

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

S.D., Appellant)	
)	
and)	Docket No. 17-0862
)	Issued: November 6, 2017
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Dallas, TX, Employer)	
)	
)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 9, 2017 appellant filed a timely appeal from an October 14, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish more than 55 percent permanent impairment of the right lower extremity and more than 37 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence to OWCP after the October 14, 2016 decision was issued. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 18, 2006 appellant, then a 49-year-old clerk, filed an occupational disease claim (Form CA-2) alleging a bilateral knee condition that reportedly arose on or about December 15, 2005. On June 5, 2006 OWCP accepted appellant's claim for multiple bilateral knee conditions, including medial and lateral meniscus tears, old disruption of anterior cruciate ligament (ACL), loose body, unspecified knee enthesopathy, and aggravation of preexisting conditions. Appellant underwent right knee arthroscopy on August 10, 2006, and left knee arthroscopy on October 30, 2006. OWCP subsequently expanded appellant's claim to include bilateral old bucket handle tear of the medial meniscus and osteochondritis dissecans. On October 8, 2007 appellant underwent OWCP-approved left total knee arthroplasty.

By decision dated September 30, 2008, OWCP granted appellant a schedule award for 55 percent permanent impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity.³ The left lower extremity rating was based on the outcome/result (good) of appellant's knee arthroplasty and the right lower extremity rating was based on appellant's previous partial and medial meniscectomy in conjunction with knee joint arthritis.

On November 3, 2008 appellant underwent additional right knee surgery, which OWCP authorized.

On January 20, 2009 appellant returned to work as a modified mail processing clerk, with no loss in wages. By decision dated April 22, 2009, OWCP found that appellant's position as a modified mail processing clerk fairly and reasonably represented his wage-earning capacity. Because his actual weekly earnings (\$1,060.63) effective January 20, 2009 met or exceeded the current wages of his date-of-injury position, it determined that appellant had zero loss of wage-earning capacity.

On December 2, 2013 appellant underwent OWCP-approved right total knee arthroplasty, performed by Dr. Deepak V. Chavda, an orthopedic surgeon. OWCP resumed payment of wage-loss compensation for temporary total disability.

On June 2, 2014 appellant returned to part-time (4 hours), limited duty as a modified custodian.⁴ OWCP paid appellant compensation for four hours of lost wages per day.

On April 16, 2015 appellant filed a claim for an additional schedule award (Form CA-7). The employing establishment noted that appellant had retired effective April 20, 2015.

In an April 1, 2015 report, Dr. Chavda diagnosed traumatic arthropathy and reported that appellant had undergone a left total knee arthroplasty in 2007 and a right total knee arthroplasty in December 2013. He found that appellant continued to suffer persistent pain since replacement

³ The schedule award was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (A.M.A., *Guides*).

⁴ Appellant also has an accepted right shoulder condition (xxxxxx194), which arose on May 19, 2003. The modified custodian position was designed to accommodate limitations due to appellant's employment-related right upper extremity condition, as well as his bilateral lower extremity conditions.

of both knees, right worse than left. Dr. Chavda further diagnosed bilateral knee post-traumatic arthritis, and recommended physical therapy.

In an April 29, 2015 letter, OWCP advised appellant that for consideration to be given to the payment of a schedule award, the medical evidence must support a finding that the accepted injury resulted in permanent impairment after reaching maximum medical improvement (MMI). It found that Dr. Chavda's April 1, 2015 report indicated that appellant's condition had not yet reached MMI and; therefore, no additional action could be taken on his schedule award claim at that time.

On July 24, 2015 appellant filed another claim for schedule award (Form CA-7). In support of his claim, he submitted a May 6, 2015 report from Dr. Chavda, who indicated that appellant had reached MMI. Dr. Chavda referred appellant to Dr. Anil T. Bangale for an impairment rating.

In a June 9, 2015 report, Dr. Bangale, a family practitioner, diagnosed right knee traumatic degenerative joint disease and traumatic arthroplasty. He determined that appellant had reached MMI and opined that he had 20 percent whole person permanent impairment based on the A.M.A., *Guides*. (5th ed. 2001).

In an August 6, 2015 letter, OWCP noted that appellant was currently receiving compensation benefits on the periodic rolls. It advised him that a schedule award and compensation could not be paid concurrently on the same case file, thus, no further action would be taken on his July 24, 2015 schedule award claim. OWCP further noted that, should appellant elect to receive retirement benefits in lieu of FECA wage-loss benefits, it would be able to address his claim at that time.

