



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

There are three OWCP claims that have been administratively combined and are relevant to the issue of permanent impairment in this case. On October 27, 1978 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left knee injury on June 6, 1978 from a bolt head that protruded from a dash panel. OWCP accepted the claim for left knee meniscus derangement and left leg traumatic arthropathy. On January 5, 1979 appellant underwent authorized left knee surgery that included a total medial meniscectomy.

By decision dated July 17, 1990, OWCP issued a schedule award for 10 percent left leg permanent impairment, based on loss of motion and pain. The date of maximum medical improvement (MMI) was June 23, 1979. In a report dated December 10, 2011, an OWCP medical adviser, Dr. Brian M. Tonne, an orthopedic surgeon, opined that appellant had 28 percent left leg permanent impairment. He indicated that he had applied Table 16-3 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), for left knee arthritis. By decision dated January 9, 2012, OWCP issued a schedule award for an additional 18 percent permanent impairment to the left leg.

OWCP also requested that Dr. Tonne provide an opinion as to whether appellant had sustained a consequential right knee condition. By report dated April 19, 2012, another OWCP medical adviser, Dr. Nabil F. Angley, a Board-certified orthopedic surgeon, opined that it was reasonable to conclude that appellant's degeneration of the right knee meniscus was a consequential injury. On April 24, 2012 OWCP accepted bilateral meniscus derangement, bilateral traumatic arthropathy of the lower legs, and right knee internal derangement. By report dated September 6, 2012, Dr. Angley opined that appellant had 26 percent right leg permanent impairment based on Table 16-3. In a decision dated February 6, 2013, OWCP issued a schedule award for 26 percent permanent impairment of the right leg.

With respect to the left leg, appellant requested reconsideration on March 6, 2012 and argued that OWCP had used an incorrect date of MMI for the July 17, 1990 left leg schedule award. OWCP issued a May 21, 2012 decision finding that appellant was not entitled to an additional schedule award for the left leg. By letter received by OWCP on May 29, 2012, appellant requested reconsideration and argued that he was not contesting the percentage of impairment, but the date of MMI and corresponding pay rate.<sup>3</sup> In a decision dated November 27, 2012, OWCP denied modification of its prior decision.

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<sup>2</sup> Docket No. 13-0767 (issued July 8, 2013); Docket No. 13-2135 (issued April 3, 2014); Docket No. 14-0172 (issued September 28, 2015).

<sup>3</sup> Appellant retired from federal employment on November 2, 2012.

Appellant appealed to the Board from the November 27, 2012 decision on February 11, 2013. In a July 8, 2013 decision, the Board reviewed the November 27, 2012 OWCP decision, set it aside, and remanded the case to OWCP to make proper findings with respect to MMI and pay rate.<sup>4</sup>

OWCP issued a nonmerit decision dated August 28, 2013 denying appellant's May 29, 2012 reconsideration request. Appellant appealed to the Board and, by order dated April 3, 2014, the Board again remanded the case to OWCP, finding that the August 28, 2013 OWCP decision had not complied with the directive of the Board set forth in the July 8, 2013 decision.<sup>5</sup> The record indicates that OWCP subsequently issued a July 29, 2014 decision amending the July 17, 1990 schedule award for the left leg, finding that the date of MMI was March 19, 1990.

The second claim was a recurrence of disability claim (Form CA-2a) dated December 28, 1991. Appellant indicated that the injury was a slip and fall which occurred on March 18, 1991 involving both shoulders. OWCP developed the claim as a new injury under OWCP File No. xxxxxx938. Under this claim, it accepted bilateral shoulder strains, fracture left humerus, lumbar strain, and C6-7 herniated disc. An OWCP medical adviser opined, in a June 9, 1995 report, that under the fourth edition of the A.M.A., *Guides* appellant had 19 percent impairment of both arms. The medical adviser noted loss of range of motion and pain. By decision dated December 12, 1995, OWCP issued a schedule award for 38 percent permanent impairment of the upper extremities for "loss of use of right and left shoulders."

