



schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 5, 2009 appellant, then a 44-year-old boiler plant operator, filed a traumatic injury claim (Form CA-1) alleging that on March 5, 2009 he sustained a right knee injury as the result of a slip and fall while at work. OWCP accepted the claim for right knee medial meniscus, right knee internal derangement, lower leg joint pain, right residual foreign body in soft tissue, and right leg joint derangement.<sup>4</sup>

A March 14, 2009 magnetic resonance imaging (MRI) scan of appellant's right knee was interpreted by Dr. G. William Eason, a diagnostic radiologist, as revealing small patellofemoral joint effusion, and cartilage erosion of the articular surface of the patella to a mild degree, with medial patellar facet subchondral pitting.

By decision dated December 24, 2013, OWCP granted appellant a schedule award for 31 percent permanent impairment of his right lower extremity. The period of the award ran from December 15, 2013 to August 31, 2015.

Appellant subsequently underwent a total right knee arthroplasty, which was performed on March 14, 2016.

On December 22 and 28, 2016 OWCP received appellant's claims (CA-7 forms) for an increased schedule award.

In support of his claim for an increased schedule award, appellant submitted a December 20, 2016 report from Dr. Christopher William Olcott, a treating Board-certified orthopedic surgeon. Dr. Olcott noted that appellant was status post total right knee replacement surgery. Examination findings included no antalgic gait, mild right knee diffuse swell, and active knee extension with no extensor lag. Dr. Olcott related that appellant had 50 percent permanent right lower extremity impairment due to total knee arthroplasty.

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<sup>3</sup> Docket No. 14-386 (issued May 27, 2014). By decision dated April 17, 2013, OWCP determined that appellant's actual earnings as a motor vehicle dispatcher fairly and reasonably represented his loss of wage-earning capacity (LWEC). By decision dated May 27, 2014, the Board affirmed a July 25, 2013 decision which denied modification of the April 17, 2013 LWEC determination.

<sup>4</sup> Appellant underwent a number of surgical procedures which were authorized by OWCP. A right knee arthroscopy with partial medial meniscectomy, debridement complete rupture anterior cruciate ligament, removal of bony loose body from intercondylar notch area, and grade 4 chondromalacia patella debridement was performed on April 8, 2009. Right knee anterior cruciate ligament reconstruction, partial meniscectomy, synovectomy, high tibial osteotomy, hamstring auto graft, and right knee arthroscopic microfracture of trochlea articular cartilage lesion, was performed on January 12, 2010. Right knee arthroscopic major synovectomy, was performed on July 29, 2010. Right knee hardware removal was performed on May 12, 2011.

Dr. Olcott, in a January 23, 2017 report, noted that appellant was seen for severe right knee tricompartmental osteoarthritis. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>5</sup> he determined appellant had 25 percent permanent impairment of the right lower extremity.

By correspondence dated February 13, 2017, OWCP requested clarification from Dr. Olcott regarding his impairment rating. Specifically, it inquired as to whether the current 25 percent permanent impairment rating was in addition to the previously awarded 31 percent permanent impairment rating.

Dr. Olcott, in a February 24, 2017 letter, informed OWCP that the 25 percent permanent impairment was in addition to the prior 31 percent impairment rating. In support of his opinion, he referenced Appendix A, p. 604 of the A.M.A., *Guides*.

On March 12, 2017 Dr. Herbert White, Jr., serving as a district medical adviser (DMA) Board-certified in internal and occupational medicine, reviewed Dr. Olcott's impairment rating and concluded that appellant had 21 percent permanent impairment of the right lower extremity. Using Table 16-3, p. 511 he placed appellant in class 2 for good result following total knee replacement. Next, Dr. White assigned a grade 0 for functional history based on normal gait using Table 16-6, p. 516, and a grade 2 for clinical studies based on implant in good position using Table 16-8, p. 519. He excluded assigning a grade for physical evaluation as it was used in determining class placement. Using the net adjustment formula, Dr. White found that appellant had 21 percent right lower extremity permanent impairment.

In a letter dated April 12, 2017, Dr. Olcott noted his disagreement with the DMA's impairment rating. He noted x-ray interpretations showed right knee advanced degenerative changes with near complete medial and joint space loss. Dr. Olcott provided examination findings. He noted that appellant had previously been found to have 31 percent right lower extremity permanent impairment and determined appellant had an additional 25 percent right lower extremity permanent impairment, resulting in a total permanent impairment of right lower of 48 percent, using the A.M.A., *Guides* (6<sup>th</sup> ed.)

On May 15, 2017 OWCP referred appellant to Dr. Jeffrey Kevin Moore, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of appellant's permanent impairment.

Dr. Moore, in a June 5, 2017 report, noted his review of the statement of accepted facts and medical record. A physical examination of appellant's right knee revealed status post total knee arthroplasty, no substantial swelling, no tenderness, leg intact neurovascularly, no limp, and active range of motion of 0 to 130 degrees. Dr. Moore concurred with Dr. White that appellant had 21 percent right lower extremity permanent impairment. Using Table 16-3, p. 511 of the A.M.A., *Guides* (6<sup>th</sup> ed.), he assigned a class 2 for total right knee arthroplasty with good result, which had a default grade C of 25 percent. Dr. Moore found modifiers of 0 for functional history, physical evaluation was not applicable, two for clinical studies based on x-ray interpretations. He applied

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

the net adjustment formula, finding an adjustment of minus 2 to grade A and 21 percent right lower extremity permanent impairment.

