

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

A.G., Appellant	)	
	)	
and	)	<b>Docket No. 18-0169</b>
	)	<b>Issued: June 1, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Trenton, NJ, Employer	)	
	)	

*Appearances:*  
Jason S. Lomax, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 30, 2017 appellant, through counsel, filed a timely appeal from an August 28, 2017 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.

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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.*

## ISSUE

The issue is whether appellant has established more than 18 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 10, 2013 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a bilateral knee injury as a result of his repetitive employment duties. On August 22, 2016 OWCP accepted the claim for left knee medial collateral bursitis, left knee tear of posterior horn of posterior medial meniscus, right knee tear of posterior horn of posterior medial meniscus, right knee spontaneous disruption of anterior cruciate ligament (ACL), and bilateral osteoarthritis of the knees.

On October 6, 2016 OWCP referred appellant to Dr. David Weiss, a Board-certified orthopedic surgeon, for a second opinion examination pertaining to permanent impairment of the right and left lower extremities. In his report, Dr. Weiss documented appellant's history of injury, summarized prior medical records, reviewed diagnostic testing, and provided physical examination findings. He reported that the lower extremity activity scale (LEAS) totaled 62 percent for the right lower extremity and 67 percent for the left. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> Dr. Weiss calculated nine percent permanent impairment for each lower extremity based on the diagnosis-based impairment of primary joint arthritis. Utilizing Table 16-3, Knee Regional Grid, he determined that the right knee primary joint arthritis resulted in class 1 placement at default value of seven percent.<sup>5</sup> Dr. Weiss assigned a grade modifier of 3 for functional history based on a 62 percent LEAS, a grade modifier of 2 for physical examination, and no grade modifier for clinical studies as it was not applicable. Applying the net adjustment formula  $((3-1) + (2-1))$ <sup>6</sup> resulted in 3, warranting movement two places to the right for grade E nine percent permanent impairment of the right lower extremity. With respect to appellant's left knee primary joint arthritis, Dr. Weiss assigned a grade modifier of 3 for functional history based on 67 percent LEAS, a grade modifier of 2 for physical examination, and no grade modifier for clinical studies as it was not applicable. Applying the net adjustment formula  $((3-1) + (2-1))$ <sup>7</sup> resulted in 3, warranting movement two places to the right for grade E nine percent permanent impairment of

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<sup>3</sup> Docket No.15-0616 (issued June 12, 2015). The Board affirmed OWCP's August 1, 2014 decision finding that appellant had not established that his bilateral knee conditions were causally related to his federal employment duties.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *Id.* at 511, Table 16-3.

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

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

the left lower extremity. Dr. Weiss concluded that appellant reached maximum medical improvement (MMI) on October 6, 2016.

On December 15, 2016 appellant filed a claim for a schedule award (Form CA-7).

On December 21, 2016 OWCP routed the case file to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as OWCP's District Medical Adviser (DMA), for review as to whether appellant sustained a permanent impairment of the lower extremities.

In a February 19, 2017 report, Dr. Orenstein reported that appellant reached MMI on October 6, 2017. He agreed with Dr. Weiss in assigning class 1 for primary knee joint arthritis with a default value of seven percent.<sup>8</sup> Dr. Orenstein determined that both knees should be assigned a grade 3 functional history due to the LEAS score and that clinical studies were not applicable as they were used to assign the class. He found that the right knee physical examination should be assigned a grade modifier of 1 based on .5 centimeters of atrophy and minimal palpatory findings. Dr. Orenstein explained that the functional history adjustment differed by two or more grades from the physical examination and would not be used in calculating the net adjustment for the right lower extremity. He calculated a net adjustment of zero for the right knee amounting to grade C default value of seven percent permanent impairment of the right lower extremity. For the left knee physical examination, Dr. Orenstein assigned a grade modifier of 2 based on 1 centimeter of calf atrophy and moderate palpatory findings. Applying the net adjustment formula  $((3-1) + (2-1))$  resulted in 3, warranting movement two places to the right for grade E nine percent permanent impairment of the left lower extremity.<sup>9</sup>

On April 25, 2017 OWCP requested the DMA provide clarification pertaining to his left lower extremity impairment rating. It informed him that appellant was previously awarded 18 percent permanent impairment of the left lower extremity under a prior claim, OWCP File No. xxxxxx739.<sup>10</sup> OWCP noted that the DMA awarded appellant 9 percent permanent impairment of the left lower extremity under the present claim, OWCP File No. xxxxxx254. It asked if this 9 percent was in addition to the 18 percent left lower extremity rating previously awarded, resulting in a total 27 percent permanent impairment of the left lower extremity.

In a June 3, 2017 addendum report, Dr. Orenstein reported that since appellant was previously awarded 18 percent permanent impairment of the left lower extremity, he should not be awarded any additional impairment for the left lower extremity. He further reported that appellant should receive seven percent permanent impairment of the right lower extremity.

On June 15, 2017 OWCP granted appellant a schedule award for seven percent permanent impairment of the right lower extremity. The date of MMI was noted as October 6, 2016. The award covered a period of 20.16 weeks from October 6, 2016 to February 24, 2017.

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<sup>8</sup> *Supra* note 5.

<sup>9</sup> *Supra* note 6.

<sup>10</sup> Under OWCP File No. xxxxxx739, OWCP accepted appellant's March 11, 2000 traumatic injury claim for a left ankle injury due to twisting his ankle while delivering mail.

