

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

C.W., Appellant)	
)	
and)	Docket No. 18-0618
)	Issued: March 27, 2019
DEPARTMENT OF THE AIR FORCE,)	
HEADQUARTERS AIR FORCE SPACE)	
COMMAND, El Segundo, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 January 30, 2018 appellant, through counsel, filed a timely appeal from an October 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that acceptance of her claim should be expanded to include the conditions of permanent aggravation of right knee osteoarthritis and permanent aggravation of right lateral meniscus derangement as causally related to the accepted June 20, 2011 employment injury; and (2) whether she has met her burden of proof to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

FACTUAL HISTORY

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

On June 20, 2011 appellant, then a 62-year-old budget technician, filed an occupational disease claim (Form CA-2) alleging that she developed a right knee injury as a result of her federal employment duties, which required rising from her desk, walking, and ascending and descending stairs. She did not stop work. By decision dated December 7, 2012, OWCP accepted the claim for temporary aggravation of right knee osteoarthritis and temporary aggravation of right lateral meniscus derangement.

On February 25, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a May 13, 2013 medical report, Dr. H. Daniel Maghen, a Board-certified orthopedic surgeon, diagnosed osteoarthritis of the right knee and acute right knee tear of the lateral meniscus. He recommended total knee arthroplasty.

In a May 13, 2013 report, Dr. John Carmel Norton, Board-certified in occupational medicine, diagnosed osteoarthritis of the right knee and derangement of lateral meniscus. He related that appellant had permanent work restrictions and reported that she had reached maximum medical improvement (MMI) as of May 13, 2013.

OWCP referred appellant, a statement of accepted facts (SOAF), and the case record to Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's entitlement to a schedule award. In a report dated February 21, 2014, Dr. Rogachefsky reported that appellant was not compliant and did not participate adequately in the physical examination. He further noted that, based on her work activities of walking to a printer, rising from a desk, and walking to the elevators, he did not see work-related causation for the bilateral knee conditions and bilateral degenerative arthritis. Dr. Rogachefsky opined that these were nonwork-related diagnoses/injuries and preexisting conditions. He explained that her conditions were not work related as appellant had not experienced acute events and only claimed repetitive work had caused her injuries. As such, Dr. Rogachefsky determined that a schedule award would not be appropriate.

³ Docket No. 16-0749 (issued August 26, 2016).

By decision dated April 17, 2014, OWCP denied appellant's claim for a schedule award, finding that the evidence submitted was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that appellant had failed to adequately participate in Dr. Rogachefsky's physical examination and he had found no permanent impairment causally related to her accepted employment injury.

On May 20, 2015 appellant filed another claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a June 3, 2015 impairment rating from Dr. Mesfin Seyoum, a treating pediatric physician. Dr. Seyoum provided a detailed medical history, reviewed appellant's prior diagnostic and medical reports, and set forth findings on physical examination. He diagnosed right lower leg osteoarthritis, right lateral meniscus derangement, chondromalacia patella, and marked genu valgum, which he opined were caused or aggravated by her work-related injury. Dr. Seyoum reported that a January 21, 2013 right knee magnetic resonance imaging (MRI) scan was positive for anterior cruciate and lateral collateral ligament tears, lateral meniscus tears, and degenerative changes. In accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ he determined that MMI had been reached. Utilizing Table 16-3 of the A.M.A., *Guides*, he classified the right knee cruciate and lateral collateral ligaments in class 2 and calculated 22 percent permanent impairment of the right lower extremity.⁵

On August 11, 2015 appellant requested reconsideration of the April 17, 2014 schedule award decision.

By decision dated November 2, 2015, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On March 7, 2016 appellant appealed to the Board. By decision dated August 26, 2016, the Board set aside the November 2, 2015 decision, finding that OWCP improperly adjudicated appellant's schedule award claim as an untimely request for reconsideration under the clear evidence of error standard and failed to issue an appropriate decision regarding appellant's claim for an increased schedule award.⁶ The Board remanded the case to OWCP to review and develop the medical evidence and issue a *de novo* decision regarding appellant's claim for a schedule award.

On remand OWCP routed the case file, the SOAF, and a series of questions to Dr. David I. Krohn, an OWCP district medical adviser (DMA) Board-certified in internal medicine, for the purposes of determining whether appellant sustained a permanent aggravation of her right knee conditions causally related to her accepted employment injury. It requested that Dr. Krohn discuss whether she sustained permanent impairment of the right lower extremity warranting a schedule award.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ *Id.* at 510.

⁶ *Supra* note 3; *see also E.T.*, Docket No. 13-1691 (issued September 25, 2013).