Appellant subsequently elected to receive retirement benefits effective June 1, 2016. On June 2, 2016 he filed a claim for an additional schedule award (Form CA-7).

In a June 8, 2016 report, Dr. Mary F. Burgesser, a Board-certified physiatrist, noted that appellant had developed bilateral knee injuries as a result of his federal employment duties. She found that appellant had difficulty standing, sitting, climbing, and walking. Appellant also had moderate difficulty bathing and dressing. Upon physical examination, Dr. Burgesser found that appellant ambulated with an antalgic gait. Appellant's range of motion was 0 to 90 degrees and there was no swelling and decreased sensation on the lateral right knee. Dr. Burgesser reiterated appellant's accepted bilateral knee conditions and reported that an injection was not offered that day.

In a June 20, 2016 letter, OWCP advised appellant of the deficiencies of his claim and requested that he submit additional evidence, specifically a report from his treating physician that contained a detailed description of his permanent impairment based on the sixth edition of the A.M.A., *Guides* (2009).

In response, appellant resubmitted Dr. Bangale's June 9, 2015 whole person impairment rating under the fifth edition of the A.M.A., *Guides*.

In an August 18, 2016 letter, OWCP advised Dr. Bangale that it required all impairment determinations to be calculated according to the sixth edition of the A.M.A., *Guides*, and requested a new report within 30 days.

By decision dated October 14, 2016, OWCP denied appellant's claim for an increased schedule award. It noted that appellant had previously received an award for 55 percent permanent impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity, but the medical evidence did not support an increase in the impairment already compensated.

LEGAL PRECEDENT

The schedule award provisions of FECA⁵ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁸ Under the sixth edition, 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).⁹ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹⁰

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁶ See *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). See also 5 U.S.C. § 8107.

⁷ See *D.T.*, Docket No. 12-0503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, *International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.

⁹ *Id.* at 494-531.

¹⁰ See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

ANALYSIS

OWCP accepted appellant's occupational disease claim for multiple bilateral knee conditions. It also authorized numerous surgeries, including bilateral total knee arthroplasties. In September 2008, OWCP granted a schedule award for 55 percent permanent impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides* (2001). Since the 2008 schedule award, appellant has undergone two additional right knee surgical procedures, including a December 2, 2013 right total knee arthroplasty. On June 2, 2016 he filed a claim for an additional schedule award (Form CA-7). It is appellant's burden of proof to submit sufficient evidence to establish the extent of permanent impairment.¹¹

In his June 9, 2015 report, Dr. Bangale determined that appellant had reached MMI and opined that he had 20 percent whole person permanent impairment based on the fifth edition of the A.M.A., *Guides*. The Board has long held that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.¹² Dr. Bangale's report was based on the fifth edition of the A.M.A., *Guides*. OWCP, however, currently uses the sixth edition of the A.M.A., *Guides* to calculate schedule awards.¹³ A medical opinion, based on an inappropriate edition of the A.M.A., *Guides*, is of diminished probative value in determining the extent of permanent impairment.¹⁴

Moreover, Dr. Bangale provided a rating for whole person impairment. There is no statutory basis for the payment of a schedule award for whole body impairment under FECA.¹⁵ Payment is authorized only for the permanent impairment of specified members, organs, or functions of the body.¹⁶ For these reasons, the Board finds Dr. Bangale's opinion as to the extent of permanent impairment is of limited probative value and insufficient to establish that appellant is entitled to an increased schedule award.

The reports from Drs. Chavda and Burgesser fail to provide an impairment rating based on the sixth edition of the A.M.A., *Guides*. Thus, these reports are of no probative value regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.¹⁷

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 55 percent permanent

¹¹ See *Annette M. Dent*, 44 ECAB 403 (1993).

¹² See *P.O.*, Docket No. 15-1631 (issued June 2, 2016); *Fritz A. Klein*, 53 ECAB 642 (2002).

¹³ See *supra* note 7.

¹⁴ See *T.R.*, Docket No. 17-0047 (issued July 27, 2017).

¹⁵ See *N.H.*, Docket No. 17-0696 (issued July 19, 2017).

¹⁶ *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁷ See *Richard A. Neidert*, 57 ECAB 474 (2006) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity. Accordingly, appellant has not established that he is entitled to a schedule award greater than that previously received.¹⁸

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 55 percent permanent impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).