

FACTUAL HISTORY

On August 4, 2014 appellant, then a 55-year-old boilerplate operator, filed a notice of recurrence (Form CA-2a) alleging that she developed dizziness on July 9, 2014, while in the performance of her federal employment duties. She explained that, after her original May 18, 2014 employment injury, she was able to return to limited-duty work.² OWCP converted the recurrence claim to a claim for new injury and assigned OWCP File No. xxxxxx709.

By decision dated September 17, 2014, OWCP accepted appellant's claim for tear of the left medial meniscus.

On October 28, 2014 appellant underwent arthroscopic subtotal medial and lateral meniscectomy and chondroplasty of the trochlear groove and medial femoral condyle of the left knee. She returned to full-time light-duty work on February 20, 2015.

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

By development letter dated October 21, 2016, OWCP requested that appellant submit additional medical evidence including a report from her attending physician which addressed her work-related condition, the date of maximum medical improvement (MMI), objective findings, subjective complaints, and an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ OWCP afforded appellant 30 days to respond.

By decision dated November 23, 2016, OWCP denied appellant's schedule award claim. It found that she had not submitted medical evidence establishing permanent impairment of her left lower extremity.

Appellant thereafter submitted additional medical evidence. In a report dated August 17, 2016, Dr. Richard K. Hoy, a Board-certified orthopedic surgeon, evaluated appellant's permanent impairment based on the sixth edition of the A.M.A., *Guides*. He found that appellant had reached MMI and required no further treatment for her left knee. Dr. Hoy opined that he estimated that appellant had four percent permanent impairment of the left lower extremity due to partial medial and lateral meniscectomies. In a report dated September 28, 2016, he examined appellant due to right hip pain. Dr. Hoy noted that appellant reported to her that a left knee injury caused her knee to buckle resulting in a fall from her porch in March. He diagnosed primary osteoarthritis of the pelvic region and thigh, tear of the lateral cartilage of the knee. Dr. Hoy found that appellant had six percent permanent impairment of the left knee due to medial and lateral meniscectomies, four percent permanent impairment due to patella femoral arthritis, and eight percent impairment due to osteoarthritis in the weight-bearing portion of the joint. He concluded that appellant had a total of 18 percent permanent impairment of her left lower extremity.

² The statement of accepted facts (SOAF) reflects that, on May 17, 2014, appellant was descending stairs when she felt a snap behind her left knee. OWCP assigned that claim OWCP File No. xxxxxx216 and accepted it for left calf strain. OWCP File No. xxxxxx216 has not been administratively combined with the present claim.

³ A.M.A., *Guides* (6th ed. 2009).

On April 24, 2017 OWCP referred appellant, a SOAF, and list of questions to Dr. Kevin Scott, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding her permanent impairment of the left knee for schedule award purposes. In his May 11, 2017 report, Dr. Scott noted appellant's history of injury in May 2014. He reported that appellant had a limp, that she had 120 degrees of flexion and 0 degrees of extension. Dr. Scott also reported anterior knee pain, and positive patellar grind test. He found that appellant had reached MMI for her left knee and diagnosed partial medial and lateral meniscectomy with chondroplasty of the medial femoral condyle, and trochlear groove of the left knee. Dr. Scott utilized Table 16-3 of the A.M.A., *Guides*,⁴ and found appellant had a class 1 impairment due to the partial medial and lateral meniscectomies. He determined that she had a functional history grade modifier of 1 based on her limp.⁵ Dr. Scott further found physical examination grade modifier of 1 based on her palpable tenderness around the anterior prior of her knee and positive patella grind.⁶ He applied grade modifier 1 for clinical studies based on her knee arthritis.⁷ Dr. Scott utilized the net adjustment formula and reached zero for a grade C default value of 10 percent permanent impairment of the left lower extremity.⁸

On October 24, 2017 OWCP's medical adviser, Dr. Arthur A. Harris, a Board-certified orthopedic surgeon, reviewed the medical record to determine appellant's permanent impairment. He found that appellant had 10 percent permanent impairment of the left lower extremity based on the sixth edition of the A.M.A., *Guides* and that appellant reached MMI on May 11, 2017.

By decision dated December 19, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of her left lower extremity. In a December 19, 2017 form, postmarked February 5, 2018, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated February 27, 2018, a representative of OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record, finding that her request was untimely. OWCP's hearing representative noted that OWCP issued its decision on December 19, 2017 and appellant's request for a review of the written record was postmarked on February 5, 2018, more than 30 days after OWCP's December 19, 2017 decision. She noted that, as appellant's request was untimely, appellant was not entitled to a review of the written record as a matter of right. The hearing representative then exercised her discretion and found that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

⁴ *Id.* at 509, Table 16-3.

⁵ *Id.* at 516, Table 16-6.

⁶ *Id.* at 517, Table 16-7.

⁷ *Id.* at 519, Table 16-8.

