



## ISSUES

The issues are: (1) whether appellant has more than 21 percent permanent impairment of the right lower extremity, for which he has received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

Appellant, then a 46-year old letter carrier, filed a traumatic injury claim (Form CA-1) on June 29, 1994 alleging that on that date he sustained a right knee injury in the performance of duty. He alleged that he was ascending stairs to deliver mail when the steps gave way. OWCP initially denied the claim for compensation on December 20, 1994. Appellant underwent right knee arthroscopic surgery, including a partial medial meniscectomy, on June 3, 1996. By decision dated January 27, 1997, an OWCP hearing representative reversed the December 20, 1994 decision, and accepted that appellant sustained a right knee sprain as a result of the employment incident.

By letter dated August 7, 1998, OWCP advised appellant that the accepted conditions had been expanded to include right medial meniscus tear, fracture tibia plateau, and degenerative joint disease of the right knee.

On August 25, 1998 appellant's treating physician, Dr. Thomas W. Byron, Board-certified in orthopedic surgery, related that following appellant's June 29, 1994 right knee meniscal injury he had developed extra articular changes in the right knee, consistent with degenerative arthritis. He opined that he expected appellant would require a total knee replacement in the future. Dr. Byron related that appellant currently had structural alignment deficits, with mild varus inclination of the knee, and moderate occasional pain. He related that appellant had 10 percent permanent impairment of the right lower extremity.

In a September 9, 1998 report, an OWCP medical adviser opined that appellant had 20 percent permanent impairment of the right lower extremity under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>3</sup> He indicated that the permanent impairment was based on Table 36 of the A.M.A., *Guides*.

OWCP issued a schedule award on September 16, 1998 for 20 percent permanent impairment of the right lower extremity.

In a report dated December 5, 2007, Dr. Byron diagnosed right knee osteoarthritis, and noted a June 3, 1996 right medial meniscectomy. He provided results on examination and indicated that appellant was working modified duty. Dr. Byron noted that appellant was scheduled to retire.<sup>4</sup>

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>4</sup> An April 3, 2015 statement of accepted facts (SOAF) reported appellant retired in 2008.

Appellant underwent a total right knee replacement surgery on January 9, 2014. On July 14, 2014 he filed a Form CA-7 (claim for compensation) requesting an additional schedule award.

By report dated October 7, 2014, Dr. Eugene Kim, a Board-certified orthopedic surgeon, reported appellant was nine months status post total right knee surgery. He provided physical examination results, noting minimal swelling of the right knee with no instability.

OWCP prepared a SOAF dated April 3, 2015 and referred the case to an OWCP medical adviser. In a report dated April 3, 2015, Dr. Morley Slutsky, an OWCP medical adviser, opined that appellant had 21 percent permanent impairment of the right lower extremity. He indicated that appellant's permanent impairment had been rated under the sixth edition of the A.M.A., *Guides* based on the diagnosis of total knee replacement with good result.

By decision dated May 12, 2015, OWCP issued a schedule award for an additional one percent permanent impairment of the right lower extremity.

On May 19, 2015 appellant requested a hearing before an OWCP hearing representative. A hearing was held on December 14, 2015.

Appellant submitted a report from Dr. Kim dated October 14, 2015. He reported that appellant had complained of medial discomfort in the right knee. Dr. Kim provided results on examination, and noted tender palpation over medial retinaculum, with no instability. By report dated November 23, 2015, he wrote that appellant had reported significant improvement with a Flector patch. Dr. Kim reported minimal tenderness of the right knee, with no swelling or instability.

In a report dated February 4, 2016, Dr. David Cooper, a Board-certified orthopedic surgeon, provided a history and results on examination. He wrote that appellant reported pain and weakness of the right leg, with numbness outside of the surgery scar. Dr. Cooper reported reduced right knee range of motion, with 5 degrees extension and 95 degrees flexion. He reported diffuse tenderness both medially and laterally, laxity on the knee with some degree of mid flexion instability. Dr. Cooper opined that appellant had 71 percent permanent impairment of the right lower extremity, based on a total knee replacement with a poor result.

By decision dated February 22, 2016, OWCP's hearing representative remanded the case for further development. He directed OWCP to refer the case back to the OWCP medical adviser for an opinion as to whether appellant had more than 21 percent right lower extremity permanent impairment.

In a report dated February 28, 2016, an OWCP medical adviser, Dr. Herbert White, Jr., opined that Dr. Cooper's report was of diminished probative value as it was "so different" from Dr. Kim's reports. He opined that examination findings that differed from previously recorded observations may be excluded from the impairment calculation.

