

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

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**T.N., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 18-0464  
Issued: September 4, 2018**

*Appearances:*

*Alan J. Shapiro, 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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 5, 2018 appellant, through counsel, filed a timely appeal from an August 2, 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 two percent permanent impairment of her right lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

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

On July 7, 2012 appellant, then a 31-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 6, 2012, while at work, she strained her right knee while walking down a set of stairs. By decision dated September 19, 2012, OWCP accepted the claim for right knee strain. It subsequently expanded the acceptance of the claim to include the conditions of right lateral collateral ligament sprain of knee and right tear of the medial meniscus of knee.

In a September 7, 2012 diagnostic report, Dr. David Garelick, an attending Board-certified orthopedic surgeon, reported that a magnetic resonance imaging (MRI) scan of the right knee revealed a tear of the posterior horn of the medial meniscus extending to the inferior surface and a likely occult tear of the posterior horn of the lateral meniscus that extended to the superior surface. Moderate-to-marked degenerative changes of the patellar cartilage were also found.

In an October 15, 2012 report, Dr. Garelick recommended right knee arthroscopy surgery. The procedure was subsequently authorized by OWCP.

In a November 15, 2012 operative report, Dr. Garelick noted a preoperative diagnosis of medial meniscus tear of right knee and a postoperative diagnosis of medial meniscus tear of right knee, postpatella femoral chondromalacia. Appellant underwent right knee arthroscopy, partial medial meniscectomy, and chondroplasty patella. Dr. Garelick reported that operative findings showed the femoral trochlea was relatively pristine, but there was grade 3 chondromalacia throughout the entire undersurface of the patella. There were no loose bodies in the lateral gutter and the anterior and posterior cruciate ligaments were intact and normal. The lateral meniscus and lateral femoral condyle were also pristine. There were some grade 2 and grade 3 changes throughout the entire lateral tibial plateau. Dr. Garelick noted that an easy transition was made in the medial joint space and there was “a just a minimal undersurface tear of the middle horn of the medial meniscus.” The medial femoral condyle and medial tibial plateau were pristine.

On January 21, 2013 Dr. Garelick released appellant to full-duty work without restrictions status post right knee arthroscopy.

On August 9, 2013 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated August 20, 2013, OWCP requested that appellant submit a report from her attending physician addressing her work-related conditions, the date of maximum

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<sup>3</sup> Docket No. 15-0690 (issued November 1, 2016).

medical improvement (MMI), objective findings, subjective complaints, and an impairment rating rendered according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup>

In support of her claim, appellant submitted an August 23, 2013 medical report and impairment rating from Dr. Neil Allen, Board-certified in internal medicine. Dr. Allen noted a diagnosis of right knee sprain, right lateral collateral ligament, and right tear of the meniscus. He provided findings on physical examination and noted normal gait, normal range of motion, and negative for atrophy. Dr. Allen further noted that palpation revealed mild tenderness through the joint line and mild crepitus with knee extension over the lateral aspect of the joint. He indicated that he reviewed Dr. Garelick's September 7, 2012 MRI scan of the right knee, which revealed a tear of the posterior horn of the medial meniscus extending into the inferior surface and a likely occult tear of the posterior horn of the lateral meniscus that extended to the superior surface.

Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Allen opined that appellant had eight percent permanent impairment of the right lower extremity. According to Table 16-3 (Knee Regional Grid) on page 511, he utilized the MRI scan findings to determine class 1 diagnosis-based impairment (DBI), which yielded a default value of 10 percent. Dr. Allen noted that physical examination revealed negative for instability, negative Lachman's, normal range of motion, and negative for muscle atrophy. He assigned a grade modifier of 1 for physical examination based on mild palpatory findings which were consistently documented and supported by observed abnormalities.<sup>5</sup> Dr. Allen determined that functional history yielded a grade modifier of 1 based on the AAOS Lower Limb Questionnaire score of 72 and normal gait.<sup>6</sup> Clinical studies were assigned a grade modifier of 0 based on x-rays of the right knee which revealed no evidence of fracture or dislocation and tiny joint effusion.<sup>7</sup> Utilizing the net adjustment formula, Dr. Allen calculated eight percent permanent impairment of the right lower extremity.<sup>8</sup>

On December 19, 2013 OWCP routed Dr. Allen's report and the case file to Dr. Garelick, in his role as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of the right lower extremity and the date of MMI.