The third claim was a traumatic injury claim filed on December 18, 2000 for a November 21, 2000 injury, assigned OWCP File No. xxxxxx096. Appellant alleged that he slipped on snow and ice while in the performance of duty, and injured his right wrist, right shoulder, and low back. OWCP accepted the claim for aggravation of right shoulder osteoarthritis on July 18, 2001. It also accepted lumbar sprain, and displacement of cervical intervertebral disc without myelopathy.

Appellant submitted two reports dated September 27, 2011 from Dr. John Ellis, a Board-certified family practitioner. In one report, Dr. Ellis provided a history and results on examination and addressed a left lower extremity permanent impairment based on the left knee. He opined that appellant had 26 percent permanent impairment based on Table 16-3. Dr. Ellis indicated that this was separate from an L5-S1 spinal nerve impairment affecting the lower extremities.

In the second September 27, 2011 report, Dr. Ellis opined that for the left upper extremity, appellant had 17 percent permanent impairment under the sixth edition of the A.M.A., *Guides*. He reported that the permanent impairment was based on post-traumatic degenerative joint disease, fracture of the humerus, and cervical spinal nerve root impairments. For the right upper extremity, the impairment was 14 percent based on post-traumatic degenerative joint disease, and cervical spinal nerve root impairment. Dr. Ellis found that appellant had four

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<sup>4</sup> Docket No. 13-0767 (issued July 8, 2013).

<sup>5</sup> Docket No. 13-2135 (issued April 3, 2014).

percent permanent impairment to the lower extremities due to L5-S1 spinal nerve root impairment. He indicated that he did not consider the left or right knee permanent impairment.

OWCP referred the case to an OWCP medical adviser, Dr. Tonne. In a report dated April 5, 2013, Dr. Tonne opined that the permanent impairment of appellant's right upper extremity was 14 percent, and of his left upper extremity 17 percent. As to the lower extremities, he found greater impairment than Dr. Ellis. Dr. Tonne opined that appellant had 10 percent permanent impairment of each leg for spinal nerve root impairment, based on *The Guides Newsletter*.

By decision dated June 6, 2013, OWCP found that appellant was not entitled to an additional schedule award. It found that he had already received schedule awards for greater impairment than 17 percent for the left upper extremity, 14 percent for the right upper extremity, and 10 percent for each leg. Appellant requested reconsideration. By decision dated June 25, 2013, OWCP denied merit review of the claim.

Appellant appealed the June 6 and 25, 2013 decisions to the Board.<sup>6</sup> By order dated April 28, 2014, the Board directed OWCP to provide the complete case record within 30 days.<sup>7</sup> The Board noted that there were other claims relevant to the schedule award issue. By order dated September 28, 2015, the Board remanded the case to OWCP.<sup>8</sup> The Board noted that OWCP had not complied with the April 28, 2014 order to provide the complete case records.

By decision dated December 16, 2015, OWCP found that appellant was not entitled to an additional schedule award. It again found that he had received schedule awards previously that were greater than the impairments found by OWCP medical adviser, Dr. Tonne, in his April 5, 2013 report.

On January 7, 2016 appellant requested reconsideration. He argued that OWCP had not properly reviewed the medical evidence submitted. Appellant submitted a December 22, 2015 report from Dr. Yousif Hamati, a Board-certified orthopedic surgeon, who reported that appellant had right carpal tunnel syndrome and left ulnar nerve neuropathy, along with lumbar radiculopathy, spinal canal stenosis, and axonal polyneuropathy of both legs. Dr. Hamati opined that repetitive work was a major contributing factor. Appellant also submitted December 14, 2015 nerve conduction velocity study results.

In a decision dated June 24, 2016, OWCP reviewed the merits of the claim, but denied modification of the December 16, 2015 decision. It found that appellant had failed to submit medical evidence on reconsideration showing an increased permanent impairment.

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<sup>6</sup> The Board appeal pertained to the March 18, 1991 claim under File No. xxxxxx938. Appellant's claims were administratively combined with the November 21, 2000 injury, File No. xxxxxx096, serving as the master file and the two prior claims as subsidiary files.

<sup>7</sup> Docket No. 14-0172 (issued April 28, 2014).

<sup>8</sup> Docket No. 14-0172 (issued September 28, 2015).