By decision dated March 14, 2016, OWCP found appellant was not entitled to an additional schedule award. It found the weight of the evidence was represented by Dr. White's report.

On April 5, 2016 appellant, through counsel requested a hearing before an OWCP hearing representative. A hearing was held on July 13, 2016. The record indicates that appellant submitted reports from Dr. Kim dated May 23 and June 1, 2016. In the June 1, 2016 report, Dr. Kim provided results on examination, noting tenderness over the medial femoral condyle, with trace swelling, no effusion or instability.

By decision dated August 30, 2016, the hearing representative affirmed the March 14, 2016 OWCP decision. He found the weight of the medical evidence was represented by Dr. White.

On September 13, 2016 appellant, through counsel, requested reconsideration. No additional evidence was submitted.

By decision dated December 9, 2016, OWCP denied merit review of the claim. It found appellant had not met any of the requirements for a merit review.

### **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.<sup>5</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>6</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>7</sup>

With respect to a knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3. The Class of Diagnosis (CDX) impairment 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).<sup>8</sup>

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

In the present case, OWCP issued a schedule award decision dated September 16, 1998 for 20 percent permanent impairment of the right lower extremity. An additional one percent permanent impairment award was granted in a decision dated May 12, 2015. The May 12, 2015

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<sup>5</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>6</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>7</sup> FECA Bulletin No. 09-03 (March 15, 2009).

<sup>8</sup> The net adjustment is up to +2 (grade E) or -2 (grade A).

award was based upon the report from OWCP's medical adviser, Dr. Slutsky. Dr. Slutsky reported on April 3, 2015 that appellant's permanent impairment had been rated under the sixth edition of the A.M.A., *Guides* based on the diagnosis of total knee replacement with good result.<sup>9</sup>

Appellant thereafter submitted a report dated February 4, 2016 from Dr. Cooper. Based on his examination, Dr. Cooper found that appellant had a 71 percent right lower extremity permanent impairment, for total knee replacement with a poor result.

The case was remanded to an OWCP medical adviser, Dr. White, to review Dr. Cooper's report. According to Dr. White, the February 4, 2016 report could not provide a basis for a permanent impairment rating because the examination results were inconsistent with another attending physician, Dr. Kim. He referred to a section of the A.M.A., *Guides*, with regard to examination findings that differed from previously recorded observations.<sup>10</sup> This section explains that an examining physician may exclude some findings from the impairment calculation "as described later in this chapter." The A.M.A., *Guides* relate that physical examination findings the examiner determines to be "unreliable or inconsistent" are excluded from grading the impairment, such as inconsistent range of motion results.<sup>11</sup>

In this case, Dr. White was not the examining physician. The examining physician, Dr. Cooper, gave no indication that he felt the examination results were unreliable or inconsistent. He did not indicate, for example, that range of motion results were unreliable, and the Board notes that Dr. Kim had not provided range of motion results in his reports.

If OWCP's medical adviser felt that the physical findings reported by Dr. Cooper were inconsistent with other medical evidence of record, the proper procedure would have been to refer the case for a second opinion examination. In *A.H.*, OWCP's medical adviser opined that the physical examination findings from the attending physicians were inconsistent.<sup>12</sup> The case was properly referred for a second opinion examination as to a permanent impairment under the A.M.A., *Guides*. Under OWCP procedures, when OWCP's medical adviser cannot make a proper determination as to permanent impairment based on the evidence, the case should be referred for additional development.<sup>13</sup>

The case will accordingly be remanded to OWCP for further development. OWCP should refer the case for a second opinion examination and report as to a permanent impairment to the right lower extremity. After such further development as is deemed necessary, it should

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<sup>9</sup> A.M.A. *Guides* 511, Table 16-3. A grade A impairment for good result from total knee replacement is 21 percent.

<sup>10</sup> *Id.* at 496.

<sup>11</sup> *Id.* at 517-518.

<sup>12</sup> Docket No. 10-0687 (issued October 20, 2010).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (February 2013); *see also* Chapter 2.808.6(f)(2)(c) (February 2013) (when OWCP's medical adviser believes the permanent impairment has not been properly described, a new evaluation may be obtained).

issue an appropriate decision. In light of the Board's findings, the second issue is moot and will not be addressed on this appeal.

**CONCLUSION**

The Board finds the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 30, 2016 is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 5, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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