In an October 28, 2016 report, Dr. Krohn reported that appellant's chart was reviewed for the purpose of determining whether her accepted work-related conditions of temporary aggravation of right knee osteoarthritis and lateral meniscus derangement should be upgraded to permanent conditions for the purposes of establishing a ratable impairment to her right lower extremity. He reviewed the medical records and diagnostic testing, noting that the evidence of record was insufficient to establish that appellant's work activities caused permanent aggravation of her right knee osteoarthritis and lateral meniscus degeneration. Dr. Krohn explained that appellant's underlying conditions were caused by genetic predisposition and would have occurred with or without her employment activities which were relatively sedentary in nature. He noted that meniscal degeneration did not represent a meniscal injury, but rather reflected the process of joint degeneration that predisposes to arthritis. Dr. Krohn also noted that while the medical reports of record demonstrated evidence of lateral meniscus degeneration, diagnostic studies revealed no objective evidence of a definitive meniscal tear such that the acceptance of the claim should be expanded to include permanent aggravation of right knee lateral meniscus derangement.

Appellant also submitted a September 22, 2016 medical report from Dr. Mark A. Goldstein, an osteopathic physician. Dr. Goldstein reviewed diagnostic testing, provided findings on physical examination, and diagnosed right knee osteoarthritis.

By decision dated December 19, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish that she sustained permanent impairment of a scheduled member or function of the body. It further found that the evidence of record did not establish that her accepted conditions of temporary aggravation of right knee osteoarthritis and right lateral meniscus derangement should be accepted as permanent conditions.

By letter received on December 29, 2016, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

The hearing was held on June 19, 2017. During the hearing, appellant discussed her employment duties, which entailed walking and ascending and descending stairs, totaling approximately 1,000 steps daily. The record was held open for 30 days for submission of further medical evidence.

Following the hearing, an August 16, 2017 medical report was received from Dr. Rathin Nishikant Vora, Board-certified in internal medicine, who diagnosed right knee osteoarthritis.

By decision dated October 3, 2017, OWCP's hearing representative affirmed the December 19, 2016 decision with respect to the denial of the schedule award and denial of expansion of the acceptance of the claim.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁷ To establish causal relationship between the condition and the

⁷ O.S., Docket No. 18-1519 (issued February 7, 2019); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.⁸ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹ Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include the conditions of permanent aggravation of osteoarthritis and permanent aggravation of right lateral meniscus derangement as causally related to her federal employment duties.¹¹

In an October 28, 2016 report, Dr. Krohn, serving as a DMA, reviewed the medical records and the SOAF and discussed appellant's work-related conditions. He opined that appellant had not sustained permanent aggravation of her right knee osteoarthritis and lateral meniscus derangement warranting entitlement to a schedule award. Dr. Krohn explained that appellant's right knee osteoarthritis and meniscal degeneration developed as a result of genetic predisposition, which were unrelated to her work activities. He noted that these conditions would have developed with or without her employment activities, which were relatively sedentary in nature. Dr. Krohn further explained that meniscal degeneration was a process of joint degeneration that predisposed to arthritis.¹² He opined that permanent impairment of right knee lateral meniscus derangement should not be accepted as appellant's right knee MRI scan studies failed to provide objective evidence of a definitive meniscal tear, but rather only revealed lateral meniscus degeneration. The Board notes that Dr. Krohn's findings were supported by diagnostic studies of the right knee which suggested a possible meniscal tear rather than a definitive tear.¹³ The Board finds his report to be sufficiently detailed and well reasoned to establish that appellant sustained a temporary, rather

⁸ See 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁹ *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *James Mack*, 43 ECAB 321 (1991).

¹⁰ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *V.W.*, 58 ECAB 428 (2007).

¹¹ *T.K.*, Docket No. 16-1543 (issued March 13, 2017).

¹² *S.R.*, Docket No. 12-1098 (issued September 19, 2012).

¹³ *A.H.*, Docket No. 18-0050 (issued March 26, 2018).

than a permanent, aggravation of her preexisting right knee osteoarthritis and lateral meniscus degeneration.¹⁴

Dr. Rogachefsky's February 21, 2014 second opinion report also fails to provide support for a permanent aggravation of appellant's right knee conditions. He opined that appellant's bilateral knee conditions and bilateral degenerative arthritis were nonwork-related diagnoses/injuries and preexisting conditions. Dr. Rogachefsky explained that appellant had not experienced acute events and the repetitive work activities of walking to a printer, rising from a desk, and walking to the elevators would not have caused the bilateral knee conditions and degenerative arthritis. Given the above, this opinion does not provide support for a work-related right knee injury.¹⁵

OWCP received May 13, 2013 reports from Drs. Maghen and Norton. These reports do not establish that the claim should be accepted for a work-related permanent aggravation of right knee osteoarthritis and permanent aggravation of right lateral meniscus derangement.¹⁶ They provided a diagnosis of right knee osteoarthritis and derangement of lateral meniscus, but they did not provide a firm diagnosis of permanent aggravation of right knee osteoarthritis and derangement of lateral meniscus. The reports also failed to provide an opinion on the cause of appellant's condition. The Board has held that the claimant must submit medical evidence providing a firm diagnosis of a permanent impairment and must establish that the condition is employment related.¹⁷ Additionally, medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁸ Similarly, Drs. Goldstein and Vora diagnosed right knee osteoarthritis, but provided no opinion as to whether appellant's accepted employment injury caused a permanent aggravation of appellant's condition. Therefore these reports have no probative value.¹⁹

