

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

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C.O., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
San Antonio, TX, Employer )

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**Docket No. 16-1775  
Issued: May 25, 2017**

*Appearances:*

*Lonnie Boylan, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 2, 2016 appellant, through counsel, filed a timely appeal from a March 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established permanent impairment of a scheduled member due to his work-related injuries.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 6, 2014 appellant, then a 45-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on April 6, 2014 he sustained an injury when a piece of angle iron fell on his right foot. OWCP accepted the claim for contusion of foot and ankle, internal derangement of right knee, and tear of lateral meniscus of right knee. Appellant was off work intermittently and received wage-loss and medical compensation benefits.

In a July 17, 2014 medical report, Dr. Thomas Martens, an osteopathic physician, reported that an April 16, 2014 magnetic resonance imaging (MRI) scan of appellant's right foot revealed some dorsal soft tissue edema about the medial midfoot and forefoot, no bone contusion or fracture of foot, and intact extensor and flexor tendons. He further reported that an April 22, 2014 MRI scan of the right knee revealed partially discoid lateral meniscus with central edge tear posteriorly, intact medial meniscus, moderately large chondral defect in the distal femoral trochlear groove laterally, small joint effusion, and intact cruciate and collateral ligaments.

In an October 17, 2014 note, Dr. Thomas Burns, a Board-certified orthopedic surgeon, reported that appellant was scheduled to undergo right knee arthroscopy with partial lateral meniscectomy and debridement on October 31, 2014. The surgery was approved by OWCP.

In an October 31, 2014 operative report, Dr. Burns provided preoperative diagnoses of possible discoid lateral meniscus with tear and chondral defect trochlear groove. He reported that the arthroscopy revealed medial and lateral gutters with no abnormalities and intact meniscus and articular cartilage within the medial compartment. Dr. Burns further reported that examination of the lateral meniscus revealed a small loose body, which was removed with a motorized shaver. This appeared to have originated from a lateral tibial plateau articular cartilage defect, which was relatively deep, and which was treated. Dr. Burns related that examination of the lateral meniscus revealed no evidence of discoid meniscus and no evidence of tear. His postoperative diagnoses were noted as chondral defect trochlear groove, chondral defect lateral tibial plateau, and multicompartement synovitis. The procedures performed were identified as chondroplasty trochlear groove, chondroplasty lateral tibial plateau, and multicompartement synovitis.

In a November 10, 2014 medical report, Dr. Burns reported that appellant presented for evaluation one week post right knee arthroscopy with partial lateral meniscectomy and chondroplasty.

In a February 9, 2015 report, Dr. Burns reported that appellant was over three months status post right knee arthroscopy for which he had a chondral defect in the lateral tibial plateau. He reported that a small loose body was removed and the area was treated with chondroplasty.

A February 10, 2015 physical rehabilitation evaluation by Dr. Helo Chen, an osteopathic physician, reported that appellant had undergone physical rehabilitation for right knee internal derangement, right knee tear of the lateral meniscus, and right contusion of foot/ankle.

In an April 15, 2015 diagnostic report, Dr. Michael Harper, a Board-certified diagnostic radiologist, reported that an MRI scan of the right knee revealed stable patellofemoral arthritis, slightly worsened medial compartment/medial femoral condyle arthritis, and slightly more prominent lateral tibial plateau chondromalacia. He further noted findings of status post resection of meniscal tear of the posterior horn lateral meniscus. Dr. Harper explained that appellant had a subtle/incomplete discoid lateral meniscus and there was no evidence of a medial meniscal tear. He further diagnosed slight medial collateral ligament (MCL) sprain and intact cruciate ligament.

On August 25, 2015 Dr. Ryan Shock, a podiatrist, reported that appellant complained of increased right foot pain. He diagnosed sprain of ankle, arthritis and degenerative joint disease (DJD) of foot and ankle, and tenosynovitis of foot and ankle.