In a December 23, 2013 report, Dr. Garelick reported that appellant's chart was re-reviewed for the purpose of determining permanent partial impairment of the lower right extremity due to a medial meniscus tear and knee sprain, which had been accepted as work related. On November 15, 2012 appellant underwent a right knee arthroscopy and partial medial meniscectomy. Dr. Garelick reported that Dr. Allen's August 23, 2013 report noted subjective complaints of right knee pain. Physical examination was normal except for tenderness to palpation at the medial joint line. Dr. Garelick noted that Dr. Allen recommended eight percent impairment

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

<sup>5</sup> *Id.* at 517, Table 16-7.

<sup>6</sup> *Id.* at 516, Table 16-6.

<sup>7</sup> *Id.* at 511, Table 16-3.

<sup>8</sup> *Id.* at 521.

of the right lower extremity, which appeared to be based on MRI scan findings for a medial and lateral meniscal tear. However, the operative report established that there was only a medial meniscus tear present as the lateral meniscus was pristine. Thus, Dr. Garelick opined that Dr. Allen's impairment rating should be disregarded. He determined that appellant should be awarded two percent impairment of the right lower extremity for partial medial meniscectomy as noted in Table 16-3, page 509 of the A.M.A., *Guides*. Dr. Garelick found no change to the award with use of the net adjustment formula and concluded that MMI had occurred three months postsurgery, February 15, 2013.

By decision dated May 9, 2014, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. It found that the weight of the medical evidence rested with Dr. Garelick serving as the DMA. The date of MMI was found to be February 15, 2013. The award covered a period of 5.76 weeks from February 15 to March 27, 2013.

On May 15, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

At the December 1, 2014 hearing, counsel argued that the case required further medical development because Dr. Garelick improperly dismissed Dr. Allen's report and substituted his own judgment for the examination findings.

By decision dated January 21, 2015, an OWCP hearing representative affirmed the May 9, 2014 schedule award decision, noting that the weight of the medical opinion rested with Dr. Garelick serving as the DMA.

On February 10, 2015 appellant, through counsel, appealed to the Board. By decision dated November 1, 2016, the Board set aside the January 21, 2015 decision, finding that Dr. Garelick should have been disqualified as the DMA as he previously served as appellant's treating physician.<sup>9</sup> The Board remanded the case for another DMA to review Dr. Allen's impairment rating and provide a reasoned opinion regarding the nature and extent of appellant's permanent impairment.

On remand OWCP routed Dr. Allen's report, a statement of accepted facts (SOAF), and the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's DMA, for review and a determination on permanent impairment of the right lower extremity and the date of MMI.

In a November 30, 2016 report, Dr. Katz reported that appellant's chart was reviewed for the purpose of determining permanent impairment of the lower right extremity due to a right medial meniscus tear and lateral collateral ligament sprain of knee, which had been accepted as work related. He noted that on November 15, 2012 Dr. Garelick had performed a right knee arthroscopy with partial medial meniscectomy and chondroplasty patella. Dr. Katz described the impairment ratings provided by both Dr. Allen and Dr. Garelick. He noted that, despite the prior conflict found in Dr. Garelick's capacity as the DMA, he agreed with his impairment findings.

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<sup>9</sup> *Supra* note 2.

Dr. Katz explained that Dr. Allen appeared to rate his impairment on the basis of medial and lateral meniscal tears *via* the September 7, 2012 MRI scan. However, a subsequent report revealed there were no tears present in the lateral meniscus. Dr. Katz recalculated the impairment based on a partial medial meniscectomy, class 1 with a default value of two percent.<sup>10</sup> He assigned a grade modifier of 1 for functional history, a grade modifier of 1 for clinical studies, and no grade modifier for clinical studies. Applying the net adjustment formula resulted in zero for default value C, amounting to two percent permanent impairment of the right lower extremity. Dr. Katz concluded that the date of MMI was August 23, 2013, the date of Dr. Allen's examination. He reported that as two percent had already been awarded for the right lower extremity, appellant was not entitled to an additional award.

By decision dated December 13, 2016, OWCP denied appellant's claim for an increased schedule award, finding that she was entitled to no more than the two percent permanent impairment of the right lower extremity previously awarded.

On December 20, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

At the May 22, 2017 hearing, counsel argued that OWCP improperly relied on the report of Dr. Katz serving as the DMA. He asserted that Dr. Katz relied on Dr. Garelick's report, which was biased, when providing his impairment rating, as it had previously been deemed improper due to a conflict of interest. Counsel further asserted that Dr. Katz failed to provide adequate detail or discussion of his impairment rating and why Dr. Allen's rating was improper.

By decision dated August 2, 2017, an OWCP hearing representative affirmed the December 13, 2016 schedule award decision, noting that the weight of the medical opinion rested with Dr. Katz serving as the DMA.