On July 27, 2017 Dr. White reviewed and concurred with Dr. Moore's impairment determination.

By decision dated July 31, 2017, OWCP denied appellant's claim for an increased schedule award.

On September 8, 2017 OWCP received appellant's request for reconsideration, accompanied by a September 5, 2017 report from Dr. Olcott.

Dr. Olcott, in his September 5, 2017 report, reiterated his findings and impairment rating from his prior April 12, 2017 report.

By decision dated November 29, 2017, OWCP denied reconsideration. It found Dr. Olcott's September 5, 2017 report repetitive of his prior report and insufficient to warrant a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Under section 8107 of FECA<sup>6</sup> and section 10.404 of the implementing federal regulations,<sup>7</sup> schedule awards are payable for permanent impairment of specified body members, functions, or organs. FECA however does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>8</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>9</sup> Under the sixth edition, the evaluator identifies the impairment class of diagnosis condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).<sup>10</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404

<sup>8</sup> *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>9</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), page 3, section 1.3, The ICF Disability and Health: A Contemporary Model of Disablement.

<sup>10</sup> *Id.* at (6<sup>th</sup> ed. 2009), pp. 493-556.

<sup>11</sup> *Id.* at 521.

In determining impairment for the lower extremities, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish more than 31 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

OWCP accepted appellant's claim for right knee torn medial meniscus, right knee internal derangement, lower leg joint pain, right residual foreign body in soft tissue, and right leg joint derangement. Appellant underwent a number of medical procedures, including a total right knee replacement.

On December 24, 2013 OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity. On December 22 and 28, 2016 appellant filed a claim for an increased schedule award. By decision dated July 31, 2017, OWCP denied his claim for an increased schedule award.

The record contains reports from Dr. Olcott, appellant's treating physician. In a report dated December 20, 2016, Dr. Olcott related that appellant had 50 percent permanent impairment of the right lower extremity due to total knee arthroplasty. He did not however reference the A.M.A., *Guides* to support his impairment rating nor did he provide his calculations. It is well established that when an attending physician's report provides an estimate of impairment, but does not address how the rating was made under the A.M.A., *Guides*, it is of little probative value.<sup>13</sup>

In his January 23, 2017 report, Dr. Olcott opined that appellant was entitled to an additional 25 percent right lower extremity permanent impairment due to tricompartmental osteoarthritis. 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.<sup>14</sup> The MRI scan of appellant's right knee taken on March 14, 2009 however did not reveal

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<sup>12</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); see *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>13</sup> See *R.B.*, Docket No. 14-2038 (issued May 5, 2015); *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

<sup>14</sup> *E.I.*, Docket No. 18-0377 (issued August 27, 2018).

preexisting osteoarthritis of the right knee. Appellant's right knee osteoarthritis therefore was not to be considered in rating permanent impairment of his right knee.<sup>15</sup>

In a March 12, 2017 report, Dr. White, a DMA, reviewed Dr. Olcott's report and disagreed with his impairment rating. Using Table 16-3, p. 511 he identified a class 2 for good result of total knee replacement. Next, Dr. White assigned a grade 0 for functional history using Table 16-6, p. 516 and a grade 2 for clinical studies using Table 16-8, p. 519. Using the net adjustment formula, he found that appellant had 21 percent right lower extremity permanent impairment.

OWCP referred appellant for a second opinion evaluation with Dr. Moore. In a June 5, 2017 report, Dr. Moore noted that, under Table 16-3, page 511 of the A.M.A., *Guides*, Knee Regional Grid, right knee total arthroplasty, appellant was a class 2 impairment, grade C, with a default impairment rating of 25 percent. He noted the grade modifier for functional history. Dr. Moore found grade modifiers of 0 for functional history, physical evaluation was not applicable, two for clinical studies based on x-ray interpretations. He properly utilized the net adjustment formula to find a net adjustment of zero which would place appellant at grade A for 21 percent permanent impairment of the right lower extremity. Dr. Moore opined that appellant had 21 percent permanent impairment of the right lower extremity.

On July 27, 2017 Dr. White, a DMA reviewed Dr. Moore's June 5, 2017 report and agreed with his impairment rating and calculations.

The Board finds that the DMA, and Dr. Moore, the second opinion physician, properly calculated permanent impairment under the A.M.A., *Guides*. There is no current medical evidence in accordance with the A.M.A., *Guides* which supports that appellant sustained more than 31 percent permanent impairment for his right lower extremity for which he previously received a schedule award.

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 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>16</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a

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

<sup>16</sup> 5 U.S.C. § 8128(a); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>17</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>19</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant's request for reconsideration dated September 7, 2017 did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. He is therefore not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case. Appellant submitted a September 5, 2017 report by Dr. Olcott in which he again concluded that appellant was entitled to an additional 25 percent right lower extremity permanent impairment. This report is repetitive of Dr. Olcott's April 12, 2017 report. The submission of this evidence does not require reopening appellant's case for merit review as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity, for which he previously received a schedule award. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>18</sup> *Id.* at § 10.607(a).

<sup>19</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>20</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>21</sup> *T.H.*, Docket Nos. 17-1578 & 17-1651 (issued April 26, 2018); *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 29 and July 31, 2017 are affirmed.

Issued: October 22, 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