



## ISSUE

The issue is whether appellant has established that the employee is entitled to a schedule award in addition to the 12 percent permanent impairment of the right upper extremity and 18 percent permanent impairment of the right lower extremity, for which he previously received schedule awards.

## FACTUAL HISTORY

On August 21, 2014 the employee, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2014 he felt extreme pain and a “pop” in his right knee and right shoulder when he stepped into a gopher hole, hyperextended his right knee, and fell down onto his right shoulder in the performance of duty. He stopped work and was released to limited duty on August 21, 2014.

OWCP accepted the employee’s claim for right shoulder rotator cuff tear and right knee medial meniscus tear.

On November 12, 2014 the employee underwent authorized right knee surgery. He stopped work and received wage-loss compensation for the period November 12 to 26, 2014. On January 21, 2015 the employee underwent authorized right shoulder surgery and stopped work again. OWCP paid disability compensation for the period January 21 to March 5, 2015.

On May 22, 2015 the employee filed a claim for a schedule award (Form CA-7).

The employee submitted an April 30, 2015 report by Dr. Michael R. Lenihan, a Board-certified orthopedic surgeon. He reviewed the employee’s history and described the August 20, 2014 employment incident. Dr. Lenihan related that the employee currently complained of dull aching pain in his shoulder with some feelings of mild weakness and no significant ongoing symptoms with regard to the knee. Upon physical examination of the employee’s right shoulder, he reported minimal residual tenderness over the acromioclavicular (AC) joint and mild tenderness over the lateral acromial edge. Motor strength was 5/5. Dr. Lenihan indicated that examination of the employee’s right knee showed no significant medial or lateral joint line tenderness, no significant anterior, posterior, varus, or valgus laxity, and no effusion. Motor and sensory examination did not reveal any focal deficits. Dr. Lenihan diagnosed right knee status post partial medial meniscectomy and right shoulder status post glenoid labral debridement and debridement of the long tendon of the biceps and resection of the distal clavicle. He noted that appellant had a *QuickDASH* score of 25.

Dr. Lenihan reported that the employee’s condition should be considered permanent and stationary. He indicated that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> Knee Regional Grid on page 509, the employee had two percent permanent impairment of the right lower extremity as he had undergone a partial meniscectomy of his right knee. Dr. Lenihan reported no significant upward or downward modifying factors. Regarding the employee’s right shoulder injury, he

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

referenced the Shoulder Regional Grid on page 403, and determined that the employee had 10 percent permanent impairment of the right upper extremity for post-distal clavicle resection. Dr. Lenihan indicated that the employee had grade 1 modifier for functional history and physical examination due to mild palpatory findings. He related grade 4 modifier for clinical studies due to labral lesion and biceps tendon pathology, which increased the employee's impairment rating to 12 percent of the right upper extremity.

In a July 12, 2015 report, Dr. Ellen Pichey, Board-certified in preventive and occupational and family medicine and an OWCP medical adviser, noted that the employee's claim was accepted for right shoulder rotator cuff tear and right knee medial meniscus tear, with right knee partial medial meniscectomy and right shoulder arthroscopic rotator cuff repair. She referenced Table 15-5, page 403, and noted that the employee had 12 percent permanent impairment of the right upper extremity. Regarding the employee's right knee injury, Dr. Pichey indicated that according to Table 16-3, page 509, he had two percent permanent impairment of the right lower extremity. She related that due to the employee's previous schedule awards, he was only entitled to an additional six percent permanent impairment of the right upper extremity. Dr. Pichey noted a date of maximum medical improvement (MMI) of April 30, 2015, the date of the evaluation.

The employee passed away on August 22, 2015.

By letter dated April 11, 2016, OWCP noted that Dr. Pichey's July 12, 2015 report needed clarification. It referred the employee's schedule award claim, along with a statement of accepted facts (SOAF) and a copy of the medical record, to another OWCP medical adviser to determine whether the employee sustained additional permanent impairment of his right upper extremity due to his accepted right shoulder injury.<sup>4</sup>

The SOAF indicated that under OWCP File No. xxxxxx504, OWCP had accepted the employee's claim for a right thumb fracture as a result of a March 7, 1992 employment injury and paid a schedule award of 6 percent permanent impairment of the right upper extremity in March 1994. Under OWCP File No. xxxxxx957, OWCP had accepted the employee's claim for right knee medial meniscus tear, right knee sprain, and right lower leg contusion and paid a schedule award of 10 percent permanent impairment of the right lower extremity in May 2008. Under OWCP File No. xxxxxx160, OWCP had accepted the employee's claim for right ankle sprain, left shoulder sprain, and right ankle fracture and paid a schedule award of eight percent permanent impairment of the right lower extremity in August 2010.<sup>5</sup>

In a May 16, 2016 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, indicated that he reviewed the employee's medical records and the SOAF. He accurately described the August 20, 2014 employment injury and noted the employee's previous schedule awards. Dr. Berman indicated that he reviewed Dr. Lenihan's

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<sup>4</sup> The record indicates that Dr. Pichey no longer worked for OWCP, so appellant's claim was referred to another DMA.

