



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On October 17, 1997 appellant, then a 26-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that, on October 15, 1997, he injured his right knee while hiking on a hillside in the performance of duty. OWCP accepted the claim for right plica syndrome, right knee sprain, and right patella chondromalacia. It authorized right knee arthroscopies, which were performed on March 3, 1998, February 19, 1999, September 6, 2000, March 3, 2003, January 26, 2010, and March 1, 2016.

By decision dated January 29, 2013, OWCP granted appellant a schedule award for 20 percent permanent impairment of his right lower extremity.<sup>3</sup> The award covered a period of 57.6 weeks and ran from October 17, 2011 to November 23, 2012.

On November 7, 2013 appellant requested reconsideration. By decision dated February 5, 2014, OWCP denied his request for reconsideration without reviewing the merits of the claim.

On February 25, 2014 appellant appealed to the Board. By decision dated September 12, 2014, the Board affirmed OWCP's February 5, 2014 decision. The Board found that OWCP properly denied appellant's request for reconsideration of the January 29, 2013 schedule award determination as he had not submitted relevant and pertinent new evidence, advanced a new and relevant legal argument, or asserted that OWCP erroneously interpreted or applied a specific point of law.<sup>4</sup>

On April 1, 2015 OWCP expanded acceptance of appellant's claim to include aggravation of right knee osteoarthritis.

On June 20, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

On September 13, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Ronald Teed, a second opinion Board-certified orthopedic surgeon, to determine whether appellant was entitled to an increased schedule award. In an October 19, 2016 report, Dr. Teed, based upon a review of medical evidence, a statement of accepted facts (SOAF), and physical examination, diagnosed chronic right knee pain with disability and opined that there was no objective evidence supporting a rating of permanent impairment.

In a December 12, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon acting as a district medical adviser (DMA), reviewed the record and recommended that appellant

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<sup>2</sup> Docket No. 14-0796 (issued September 12, 2014).

<sup>3</sup> The impairment rating was based upon a loss of knee range of motion (ROM) as the medical evidence found the x-ray interpretations reflecting cartilage intervals did not warrant an impairment rating.

<sup>4</sup> *Supra* note 2.

be referred to a Board-certified orthopedic surgeon or specialist in physical medicine and rehabilitation, for determination of permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

In a February 17, 2017 addendum, Dr. Teed noted that a magnetic resonance imaging (MRI) scan referenced in a March 12, 2015 report found grade 3 to 4 right knee chondromalacia in the medial compartment. He opined that appellant had no more than 20 percent right lower extremity permanent impairment.

By decision dated May 25, 2017, OWCP denied appellant's claim for an additional schedule award.

On June 2, 2017 OWCP received appellant's May 30, 2017 request for reconsideration.

On September 7, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Melissa Kounine, an osteopathic physician specializing in orthopedic surgery, to determine appellant's current impairment rating. Dr. Kounine, in an October 6, 2017 report, noted appellant's medical history, which included six right knee surgeries with the most recent one performed on March 1, 2016 and a return to full-time light-duty work on June 9, 2016. She advised that a February 10, 2015 MRI scan demonstrated grade 3 to 4 right knee medial femoral condyle chondromalacia and chronic suprapatellar tendon partial tear. A physical examination revealed negative straight leg raise, moderate medial joint line and medial femoral condyle tenderness on palpation, and mild pain with patellar compression. Referencing the sixth edition of the A.M.A., *Guides*, Dr. Kounine found that appellant fell into a class 2 for moderate arthritis of the knee and applied grade modifiers of 0 for functional history, a grade of 2 for physical examination findings, and a grade of 2 for clinical studies based on moderate pathology. Using the net adjustment formula, she found a net adjustment of -2 resulting in 16 percent permanent impairment of the right lower extremity.<sup>6</sup>

On November 14, 2017 Dr. Katz, the DMA, again reviewed the medical evidence of record, including reports from Dr. Teed and Dr. Kounine, and concurred with Dr. Kounine's impairment rating of 16 percent right lower extremity permanent impairment based on a diagnosis of arthritis. He further explained that if the A.M.A., *Guides* allow the use of ROM for the diagnosis in question, the impairment should be evaluated using both the ROM and DBI methods, and the higher rating identified. Dr. Katz also noted that, if two significant diagnoses were present, the examiner should use the diagnosis with the highest causally related impairment rating for the impairment calculation. He noted that the present permanent impairment of appellant's right knee due to arthritis was less than the overlapping prior award for loss of ROM.

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

<sup>6</sup> Utilizing the net adjustment formula discussed above, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), or (0-2) + (2-2) + (2-2) = -2, resulting in 16 percent permanent impairment.

By decision dated November 15, 2017, OWCP denied modification of its prior decision, finding that the evidence submitted was insufficient to warrant an additional schedule award.

On November 27, 2017 OWCP received appellant's request for reconsideration dated November 20, 2017. In support of his request, appellant submitted a copy of page 4 from Dr. Kounine's October 6, 2017 report and a brief narrative disagreeing with the impairment rating.