By decision dated June 21, 2017, OWCP found that appellant failed to establish permanent impairment of the left lower extremity greater than the 18 percent previously awarded. It found that the current medical evidence of record established that he was entitled to nine percent permanent impairment of the left lower extremity. As he had previously received a greater award for 18 percent impairment of the left lower extremity under File No. xxxxxx739, appellant was not entitled to an increase in the impairment already compensated.

By letter dated June 27, 2017, appellant, through counsel, requested reconsideration of the June 21, 2017 schedule award decision.<sup>11</sup> Counsel argued that appellant's prior schedule award for 18 percent permanent impairment of the left lower extremity under OWCP File No. xxxxxx739 pertained to the left ankle with a March 11, 2000 date of injury. He noted that while both impairments affected the left lower extremity, appellant's current nine percent permanent impairment rating applied to the left knee and not the left ankle for which he previously received an award. As such, OWCP improperly duplicated the prior impairment and appellant was entitled to an additional schedule award for the left knee lower extremity.

In support of his argument, counsel submitted OWCP's September 22, 2003 and January 15, 2004 schedule award decisions under OWCP File No. xxxxxx739. The decisions reflect that appellant was issued a schedule awards for 18 percent permanent impairment of his left lower extremity.

On July 12, 2017 OWCP requested the DMA clarify his left lower extremity impairment rating. It informed him that appellant was previously awarded 18 percent permanent impairment of the left lower extremity for a left ankle condition under OWCP File No. xxxxxx739. OWCP requested that when providing his current impairment, to stipulate whether the percentage provided included the prior percentage awarded or if it should be considered an addition to the prior percentage awarded.

In a July 29, 2017 report, Dr. Orenstein reported that as appellant had a previous 18 percent permanent impairment award referable to the left ankle, and that he calculated 9 percent permanent impairment in his June 6, 2017 report referable to the left knee. The DMA responded that, "the current impairment rating of nine percent should be considered AN ADDITION to the prior percentage awarded." (Emphasis in the original.)

By decision dated August 28, 2017, OWCP affirmed the June 21, 2017 decision, finding that the evidence of record failed to establish permanent impairment of the left lower extremity greater than the 18 percent previously awarded. It found that the DMA opined that he should not be awarded any additional permanent impairment for the lower extremity as he was previously awarded an 18 percent permanent impairment rating for the left lower extremity (left leg) under OWCP File No. xxxxxx739.

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<sup>11</sup> The Board notes that counsel did not contest the June 15, 2017 schedule award decision pertaining to the right lower extremity.

## LEGAL PRECEDENT

The schedule award provisions 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>12</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 all claimants. Through its implementing regulations, OWCP adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>13</sup>

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>14</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>15</sup>

It is the claimant's burden of proof to establish that he or she has sustained permanent impairment of the scheduled member or function as a result of any employment injury.<sup>16</sup> OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>17</sup>

## ANALYSIS

The Board finds that appellant is entitled to a schedule award for an additional nine percent permanent impairment of his left lower extremity.<sup>18</sup>

The Board notes that under OWCP File No. xxxxxx739, appellant received schedule awards for 18 percent permanent impairment of the left lower extremity due to a left ankle injury.

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<sup>12</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

<sup>13</sup> 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>14</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>15</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>16</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>17</sup> *Supra* note 14 at Chapter 2.808.5 (March 2017).

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

Under the present claim, OWCP File No. xxxxxx935, OWCP accepted appellant's July 10, 2013 occupational disease claim for left knee medial collateral bursitis, left knee tear of posterior horn of medial meniscus, right knee tear of posterior horn of medial meniscus, right knee spontaneous disruption of ACL, and bilateral osteoarthritis of the knees. Both Dr. Weiss and Dr. Orenstein calculated nine percent permanent impairment of the left lower extremity due to appellant's left knee primary joint osteoarthritis.

OWCP's regulations provide that an employee's schedule award benefits will be reduced by compensation paid under the schedule for an earlier injury if the impairment is to 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>19</sup> In determining that appellant was not entitled to an additional schedule award for the left lower extremity, OWCP improperly found that the 9 percent permanent impairment awarded for the left knee was duplicated by the 18 percent received for the left ankle from his prior traumatic injury claim.<sup>20</sup> Moreover on July 12, 2017, OWCP requested that Dr. Orenstein provide clarification when providing his current impairment, asking that he stipulate whether the percentage provided included the prior percentage awarded or if it should be considered an addition to the prior percentage. In a July 29, 2017 addendum report, Dr. Orenstein explained that the nine percent permanent impairment of the left lower extremity under this claim should be considered an addition to the prior 18 percent awarded for the left ankle.

The Board finds that OWCP failed to properly review the medical evidence as Dr. Orenstein determined that appellant was entitled to an additional nine percent permanent impairment of the left lower extremity. OWCP further failed to rely on the advice of its DMA and improperly determined that appellant was not entitled to an additional award of the left lower extremity. The evidence of record reflects that appellant's current left knee impairment did not duplicate the previously awarded left ankle impairment.<sup>21</sup> Therefore, the Board finds that appellant has established an additional 9 percent permanent impairment due to the accepted left knee osteoarthritis condition, resulting in a total of 27 percent permanent impairment of his left lower extremity.<sup>22</sup>

### **CONCLUSION**

The Board finds that appellant has established more than 18 percent permanent impairment of his left lower extremity, for which he previously received a schedule award.

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<sup>19</sup> See 20 C.F.R. § 10.404(d)(1)-(2); *id.*

<sup>20</sup> *V.T.*, Docket No. 14-0296 (issued May 5, 2014).

<sup>21</sup> See generally *S.M.*, Docket No. 17-0914 (issued October 11, 2017).

<sup>22</sup> *Supra* note 19.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 1, 2018  
Washington, DC

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

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

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