### **LEGAL PRECEDENT**

The schedule award provision 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>11</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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>12</sup>

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).

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<sup>10</sup> *Supra* note 3 at 509, Table 16-3.

<sup>11</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

<sup>12</sup> *K.H.*, Docket No. 09-0341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

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).<sup>13</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup> Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of permanent impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has no more than two percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

OWCP accepted appellant's claim for sprain of knee, lateral collateral ligament, right and tear of the right medial meniscus. It approved a November 15, 2012 surgery for right knee arthroscopy and partial medial meniscectomy. By decisions dated May 9, 2014 and January 21, 2015, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. On November 1, 2016 the Board set aside the January 21, 2015 decision and remanded the case to be sent to a new OWCP DMA, finding that a conflict of interest existed as Dr. Garelick could not serve as both the treating physician and DMA.<sup>17</sup>

On remand Dr. Katz, serving as the DMA, determined that appellant was entitled to no more than two percent permanent impairment of the right lower extremity. The Board finds that the opinion of Dr. Katz is thorough and well rationalized.<sup>18</sup> Dr. Katz properly explained that the impairment rating provided by Dr. Allen was incorrect. He explained that Dr. Allen calculated impairment based on a diagnosis of partial medial and lateral meniscus tear, referencing a September 7, 2012 MRI scan of the right knee, which speculated as to a likely occult tear of the posterior lateral meniscus. However, Dr. Garelick's November 14, 2012 operative report established that only a medial meniscus tear was present as the lateral meniscus was pristine. The Board notes that Dr. Allen failed to provide an impairment rating based on the most current and

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<sup>13</sup> *Supra* note 3 at 493-531.

<sup>14</sup> *Id.* at 521.

<sup>15</sup> *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>16</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(e) (March 2017).

<sup>17</sup> *Supra* note 2.

<sup>18</sup> *R.V.*, Docket No. 17-0731 (issued June 7, 2017).

accurate findings, instead relying on speculative stale medical evidence.<sup>19</sup> Dr. Allen's report is of limited probative value and insufficient to determine the extent of permanent partial impairment.<sup>20</sup>

Dr. Katz properly reviewed the case record and identified a class 1 DBI of partial medial meniscectomy. He provided his calculations and assigned a grade modifier of 1 for functional history and physical examination. Utilizing the net adjustment formula warranted no movement of the default value C amounting to two percent permanent impairment of the right lower extremity.<sup>21</sup>

On appeal counsel argues that Dr. Katz improperly relied on Dr. Garelick's report, which was disqualified due to a potential conflict. The fact that the two physicians reached the same schedule award determination does not negate the accuracy of the impairment rating. Where a DMA gives a percentage of impairment based on reported findings and the A.M.A., *Guides*, his or her finding may constitute the weight of the medical evidence.<sup>22</sup>

Counsel further argues that Dr. Katz failed to adequately discuss why Dr. Allen's impairment rating was incorrect. The Board notes that, while Dr. Allen and Dr. Katz did not agree on the DBI rating, both physicians placed appellant in class 1 and assigned the same grade modifiers based on examination and history such that a conflict in medical evidence was not created.<sup>23</sup> As noted above, Dr. Katz properly explained that Dr. Allen failed to apply the correct diagnosis as appellant's operative report revealed no tear of the lateral meniscus.<sup>24</sup> As Dr. Allen's rating was based on an incorrect diagnosis, his opinion was insufficient to form the basis of appellant's schedule award.

Accordingly, the Board finds Dr. Katz correctly applied the A.M.A., *Guides* to find that appellant has no more than two percent permanent impairment of the right lower extremity.<sup>25</sup> As appellant has not submitted sufficient evidence to establish a greater permanent impairment to the right lower extremity, OWCP properly determined that she was not entitled to an additional schedule award.<sup>26</sup>

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<sup>19</sup> *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

<sup>20</sup> *T.E.*, Docket No. 11-1805 (issued August 2, 2012).

<sup>21</sup> *Supra* note 9.

<sup>22</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(j) (September 2010).

<sup>23</sup> See *J.J.*, Docket No. 14-1143 (issued December 10, 2014); *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>24</sup> *L.W.*, Docket No. 12-1613 (issued February 19, 2013).

<sup>25</sup> *Y.K.*, Docket No. 11-1623 (issued June 25, 2012).

<sup>26</sup> *C.H.*, Docket No. 16-1806 (issued March 9, 2017).

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 established more than two percent permanent impairment of the right lower extremity for which she previously received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 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