthritis condition and the December 11, 2012 employment injury. The employment incidents were two slip and falls on ice, and the accepted condition was a torn medial meniscus of the left knee. As noted above, the permanent impairment must be causally related to the employment injury.

Under Table 16-3, for a meniscal injury with a partial meniscectomy, it is CDX 1 impairment and the default (grade C) impairment is two percent. Applying the grade modifiers noted above, the medical adviser found a GMFH 2, GMPE 3, and GMCS 3. Applying the adjustment formula results in +5, or the maximum adjustment of grade E. Under Table 16-3, this is three percent leg impairment.

The Board finds that OWCP properly found that appellant had three percent permanent impairment to his left leg. Based on the probative evidence that was before OWCP as of April 29, 2015, there was no evidence of a permanent impairment greater than three percent. The maximum number of weeks for loss of use of the leg is 288 weeks under 5 U.S.C. § 8107(c). Appellant properly received three percent of 288 weeks or 8.64 weeks of compensation. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement (MMI) from residuals of the employment injury.⁸ The date of MMI was December 4, 2014, representing the date of Dr. Tauber's examination and consistent with the opinion of the medical adviser.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP."¹⁰ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹¹

⁸ *Albert Valverde*, 36 ECAB 233, 237 (1984).

⁹ 5 U.S.C. § 8128(a) (providing 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.")

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ANALYSIS -- ISSUE 2

In the present case, appellant requested reconsideration of the April 29, 2015 decision. Although a claimant may at any time seek an additional schedule award and receive a merit decision,¹² he did not submit medical evidence with new examination results showing an increased impairment. Appellant submitted evidence and argued that the April 29, 2015 was incorrect. OWCP properly determined that he was requesting reconsideration of the April 29, 2015 decision.

The Board finds that appellant has submitted new, relevant, and pertinent evidence on the issue presented. As noted, no medical evidence had previously discussed causal relationship between a diagnosed left knee arthritis condition and the employment injury. The June 18, 2015 report from Dr. Tauber provides, for the first time, an opinion that the condition was employment related. This is clearly relevant to the schedule award decision. Dr. Tauber had previously opined in his December 4, 2014 report that based on the arthritis appellant had 50 percent left leg permanent impairment. Moreover, the medical adviser had acknowledged in his March 28, 2015 report that, if arthritis were to be accepted as employment related, there would be a greater impairment.

In addition, Dr. Tauber's June 18, 2015 report states that appellant's arthritis condition "was clearly permanently aggravated by the incident of December 11, 2012," indicating that the arthritis was a preexisting condition. OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as employment related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate as there is no apportionment.¹³

Appellant is entitled to a merit review as he submitted relevant and pertinent evidence an argument previously considered by OWCP. The case will be remanded to OWCP for a proper decision on the merits of the claim. OWCP should develop the evidence as necessary to properly resolve the issues presented and issue a merit schedule award decision.

CONCLUSION

The Board finds that the April 29, 2015 properly found three percent impairment to the left leg. The Board further finds that appellant submitted sufficient evidence to require a merit review and the case is remanded to OWCP for a merit decision.

¹² *B.K.*, 59 ECAB 228 (2007).

¹³ Federal (FECA) Procedure Manual, Part 2, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2015 is affirmed. The decision dated September 9, 2015 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: January 21, 2016
Washington, DC

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

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

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