## 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>9</sup> 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.<sup>10</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>11</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 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>12</sup>

## ANALYSIS

In the present case, there are three claims that involve schedule awards for permanent impairment of appellant's upper and lower extremities. OWCP accepted that appellant sustained knee injuries in the performance of duty on June 6, 1978. The claim was initially accepted for left knee meniscus derangement and left leg traumatic arthropathy, and later expanded to include bilateral meniscus derangement, bilateral traumatic arthropathy of the lower legs, and right knee internal derangement. A schedule award was initially issued for the left leg of 10 percent, based on left knee range of motion and pain. For the left leg, appellant then received an additional 18 percent, based on left knee arthritis. As to the right leg, he received 26 percent permanent impairment award based on the right knee.

In addition, appellant has claims involving the shoulders and neck. A fall on March 18, 1991 was accepted for bilateral shoulder strains, fracture left humerus, lumbar strain, and C6-7 herniated disc. By decision dated December 12, 1995, OWCP issued a schedule award for 38 percent permanent impairment to the upper extremities for loss of use of right and left shoulders. Appellant also had a fall on November 21, 2000, accepted for of right shoulder osteoarthritis, lumbar sprain, and displacement of cervical intervertebral disc without myelopathy.

OWCP has acknowledged that the record contains new medical reports with respect to permanent impairment. In his April 5, 2013 report, OWCP medical adviser Dr. Tonne reviewed

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<sup>9</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>10</sup> A. *George Lampo*, 45 ECAB 441 (1994).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.805.5a (February 2013) and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>12</sup> *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

the September 27, 2011 report from Dr. Ellis. Dr. Tonne opined that appellant had a 17 percent permanent right upper extremity impairment, and 14 percent permanent left upper extremity impairment. He also opined that appellant had 10 percent permanent impairment of each leg in his April 5, 2013 report. The impairment was not based on the knees, but on a spinal nerve root impairment. Dr. Ellis specifically found that left leg permanent impairment based on the knees was 26 percent.

The finding by OWCP regarding the report from the medical adviser was that it did not show greater permanent impairment than already received by appellant from his three claims, but that does not resolve the issue presented. As the Board has explained, simply comparing the prior percentage of impairment awarded to the current impairment for the same member is not always sufficient.<sup>13</sup> In *J.S.*, the claimant had received a prior schedule award of 54 percent for the right leg. The medical evidence showed permanent impairment of the right ankle of 12 percent, but OWCP found no additional permanent impairment because the current impairment was not greater than the prior award. The Board remanded the case, finding there was no medical evidence explaining how the current permanent impairment duplicated the prior impairment.<sup>14</sup>

The issue is not whether the impairment ratings found by the medical adviser in the April 5, 2013 report were greater than prior impairment ratings, but whether they duplicated in whole or in part the prior impairment ratings. For example, the 28 percent permanent impairment to the left leg from the prior schedule awards was based on the left knee. Dr. Ellis had reported in his September 27, 2011 report that appellant had 26 percent permanent impairment based on the left knee, and the medical adviser found there was 10 percent impairment of the left leg from spinal nerve root impairment. Combining 26 percent and 10 percent under the A.M.A., *Guides* would result in 33 percent left leg impairment.<sup>15</sup> This would exceed the 28 percent permanent impairment for the left leg received in the July 17, 1990 and January 9, 2012 schedule awards.<sup>16</sup>

OWCP's medical adviser was not provided with a complete factual and medical background with respect to the prior schedule awards. OWCP should have provided a complete background and requested a medical adviser provide an opinion regarding the current permanent impairment to the lower and upper extremities and its relationship to the prior schedule awards. The case will be remanded to OWCP to properly resolve the issue presented. After such further development as is deemed necessary, it shall issue a *de novo* decision.

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<sup>13</sup> See, e.g., *J.S.*, Docket No. 15-1252 (issued January 19, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> A.M.A., *Guides* 604.

<sup>16</sup> See *W.H.*, Docket No. 13-146 (issued April 12, 2013) (where the Board noted that it was proper for an OWCP medical adviser to combine ratings from different regions of the extremity and, where this yielded greater impairment than that which was previously granted, an additional award was proper). See also *C.J.*, Docket No. 14-1308 (issued October 7, 2014).

**CONCLUSION**

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 24, 2016 is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: August 9, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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