

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

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**G.S., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Milan, MI, Employer**

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**Docket No. 17-0489  
Issued: May 11, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 4, 2017 appellant filed a timely appeal from a December 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</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 more than two percent permanent impairment of the left lower extremity for which he previously received a schedule award.

**FACTUAL HISTORY**

On June 22, 2015 appellant, then a 39-year-old supervisor of education, filed a traumatic injury claim (Form CA-1) alleging that on June 19, 2015 he injured his left knee running across

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

the recreational yard responding to a medical emergency. OWCP accepted the claim for a torn left lateral meniscus.

Dr. James L. Telfer, a Board-certified orthopedic surgeon, performed an authorized lateral partial meniscectomy of the left knee on November 23, 2015. He diagnosed arthritis with a lateral meniscal tear.

OWCP paid appellant compensation for total disability beginning November 23, 2015. Appellant returned to work with restrictions on January 19, 2016 and to his usual work duties on February 26, 2016.

Appellant, on February 26, 2016, filed a claim for a schedule award (Form CA-7). By letter dated February 29, 2016, OWCP advised that he had not submitted medical evidence establishing that he was at maximum medical improvement (MMI).

In a report dated May 13, 2016, Dr. Telfer discussed appellant's work injury and noted that he had a prior meniscal tear in the 1990s. He noted that x-rays obtained June 20, 2015 showed arthritis, which was confirmed by surgery. Dr. Telfer opined that appellant had reached MMI but "may have some ongoing symptoms from the knee due to his damage noted at surgery. I have told him that it was quite possible that over time, his arthritis and symptoms from that source could progress, and he might very well require knee replacement surgery."

OWCP, by letter dated June 25, 2016, requested that appellant submit an impairment evaluation from his physician addressing the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In an August 17, 2016 progress report, Dr. Telfer diagnosed a complex tear of the left lateral meniscus and again noted that appellant was at MMI. He related that he did not normally provide impairment ratings and recommended a second opinion evaluation. Dr. Telfer found no effusion or instability, but slight atrophy of the quadriceps. He related that x-rays obtained prior to surgery showed "early lateral and patellofemoral arthritis." Dr. Telfer found that appellant's loss of tissue in the meniscus due to surgery and preexisting arthritis increased his chances of "future symptoms of arthritis," but noted that his current symptoms were "minimal and tolerable."

On October 17, 2016 OWCP referred appellant to Dr. Richard H. Deerhake, a Board-certified orthopedic surgeon, for a second opinion examination. In an impairment evaluation dated November 8, 2016, Dr. Deerhake reviewed the history of injury and the medical reports of record. He indicated that appellant had prior surgery for a meniscal tear on the left knee in the 1990s and also had a history of a right knee condition. Dr. Deerhake noted that he was taking medication for arthritis, but determined that this was "not an allowed condition..." On examination he found slight effusion, significant medial and lateral femoral condylar spurring, some lateral joint line tenderness, no instability, and a negative drawer sign and McMurray's test. Dr. Deerhake measured range of motion of 0 to 130 degrees. He identified the diagnosis as a class 1 partial lateral meniscectomy using the knee regional grid set forth at Table 16-3 on page 509 of the A.M.A., *Guides*, which yielded a default value of two percent. Dr. Deerhake noted

that he did not have clinical studies such as x-rays to show joint space. He applied grade modifiers of one for functional history and physical examination to find no change from the default value of two percent.

On December 14, 2016 an OWCP medical adviser reviewed Dr. Deerhake's opinion and concurred with his findings. He noted that the two percent permanent impairment of the left lower extremity was the "sole impairment of the left lower extremity resulting from the accepted work injury of June 19, 2015."

By decision dated December 21, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The period of the award ran for 5.76 weeks from November 8 to December 8, 2016.

On appeal appellant argues that OWCP should consider his preexisting left knee arthritis in rating his permanent impairment, citing OWCP procedures and Board precedent.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>2</sup> and its implementing federal regulation,<sup>3</sup> 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. 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>5</sup>

The sixth edition requires identifying 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>6</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The Board has held that, in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included.<sup>7</sup> OWCP procedures provide that any previous impairment to the member under consideration is included in calculating the percentage

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<sup>2</sup> *Id.* at § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Id.* at § 10.404(a).

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

<sup>6</sup> A.M.A., *Guides* at 494-531.

<sup>7</sup> See *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

of loss, except when the prior impairment is due to a previous work-related injury, in which the percentage already paid is subtracted from the total percentage of impairment.<sup>8</sup>

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has an obligation to see that justice is done.<sup>9</sup> Once OWCP undertakes the development of the record, it has the responsibility to do so in a proper manner.<sup>10</sup>

### ANALYSIS

OWCP accepted that appellant sustained a torn lateral meniscus due to a June 19, 2015 employment injury. On November 23, 2015 Dr. Telfer performed a partial lateral meniscectomy of the left knee. In the surgical report and confirmed by x-rays, he indicated that arthritis was present with a lateral meniscal tear.

On February 26, 2016 appellant filed a schedule award claim. In a May 13, 2016 report, Dr. Telfer indicated that x-rays dated June 20, 2015 revealed arthritis. On August 17, 2016 he advised that he did not perform impairment ratings, however, opined that appellant was at MMI from his meniscal tear and surgery, noting that he had no instability or effusion.

OWCP referred appellant to Dr. Deerhake, an OWCP referral physician, who reviewed appellant's history of injury and prior left knee surgery for a meniscal tear in the 1990s. He noted that he took medication for arthritis, but found that it was "not an allowed condition." Dr. Deerhake also indicated that he did not have x-rays of the knee showing joint space measurements. Using Table 16-3 of the A.M.A., *Guides*, he identified the diagnosis as a partial lateral meniscectomy, which yielded a default value of two percent. Dr. Deerhake applied grade modifiers of one for functional history and physical examination, which yielded no adjustment from the default value of two percent.

The Board finds that the case is not in posture for decision. As noted, preexisting impairments to the member under consideration are included in calculating the percentage of loss for a schedule award.<sup>11</sup> As OWCP undertook development by referring appellant to Dr. Deerhake for an impairment evaluation, it has the responsibility to obtain a report that will resolve the relevant issue of the extent of his permanent impairment.<sup>12</sup> On remand OWCP should obtain the June 20, 2015 x-rays and request a supplemental opinion from Dr. Deerhake regarding any impairment due to appellant's preexisting left knee arthritis.<sup>13</sup> After such

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2, *supra* note 5 at Chapter 2.808.5(d) (February 2013).

<sup>9</sup> See *Peter C. Belkind*, 56 ECAB 580 (2005).

<sup>10</sup> See *J.F.*, Docket No. 11-0314 (issued September 22, 2011); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005).

<sup>11</sup> See *supra* note 8.

<sup>12</sup> See *K.P.*, Docket No. 16-0685 (issued August 3, 2016).

<sup>13</sup> See *J.F.*, *supra* note 10.

development as it deems necessary, OWCP shall issue a *de novo* merit decision regarding appellant's entitlement to schedule award compensation.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 21, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 11, 2017  
Washington, DC

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

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

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