On October 30, 2015 appellant filed a claim for a schedule award (Form CA-7).

By letter dated November 12, 2015, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (hereinafter A.M.A., *Guides*). It afforded him 30 days to submit the requested impairment evaluation.

In a November 23, 2015 permanent impairment rating, Dr. Chen provided physical examination findings and summarized the April 15, 2015 right knee MRI scan. Using the sixth edition of the A.M.A., *Guides*,<sup>3</sup> he opined that appellant had two percent permanent impairment of the right lower extremity. According to Table 16-3, Knee Regional Grid, on page 509, Dr. Chen utilized historical data and medical records to determine class 1 diagnosis-based impairment (DBI) for partial (medial or lateral) meniscectomy, meniscal tear, or meniscal repair, which yielded a default value of two percent. He noted that physical examination revealed minimal palpatory findings consistently documented without observed abnormalities which yielded a grade modifier of 1.<sup>4</sup> Dr. Chen determined that functional history yielded a grade modifier of 1 based on antalgic limp with asymmetric shortened stance, corrected with footwear modifications and/or orthotics.<sup>5</sup> Applying the net adjustment formula, he subtracted 1, the numerical value of the class, from the numerical value of the grade modifier for each applicable component (physical examination and functional history) and then added those values, resulting in a net adjustment of 0 ((1-1) + (1-1)).<sup>6</sup> Application of the net adjustment formula meant that movement was not warranted, resulting in class 1 default value grade C for two percent right lower extremity impairment.<sup>7</sup>

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

<sup>4</sup> *Id.* at 517, Table 16-7.

<sup>5</sup> *Id.* at 516, Table 16-6.

<sup>6</sup> *Id.* at 521.

<sup>7</sup> *Id.*

Dr. Chen further opined that appellant's right foot and ankle contusion had no permanent impairment based on the Foot and Ankle Regional Grid, explaining that there were no significant abnormal findings on examination or radiographic studies at maximum medical improvement (MMI).<sup>8</sup>

On February 9, 2016 OWCP routed Dr. Chen's report and the case file to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon and OWCP medical adviser, for review and a determination on whether appellant sustained permanent impairment of the right lower extremity and date of MMI.

In a March 13, 2016 report, Dr. Orenstein reviewed appellant's medical history and summarized diagnostic findings. Using Table 16-2, Foot and Ankle Regional Grid, he identified soft tissue contusion as the diagnosis.<sup>9</sup> Dr. Orenstein assigned class 0 with no significant objective abnormalities on examination or radiographic studies at MMI. He noted that appellant only had subjective tenderness of the dorsum of the right foot. Dr. Orenstein concurred that the impairment rating for the contusion of the right foot was zero percent.

Utilizing Table 16-3, Knee Regional Grid, Dr. Orenstein reported that there was no diagnosis that could be used to determine an impairment rating for the right knee.<sup>10</sup> He explained that the only approved condition was a tear of the lateral meniscus and other internal derangement of the right knee. Dr. Orenstein stated that, at the time of surgery, appellant did not have a partial lateral meniscectomy and, as such, the diagnosis of meniscus injury of the right knee could not be used. The date of MMI was noted as November 23, 2015, the date of Dr. Chen's impairment examination.

By decision dated March 18, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish that he sustained any permanent impairment to a member or function of the body.

### **LEGAL PRECEDENT**

The schedule award provision of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body.<sup>11</sup> However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to

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<sup>8</sup> *Id.* at 501-08, Table 16-2.

<sup>9</sup> *Id.* at 501.

<sup>10</sup> *Supra* note 6.

<sup>11</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>12</sup>

The A.M.A., *Guides* provide a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, the evaluator identifies the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).<sup>13</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup> Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>16</sup>

### ANALYSIS

OWCP accepted appellant's claim for contusion of right foot and ankle, other internal derangement of right knee, and tear of right knee lateral meniscus. The issue is whether appellant sustained permanent impairment of the right lower extremity. The Board finds that appellant has failed to establish permanent impairment of the right foot, but finds this case is not in posture for decision.