⁸ *Supra* note 4.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁹ and its implementing regulations¹⁰ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions 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 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.¹¹ 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.¹² It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included.¹³

The A.M.A., *Guides* provide a diagnosis-based 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).¹⁴ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵ Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids, and calculations of modifier scores.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established more than 10 percent permanent impairment of her left lower extremity for which she previously received schedule award compensation.

⁹ 5 U.S.C. §§ 8101-8193, 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹² *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹³ *P.R.*, *id.*; *Carol A. Smart*, 57 ECAB 340 (2006).

¹⁴ A.M.A., *Guides* 493-531 (6th ed. 2009).

¹⁵ *Id.* at 521.

¹⁶ *B.R.*, Docket No. 18-0277 (issued August 27, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

OWCP accepted that appellant sustained tear of the left medial meniscus and authorized surgery. On October 28, 2014 appellant underwent arthroscopic partial medial and lateral meniscectomies. In his August 17, 2016 report, Dr. Hoy opined that appellant had four percent permanent impairment of the left lower extremity due to partial medial and lateral meniscectomies. On September 28, 2016 he found that appellant had six percent permanent impairment of the left knee due to medial and lateral meniscectomies, four percent permanent impairment due to patella femoral arthritis, and eight percent impairment for osteoarthritis. Without explanation Dr. Hoy concluded that appellant had 18 percent permanent impairment of her left lower extremity. The Board finds that Dr. Hoy's reports failed to provide the medical findings in support of his impairment rating and failed to correlate and clearly explain his impairment calculations under the sixth edition of the A.M.A., *Guides*.¹⁷ The Board has held that when the attending physician fails to provide a rating of impairment in accordance with the A.M.A., *Guides* or does not discuss how he or she arrives at the degree of impairment based on physical findings, the opinion is of diminished probative value in establishing the degree of permanent impairment.¹⁸

OWCP referred appellant for a second opinion evaluation with Dr. Scott. In his May 11, 2017 report, Dr. Scott noted that appellant had a limp, that she had 120 degrees of flexion, and 0 degrees of extension. He also reported anterior knee pain, and positive patellar grind test. Dr. Scott found that appellant had reached MMI for her left knee and diagnosed partial medial and lateral meniscectomies. He utilized the appropriate tables of the A.M.A., *Guides*,¹⁹ determined her grade modifiers of functional history, physical examination, and clinical studies, and applied the net adjustment formula²⁰ to reach a grade C default value of 10 percent permanent impairment of the left lower extremity.²¹

In accordance with its procedures, OWCP properly referred the evidence of record to its OWCP medical adviser, Dr. Harris. In his October 24, 2017 review, Dr. Harris found that appellant had reached MMI and concurred with Dr. Scott's impairment rating, applying the sixth edition of the A.M.A., *Guides* to the physical findings of record.

The Board thus finds that OWCP properly accorded the weight of the medical evidence to the reports of Dr. Scott and OWCP's medical adviser, Dr. Harris as they correctly calculated that appellant had 10 percent permanent impairment of her left lower extremity under the sixth edition of the A.M.A., *Guides*.²² As there is no evidence of record establishing greater impairment than the 10 percent previously awarded, appellant has failed to meet her burden of proof.

¹⁷ *Id.*

¹⁸ *L.M.*, Docket No. 12-0868 (issued September 4, 2012); *John L. McClanic*, 48 ECAB 552 (1997).

¹⁹ A.M.A., *Guides* 509, Table 16-3; 516, Table 16-6; 517, Table 16-7; 519, Table 16-8.

²⁰ *Id.* at 521.

²¹ *Id.* at 509, Table 16-3.

²² *R.A.*, Docket No. 18-0499 (issued July 20, 2018).

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.²³ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.²⁴ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.²⁵ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny his or her request and must exercise its discretion.²⁶ Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).²⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed.

The December 19, 2017 appeal form on which appellant requested review of the written record was postmarked February 5, 2018. The time limitation to request a review of the written record from OWCP's Branch of Hearings and Review expired on January 18, 2018, 30 days after OWCP's December 19, 2017 decision.²⁸ As appellant's request was postmarked February 5, 2018, it was therefore untimely filed. Section 8124(b)(1) sets an unequivocal time limitation for requesting a review of the written record.²⁹ Because the request was untimely filed, appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA.

Although appellant's request for a review of the written record was untimely filed, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its

²³ 5 U.S.C. § 8124(b)(1).

²⁴ 20 C.F.R. §§ 10.616, 10.617.

²⁵ *Id.* at § 10.616(a).

²⁶ *B.R.*, *supra* note 16; *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

²⁷ *B.R.*, *supra* note 16; *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

²⁸ *Id.*

²⁹ *Id.*; *William F. Osborne*, 46 ECAB 198 (1994).

February 27, 2018 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.³⁰ Accordingly, the Board finds that OWCP properly denied appellant's February 5, 2018 request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124.

CONCLUSION

The Board finds that appellant has not established more than 10 percent permanent impairment of her left lower extremity for which she previously received schedule award compensation. The Board further finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2018 and December 19, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 29, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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

³⁰ *B.R.*, *supra* note 16; *Samuel R. Johnson*, 51 ECAB 612 (2000).