<sup>5</sup> Under OWCP File No. xxxxxx723, OWCP accepted appellant's claim for left ankle sprain and left knee tear of medial meniscus and paid a total schedule award of nine percent permanent impairment of the left lower extremity.

April 30, 2015 impairment rating report and agreed with his impairment rating. Utilizing the sixth edition of the A.M.A., *Guides*, Table 16-3, page 509, *Knee Regional Grid: Lower Extremity Impairments*, Dr. Berman assigned class 1, 2 percent permanent impairment, for partial medial meniscus tear of the right knee. He related that according to Table 16-6, Table 16-7, and Table 16-8, the employee had a grade modifier of 1 for functional history, physical examination, and clinical studies, respectively. Dr. Berman calculated that the employee had zero net adjustment, resulting in two percent permanent impairment of the right lower extremity. Regarding the employee's right shoulder injury, he referenced Table 15-5, page 403, *Shoulder Regional Grid: Upper Extremity Impairments*, and assigned class 1, grade C, default value of 10 percent. He related that according to Table 15-7, page 506, the employee had grade modifier of 1 for functional history due to mild problem. Dr. Berman indicated that according to Table 15-8, page 508, the employee had grade modifier of 1 for physical examination and according to Table 15-9, page 410, the employee had grade modifier of 3 for clinical studies due to his torn labrum and biceps tendinopathy. After applying the net adjustment formula, Dr. Berman calculated an adjustment of 2, which resulted in 12 percent permanent impairment of the right upper extremity. He noted that the employee had reached MMI on April 30, 2015, the date of Dr. Lenihan's report. Dr. Berman concluded that the employee had no increase over his previous schedule awards.

By decision dated June 15, 2016, OWCP denied the employee's schedule award claim, finding that the medical evidence of record did not warrant an increase in the previous schedule awards. It noted that the employee was previously paid schedule awards for 18 percent permanent impairment of the right lower extremity under OWCP File Nos. xxxxxx957 and OWCP File No. xxxxx160 and 6 percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx504. OWCP found that the medical evidence of record was insufficient to establish that he was entitled to an additional schedule award as a result of the August 20, 2014 employment injury.

On August 9, 2016 appellant, the employee's widow, requested reconsideration of the June 15, 2016 OWCP decision. In an August 1, 2016 statement, she indicated that she was enclosing Dr. Lenihan's medical report, which showed that appellant had not been paid twice for the same injury. Appellant related that according to the report, the employee sustained a left shoulder injury in January 1994. She asserted that he had not received a schedule award for his right shoulder, but only for his left shoulder.

Appellant resubmitted Dr. Lenihan's April 30, 2015 report.

By decision dated November 3, 2016, OWCP vacated the June 15, 2016 schedule award decision. It found that the employee had 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity according to the May 16, 2016 report of Dr. Berman, OWCP's medical adviser. OWCP further determined that because the employee had received an award of six percent permanent impairment of the right upper extremity due to his accepted right thumb injury, he was entitled to an additional schedule award of six percent permanent impairment of the right upper extremity due to his August 20, 2014 right shoulder injury.

On November 15, 2016 OWCP granted a schedule award for an additional six percent permanent impairment of the right upper extremity, based on Dr. Berman's report. The award ran from April 30 to September 8, 2015.

### **LEGAL PRECEDENT**

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>6</sup> With respect to a schedule award, it is the claimant's burden of proof to establish a permanent impairment of the scheduled member as a result of his or her employment injury.<sup>7</sup> A claimant may seek an increased schedule award if the evidence establishes an increased impairment causally related to an employment injury.<sup>8</sup> The medical evidence must include a detailed description of the permanent impairment.<sup>9</sup>

The schedule award provision of FECA<sup>10</sup> 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. FECA, however, does not specify the manner in which the percentage of 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.<sup>11</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>12</sup>

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).<sup>13</sup> In addressing impairment for the upper extremities, the sixth edition of the A.M.A., *Guides* requires identifying the impairment class for the diagnosed condition, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical

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<sup>6</sup> *John W. Montoya*, 54 ECAB 306 (2003).

<sup>7</sup> *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>8</sup> *See Rose V. Ford*, 55 ECAB 449 (2004).

<sup>9</sup> *See Vanessa Young*, 55 ECAB 575 (2004).

<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404 (1999); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>13</sup> A.M.A., *Guides* 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement (6<sup>th</sup> ed. 2009).

studies.<sup>14</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>15</sup> Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.<sup>16</sup>

### ANALYSIS

OWCP accepted that the employee sustained a right shoulder and right knee injury as a result of an August 20, 2014 employment incident. The employee also had previously accepted conditions of right thumb fracture for which he had received a schedule award of 6 percent right upper extremity impairment and right knee meniscus tear, right knee sprain, right leg contusion, and right ankle fracture, for which he had received a schedule award of 18 percent right lower extremity impairment. On May 22, 2015 the employee filed a claim for a schedule award. OWCP determined that the employee had 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity as a result of his August 20, 2014 employment injury.

