



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

Appellant underwent a nonwork-related right bunionectomy on July 27, 1999. She was discharged with excellent results on February 29, 2000 and released to return to work in April 2000. However, appellant sustained injuries to her right foot again on June 21, 2000, when she pressed hard with her right foot to brake her delivery vehicle. She filed a traumatic injury claim, assigned OWCP File No. xxxxxx270, which was accepted for bunion of the right foot and aggravation of bunionectomy. Appellant underwent another right foot surgery on June 18, 2002, which was authorized by OWCP.

On October 30, 2002 appellant saw Dr. David Weiss, an osteopath, for an impairment evaluation. Dr. Weiss opined that appellant had 38 percent right leg impairment, based on motor deficits to the right ankle (35 percent) and pain (3 percent). The impairment rating was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*). An OWCP medical adviser reviewed Dr. Weiss' report and concurred with his findings in a February 3, 2003 report.

By decision dated February 10, 2003, OWCP issued a schedule award for 38 percent permanent impairment of the right leg. The period of the award was for 109.44 weeks from October 30, 2002.

Appellant was injured again on January 20, 2005. She filed a claim, assigned File No. xxxxxx513, accepted for contusion of the left hip, tear of the lateral meniscus of the left knee, and sprain of the lumbosacral (joint) (ligament), and sprain of the left knee.

Appellant was subsequently reexamined by Dr. Weiss for an additional schedule award. In a report dated September 21, 2005, Dr. Weiss opined that appellant's right leg permanent impairment had increased to 50 percent. He found that appellant's right leg impairment was 47 percent based on motor deficits to the right ankle, and three percent due to pain. In a report dated January 17, 2006, an OWCP medical adviser concurred that appellant's right leg impairment was 50 percent. By decision dated July 18, 2006, OWCP issued a schedule award for an additional 12 percent to the right leg for a total of 50 percent permanent impairment of the right leg.

On August 13, 2009 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 11, 2009 she sustained injuries when she fell while carrying a bin in the performance of duty. She alleged that she twisted her right ankle and fell, landing on her left knee and left side. The claim was assigned OWCP File No. xxxxxx363. On October 1, 2009 OWCP accepted the claim for right ankle sprain, left knee contusion, and left knee sprain.

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<sup>3</sup> Docket No. 14-296 (issued May 5, 2014).

The record indicates that appellant underwent a right knee arthroscopy on January 22, 2010. On June 30, 2010 OWCP authorized the January 22, 2010 surgery. In a report dated September 22, 2010, Dr. Nicholas Diamond, an osteopath, opined that, under the sixth edition of the A.M.A. *Guides*, appellant had 18 percent right leg permanent impairment. He indicated that the impairment was based on a right knee meniscal injury, right knee patellofemoral arthritis, and right ankle instability. Dr. Diamond also opined that appellant had a 17 percent left leg impairment. He noted that appellant's date of maximum medical improvement was September 22, 2010.

On June 7, 2011 OWCP requested that Dr. Henry J. Magliato, an OWCP medical adviser review Dr. Diamond's report. In a June 9, 2011 report, Dr. Magliato found 18 percent permanent impairment for the right lower extremity. However, he noted that "If the right knee was never accepted, the [p]ermanent [i]mpairment is just one percent for the right ankle injury." Dr. Diamond agreed that appellant's date of maximum medical improvement was September 22, 2010.

On September 14, 2011 OWCP requested that Dr. Andrew A. Merola, another OWCP medical adviser, provide an impairment rating for appellant's left lower extremity. Dr. Merola reviewed the case record and statement of accepted facts and agreed with Dr. Diamond's impairment rating of 17 percent permanent impairment of the left leg.

By decision dated November 3, 2011, OWCP denied appellant's claim for an increased schedule award for the right leg. While Dr. Magliato agreed with Dr. Diamond's findings that she had 18 percent permanent impairment of the right lower extremity, appellant was previously paid a schedule award for 38 percent permanent impairment of the right lower extremity under OWCP File No. xxxxxx270. Appellant requested an oral hearing.

By decision dated June 6, 2012, OWCP's hearing representative set aside the November 3, 2011 decision and remanded the claim, finding that, while there was no evidence that the right knee condition was employment related, since OWCP authorized surgery on the right knee, "OWCP is responsible for any disability or impairment resulting from that surgery."