By decision dated February 12, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

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

The schedule award provisions of FECA<sup>7</sup> and its implementing federal regulations,<sup>8</sup> 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. 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>9</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</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>11</sup> Under the sixth edition, the evaluator identifies the class of diagnosis (CDX) for the diagnosed condition, which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE), and clinical studies (GMCS).<sup>12</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</sup> Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>14</sup>

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<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

<sup>11</sup> A.M.A., *Guides*, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>12</sup> *Id.* at 521.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 23-28; see also *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

In determining impairment of the lower extremities, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.<sup>15</sup> After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history, grade modifier for physical examination, and grade modifier for clinical studies.<sup>16</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.<sup>17</sup>

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

The Board finds that appellant has not met his burden of proof to establish more than 20 percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

The record contains reports from Dr. Teed, an OWCP referral physician. Dr. Teed, in an October 19, 2016 report, found no ratable impairment, but in a February 17, 2017 addendum found no more than 20 percent right lower extremity permanent impairment. However, he failed to reference the A.M.A., *Guides* or explain how he arrived at this impairment rating in accordance with the relevant standards of the A.M.A., *Guides*.<sup>18</sup> Dr. Teed failed to refer to tables or charts in the A.M.A., *Guides* in support of his determination. Thus, his report lacks probative value necessary to determine appellant's permanent impairment for schedule award purposes.<sup>19</sup>

In a September 7, 2017 report, Dr. Kounine, an OWCP referral physician, opined that appellant sustained 0 percent right lower extremity permanent impairment for the diagnosis of soft tissue plica and 16 percent right lower extremity permanent impairment for a diagnosis of arthritis in accordance with the A.M.A., *Guides*. She explained that, under Table 16-3, she assigned a class 2 for moderate arthritis knee problems and applied grade modifiers of 0 for functional history, a grade of 2 for physical examination findings, and a grade of 2 for clinical studies based on moderate pathology. Using the net adjustment formula, Dr. Kounine found a net adjust of -2 resulting in 16 percent permanent impairment. Based on her examination and review of the record, Dr. Kounine properly concluded that appellant had 16 percent right lower extremity permanent impairment.

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<sup>15</sup> See *id.* at 509-11.

<sup>16</sup> *Id.* at 513-15.

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (March 2017); see also *L.R.*, Docket No. 14-0674 (issued August 13, 2014); *Frantz Ghassan*, 57 ECAB 349 (2006).

<sup>18</sup> *James R. Hill, Sr.*, 57 ECAB 583 (2006).

<sup>19</sup> *F.S.*, Docket No. 16-0783 (issued September 26, 2017).

In accordance with its procedures, OWCP referred the evidence of record to its DMA, Dr. Katz, who reviewed the relevant medical evidence and agreed with Dr. Kounine's rating of 16 percent right lower extremity permanent impairment due to arthritis, under Table 16-3. Dr. Katz explained that Dr. Kounine had properly evaluated appellant's right knee permanent impairment due to arthritis, under Table 16-3 of the A.M.A., *Guides*.<sup>20</sup>

While appellant was previously granted a schedule award based upon loss of ROM because the arthritis-based measurements were not available, the A.M.A., *Guides* explain that for rating of the lower extremities:

“Diagnosis-Based Impairment, is the method of choice for calculating impairment. [ROM] is used principally as a factor in the Adjustment Grid.... Some of the diagnosis-based impairment grids refer to the [ROM] section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer you to this section or no other diagnosis-based sections of this chapter are applicable for impairment rating of a condition.”<sup>21</sup>

Dr. Katz properly explained that appellant's diagnosis-based impairment based upon his right knee arthritis was the proper basis for rating appellant's impairment and his ROM permanent impairment rating was overlapping.

The Board, therefore, finds that there is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than 20 percent permanent impairment of the right lower extremity. Accordingly, appellant has not established that he is entitled to a schedule award greater than that which was previously awarded.

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>22</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>20</sup> *Supra* note 5 at page 511.

<sup>21</sup> *Supra* note 5 at page 543.

<sup>22</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>23</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>24</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>25</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>26</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).

In his request for reconsideration received on November 27, 2017, appellant merely noted his disagreement with the permanent impairment rating. He has not alleged or demonstrated a specific error in the payment of his schedule award pursuant to FECA or its regulations.<sup>27</sup> Appellant, therefore, neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. As well, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant resubmitted page 4 from Dr. Kounine's October 6, 2017 report. The Board finds that as this report was duplicative of evidence of record, it did not constitute relevant and pertinent new evidence.<sup>28</sup> Therefore, resubmission of this evidence was insufficient to require OWCP to reopen the claim for consideration of the merits.

The Board finds that, as appellant did not satisfy any of the three requirements under 20 C.F.R. § 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

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<sup>23</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>24</sup> *Id.* at § 10.607(a).

<sup>25</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>26</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>27</sup> *See A.G.*, Docket No. 18-0755 (issued November 2, 2018).

<sup>28</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *See A.R.*, Docket No. 17-1504 (issued May 25, 2018); *D'Wayne Avila*, 57 ECAB 642 (2006).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish more than 20 percent permanent impairment of the 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2018 and November 15, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 11, 2019  
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