The Board finds that the evidence of record establishes that the employee had 12 percent permanent impairment of the right upper extremity and 2 percent permanent impairment of the right lower extremity causally related to the accepted August 20, 2014 employment injury.

In support of his schedule award claim, the employee submitted an April 30, 2015 report by Dr. Lenihan. He provided physical examination findings and noted diagnoses of right shoulder rotator cuff tear and right knee meniscus tear. Referring to Table 16-3, page 509, Dr. Lenihan determined that the employee had 2 percent permanent impairment of the right lower extremity due to his right knee injury. He also utilized Table 15-5, page 403, and calculated that the employee had 12 percent permanent impairment of the right upper extremity due to his right shoulder injury. The Board finds, therefore, that Dr. Lenihan's report does not support a finding that the employee has more than 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity due to his August 20, 2014 employment injury.

In accordance with its procedures, OWCP properly referred the evidence of record to its medical adviser, Dr. Berman, who in a May 16, 2016 report, reviewed the employee's medical record, including Dr. Lenihan's April 30, 2015 report and agreed with his findings. Utilizing the A.M.A., *Guides*, he calculated that the employee had 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity as a result of the employee's August 20, 2014 employment injury. Based on Dr. Berman's May 16, 2016 report, OWCP granted a schedule award for additional 6 percent permanent impairment of the right upper extremity. It determined that because the employee had received an award of 6 percent permanent impairment of the right upper extremity and 18 percent permanent

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<sup>14</sup> A.M.A., *Guides* 385-419; *see M.P.*, Docket No. 13-2087 (issued April 8, 2014).

<sup>15</sup> *Id.* at 411.

<sup>16</sup> *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

impairment of the right lower extremity under previous claims, he was not entitled to an additional schedule award.

The Board has carefully reviewed the opinion of Dr. Berman and finds that his May 16, 2016 report was sufficiently well rationalized to establish that the employee had 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity as a result of his August 20, 2014 employment injury. Dr. Berman's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*. He properly referenced Table 16-3, *Knee Regional Grid*, page 509, based on the accepted condition of right knee meniscus tear and determined that the employee had a default rating of two for partial medial meniscus tear. Dr. Berman assigned grade modifiers of 1 for functional history, physical examination, and clinical studies. He applied the net adjustment formula for a net adjustment of zero, which resulted in two percent permanent impairment of the right lower extremity. Dr. Berman also utilized Table 15-5, *Shoulder Regional Grid*, page 403, based on the accepted condition of right shoulder rotator cuff tear and determined that the employee had a default rating of 10. He assigned grade modifiers of 1 for functional history and physical examination findings and 3 for clinical studies. After applying the net adjustment formula, Dr. Berman calculated an adjustment of 2, which resulted in 12 percent permanent impairment of the right upper extremity.

The Board finds that OWCP properly relied on the report of Dr. Berman to find that the employee did not have more than 2 percent permanent impairment of the right lower extremity and 12 percent permanent impairment of the right upper extremity causally related to the August 20, 2014 employment injury. Dr. Berman based his report on the medical evidence in the record, was based on an accurate application of the A.M.A., *Guides*, and provided medical rationale for his impairment rating. The Board finds that appellant has not established more than 2 percent permanent impairment of the employee's right lower extremity and 12 percent permanent impairment of the right upper extremity due to the employee's August 20, 2014 employment injury.

On appeal, appellant alleges that she is entitled to the entire 12 percent permanent impairment for the employee's right shoulder injury. The Board finds that the previous schedule award for permanent impairment of the employee's right upper extremity was granted for his accepted right thumb condition under a previous claim, not his current accepted right shoulder condition. OWCP regulations provide that an employee's schedule award benefits will be reduced by compensation paid under the schedule award for an earlier injury if the impairment is of the same body part or function or different parts of the same part or function; and compensation payable for the later impairment in whole or in part would duplicate the earlier payment.<sup>17</sup> As OWCP's district medical adviser found that the employee was entitled to a schedule award of 12 percent permanent impairment of the right upper extremity due to his accepted right shoulder injury, the Board finds that the previous award for permanent impairment of the employee's right thumb injury would not duplicate the right shoulder award.<sup>18</sup> Therefore, the Board finds that appellant is entitled to an additional schedule award for six percent

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<sup>17</sup> See 20 C.F.R. § 10.404(d)(1)(2).

<sup>18</sup> See *M.P.*, Docket No. 17-0150 (issued June 21, 2017).

permanent impairment of the right upper extremity, for a total of 12 percent permanent impairment, due to the employee's accepted right shoulder injury.

**CONCLUSION**

The Board finds that the evidence of record establishes that the employee has 12 percent permanent impairment of the right upper extremity and 2 percent permanent impairment of the right lower extremity due to the employee's August 20, 2014 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part for payment of an additional schedule award.

Issued: January 10, 2018  
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