On remand, OWCP prepared an updated statement of accepted facts and requested that an OWCP medical adviser determine appellant's impairment of her right lower extremity for schedule award purposes. Specifically, it requested comment regarding whether any additional residuals from the right knee surgery were existent and whether appellant's right knee condition is a consequential injury due to her left knee condition.

By report dated July 26, 2012, Dr. Magliato stated that there was no evidence that the right knee was directly injured. In a report dated November 28, 2012, he stated that he was advised that, since the right knee surgery had been authorized, OWCP was responsible for any residual impairment to the right knee. Dr. Magliato indicated that appellant's current right leg impairment was 18 percent, based on the right knee (17 percent) and ankle (1 percent). The date of maximum medical improvement was noted as November 2, 2011.

In a decision dated January 17, 2013, OWCP denied appellant's claim for an increased schedule award for the right leg, finding that while OWCP's medical adviser agreed that she has

18 percent permanent impairment with a maximum medical improvement date of November 2, 2011, she was previously paid a schedule award for 50 percent permanent impairment of the right lower extremity. Thus appellant had not established increased impairment. She requested a hearing.

By decision dated May 24, 2013, an OWCP hearing representative affirmed the January 17, 2013 decision. Appellant appealed to the Board.

On May 5, 2014 the Board set aside the May 24, 2013 decision. The Board noted that OWCP had found, in decisions dated January 17 and May 24, 2013, that appellant was not entitled to an additional schedule award for the right leg. OWCP found that the evidence established a current impairment to the right knee and ankle of 18 percent, but appellant had previously received a schedule award for 50 percent impairment to the right leg in another claim. The Board remanded the case, noting there was little evidence in the current claim as to the nature of the prior schedule award. OWCP was directed to combine the case files, and properly determine whether the current right leg impairment duplicated the prior award.

On remand from the Board's May 5, 2014 decision, OWCP combined appellant's case files with respect to her right leg permanent impairment and reviewed the merits of the claim. By decision dated September 11, 2014, it again denied appellant's claim for an increased schedule award, finding that appellant had not established more than 50 percent permanent impairment of the right leg. OWCP found that since the right ankle impairment was included in the prior schedule award of 50 percent, appellant was not entitled to an additional schedule award for the right leg.

### **LEGAL PRECEDENT**

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.<sup>4</sup> Neither FECA nor the implementing 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.<sup>5</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>6</sup>

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both

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<sup>4</sup> 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).

<sup>5</sup> A. *George Lampo*, 45 ECAB 441 (1994).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); and, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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.<sup>7</sup>

### **ANALYSIS**

In a May 5, 2014 decision, the Board remanded the case to OWCP with respect to whether appellant was entitled to an additional schedule award for permanent impairment of the right leg. As the Board noted, a current permanent impairment is reduced by a prior schedule award to the extent that the prior impairment duplicates the current impairment.

The issue presented is a medical issue, but OWCP did not further develop the medical evidence. The claims examiner incorrectly stated that the current impairment rating of 18 percent found by the medical adviser was for permanent impairment of the right ankle. The record clearly indicates that the impairment was based primarily on the right knee. In a June 9, 2011 report, Dr. Magliato found 18 percent permanent impairment for the right lower extremity based on the right knee. However, he noted that “If the right knee was never accepted, the [p]ermanent [i]mpairment is just one percent for the right ankle injury.” Dr. Magliato agreed that appellant’s date of maximum medical improvement was September 22, 2010. OWCP denied appellant’s claim for an increased schedule award, finding that, although Dr. Magliato found 18 percent permanent impairment of the right leg based on the right knee, appellant had not established impairment greater than the 50 percent previously awarded. The hearing representative in the June 6, 2012 decision, however, found that, while there was no evidence that the right knee condition was accepted, since OWCP authorized the right knee arthroscopy surgery, “OWCP is responsible for any disability or impairment resulting from that surgery.” It remains unclear whether OWCP accepted appellant’s right knee condition as work related. Therefore, the case must be remanded to OWCP to determine whether a right knee condition has been accepted as work related.

Upon return of the case record, OWCP shall prepare a new statement of accepted facts and clarify the conditions that have been accepted as employment related and refer appellant for a second opinion examination in accordance with its procedures. After such further development, as it deems necessary, it shall issue an appropriate *de novo* decision.

### **CONCLUSION**

The Board finds the case not in posture for decision.

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<sup>7</sup> T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(d).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 11, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.<sup>8</sup>

Issued: October 5, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.