OWCP also received a June 3, 2015 report from Dr. Seyoum who diagnosed right leg osteoarthrosis, right lateral meniscus derangement, chondromalacia patella, and marked genu valgum and opined that these conditions were caused or aggravated by appellant's employment injury. Dr. Seyoum did not explain, however, how appellant's employment duties caused a permanent aggravation of her right knee conditions. As Dr. Seyoum did not provide a medically sound explanation of how the specific employment factors, physiologically, caused or aggravated

¹⁴ *P.G.*, Docket No. 17-0900 (issued December 7, 2017).

¹⁵ *G.M.*, Docket No. 15-1288 (issued September 18, 2015).

¹⁶ See *L.M.*, Docket No. 14-973 (issued August 25, 2014); *R.G.*, Docket No. 14-113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-548 (issued November 16, 2012).

¹⁷ See *Richard A. Bennett*, Docket No. 92-1663 (issued September 27, 1993).

¹⁸ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁹ *Id.*

appellant's right knee conditions, his reports are insufficient to establish expansion of the acceptance of the claim.²⁰

The Board therefore finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include additional conditions causally related to the accepted factors of federal employment.²¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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.²² 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 A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.²³

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).²⁴ 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.²⁵

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function as a result of any employment injury.²⁶ 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

²⁰ *T.G.*, Docket No. 14-751 (issued October 20, 2014).

²¹ *See T.M.*, Docket No. 18-1418 (issued February 7, 2019).

²² 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

²³ 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

²⁴ *See Federal (FECA) Procedure Manual, Part 2 -- Claims, Schedule Awards and Permanent Disability Claims, Chapter 2.808.6a* (March 2017); *see also Part 3 -- Medical, Schedule Awards, Chapter 3.700, Exhibit 1* (January 2010).

²⁵ *Isidoro Rivera*, 12 ECAB 348 (1961).

²⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

(date of MMI), 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*.²⁷

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 impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.²⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.²⁹

Dr. Krohn provided a well-reasoned report based on a proper factual and medical history and included detailed findings and rationale supporting his opinion. In his October 28, 2016 report, he opined that appellant did not sustain a permanent aggravation of her right knee osteoarthritis and lateral meniscus derangement warranting entitlement to a schedule award. Dr. Krohn provided a detailed discussion explaining that appellant's right knee osteoarthritis and meniscal degeneration developed as a result of genetic predisposition which were unrelated to her work activities. He provided support for his assertions based on objective clinical findings. Dr. Krohn referenced a right knee MRI scan study, which did not provide support for a meniscus tear, describing the meniscal degeneration as a process of joint degeneration that predisposed to arthritis. As Dr. Krohn explained that appellant sustained a temporary rather than a permanent aggravation of her preexisting right knee osteoarthritis and lateral meniscus degeneration, his report establishes that she had no permanent impairment of a scheduled member or function of the body warranting a schedule award.³⁰

In support of her schedule award claim, appellant submitted a June 3, 2015 impairment rating from Dr. Seyoum who opined that she sustained 22 percent permanent impairment of the right lower extremity. The Board finds that the report of Dr. Seyoum is insufficient to establish appellant's schedule award claim.³¹ The Board notes that Dr. Seyoum based his impairment rating on the diagnoses of right knee anterior cruciate and lateral collateral ligament tears, conditions which has not been accepted as employment related.³² As such, his Dr. Seyoum's opinion is insufficient to overcome the weight accorded to DMA Dr. Krohn.

²⁷ FECA Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

²⁸ *Id.* at Chapter 2.808.6(e) (March 2017).

²⁹ *D.T.*, Docket No. 17-0102 (issued April 13, 2017).

³⁰ *M.J.*, Docket No. 13-598 (issued May 8, 2013).

³¹ *K.S.*, Docket No. 15-1082 (issued April 18, 2017).

³² *R.W.*, Docket No. 15-1121 (issued August 12, 2015).

The other medical evidence submitted, including the reports of Drs. Goldstein and Vora, do not address the issue of permanent impairment in conformance with the sixth edition of the A.M.A., *Guides* and therefore lack probative value on the issue of permanent impairment.³³ The Board finds that appellant has not met her burden of proof to establish her schedule award claim.³⁴

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 met her burden of proof to establish that acceptance of her claim should be expanded to include the conditions of permanent aggravation of right knee osteoarthritis and permanent aggravation of right lateral meniscus derangement as causally related to the accepted June 20, 2011 employment injury. The Board further finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body warranting a schedule award.

³³ See *M.J.*, Docket No. 17-1776 (issued December 19, 2018).

³⁴ *V.W.*, Docket No. 09-2026 (issued February 16, 2010); *L.F.*, Docket No. 10-343 (issued November 29, 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 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