The record is consistent that appellant has no permanent impairment of the right foot. Both appellant's treating physician, Dr. Chen, and OWCP's medical adviser found that the impairment rating for the right foot and ankle contusion was zero.

As for the right knee, Dr. Chen, in his November 23, 2015 impairment evaluation, determined that appellant sustained two percent permanent impairment of the right knee. Using the DBI method, he used class 1 for partial (medial or lateral) meniscectomy, meniscal tear, or

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<sup>12</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

<sup>13</sup> *Supra* note 3 at 493-531.

<sup>14</sup> *Id.* at 521.

<sup>15</sup> *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (February 2013).

meniscal repair.<sup>17</sup> Using the net adjustment formula, Dr. Chen calculated zero resulting in class 1 default value grade C for two percent right lower extremity impairment.<sup>18</sup>

OWCP routed Dr. Chen's report to Dr. Orenstein, an OWCP medical adviser, for review and a determination on whether appellant sustained a permanent partial impairment and date of MMI.

With regard to the right knee, Dr. Orenstein disagreed with Dr. Chen. He related that there was no diagnosis that could be used to determine an impairment rating for the right knee under the Knee Regional Grid. Dr. Orenstein explained that the only approved condition was tear of the lateral meniscus and other internal derangement of the right knee. He noticed that, at the time of surgery, appellant did not undergo a partial lateral meniscectomy and, as such, the diagnosis of meniscus of the right knee could not be used to determine the impairment rating.

In his October 31, 2014 operative report, Dr. Burns reported that the arthroscopy revealed no abnormalities in the medial and lateral gutters and an intact meniscus and articular cartilage within the medial compartment. He further reported that examination of the lateral meniscus revealed no evidence of discoid meniscus and no evidence of tear, but reveal a small loose body in the lateral meniscus, which was removed with a motorized shaver. However, Dr. Burns contradicted his operative report as, in his November 10, 2014 report, he reported one week status post right knee arthroscopy with "partial lateral meniscectomy and chondroplasty."

Dr. Chen also identified right knee tear of the lateral meniscus in his treatment notes. In a more recent April 15, 2015 MRI scan of the right knee, Dr. Harper identified post resection of meniscal tear of the posterior horn lateral meniscus, explaining that appellant had a subtle/incomplete discoid lateral meniscus and there was no medial meniscal tear.

Dr. Orenstein recognized that appellant's accepted condition was tear of the left lateral meniscus. The Board notes again that Table 16-3 of the A.M.A., *Guides* allows rating of a meniscal injury for partial meniscectomy, meniscal tear or meniscal repair. However, the record is inconsistent as to whether appellant underwent partial lateral meniscectomy or had a meniscal tear. As such, the claim requires further development to determine the extent of impairment of appellant's right lower extremity.<sup>19</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>20</sup>

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<sup>17</sup> A.M.A., *Guides* 509, Table 16-3.

<sup>18</sup> *Supra* note 6.

<sup>19</sup> *C.B.*, Docket No. 11-1937 (issued April 6, 2012).

<sup>20</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

The Board will affirm zero percent permanent impairment for the right foot and ankle, but will set aside OWCP's March 18, 2016 decision as to any permanent impairment of the right knee and remand the case for further development of the medical evidence.<sup>21</sup>

Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.<sup>22</sup>

### **CONCLUSION**

The Board finds that appellant has failed to establish permanent impairment of his right foot and ankle due to his work-related injuries. The Board further finds that the case is not in posture for decision as to whether appellant has established any permanent impairment of his right knee.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part for further development consistent with this decision.

Issued: May 25, 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

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<sup>21</sup> *P.W.*, Docket No. 16-0684 (issued October 3, 2016).

<sup>22</sup> *V.D.*, Docket No. 14-26 (issued March 21, 2014).