

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 17, 1995 appellant, then a 39-year-old letter carrier, injured his right knee while in the performance of duty.³ OWCP accepted his traumatic injury claim for right knee strain and right knee lateral meniscus tear. On February 15, 1996 appellant underwent a right knee partial lateral meniscectomy and resection of hypertrophic synovium. His surgeon, Dr. Irvin A. Guterman, released appellant to resume his full-time, regular duties, effective September 30, 1996.⁴

On December 3, 2002 OWCP granted appellant a schedule award for two percent permanent impairment of his right lower extremity pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ The award was based on appellant's partial lateral meniscectomy.⁶ The Board subsequently set aside the December 3, 2002 schedule award and remanded the case to OWCP for further medical development.⁷

On December 23, 2003 OWCP granted appellant a schedule award for eight percent permanent impairment of the right lower extremity. The award was based on a finding of eight percent impairment due to unilateral leg muscle (thigh) atrophy under Table 17-6, page 530.⁸

On October 17, 2006 appellant filed a claim for an increased schedule award (Form CA-7). He also submitted medical evidence from his treating physicians supporting increased impairment.

By decision dated May 14, 2008, OWCP denied appellant's claim for an additional schedule award, finding that the medical evidence then of record did not establish permanent

² Docket No. 16-1818 (issued December 28, 2017); Docket No. 15-1502 (issued April 12, 2016); Docket No. 12-1191 (issued November 20, 2012); Docket No. 08-1651 (issued December 5, 2008); and Docket No. 03-1006 (issued September 29, 2003).

³ Appellant tripped in a hole and injured his right knee.

⁴ Dr. Guterman is Board-certified in orthopedic surgery.

⁵ A.M.A., *Guides* (5th ed. 2001).

⁶ Table 17-33, A.M.A., *Guides* 546 (5th ed. 2001).

⁷ Docket No. 03-1006 (issued September 29, 2003).

⁸ A.M.A., *Guides* (5th ed. 2001). As appellant had already received compensation for two percent right lower extremity permanent impairment, OWCP only paid him for an additional six percent impairment. OWCP issued an amended decision on March 10, 2004 explaining the offset, and clarifying that the latest schedule award was for a total eight percent right lower extremity permanent impairment, not an additional eight percent.

impairment greater than the eight percent right lower extremity permanent impairment previously awarded.

Appellant subsequently appealed to the Board. By decision dated December 5, 2008, the Board affirmed OWCP's May 14, 2008 decision.⁹

On November 8, 2010 appellant again filed a claim for an additional schedule award (Form CA-7).

In a March 5, 2012 decision, OWCP denied appellant's claim for an additional schedule award under the sixth edition of the A.M.A., *Guides*,¹⁰ which the Board affirmed in a November 20, 2012 decision.¹¹

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

In support of his claim, appellant submitted a report dated October 21, 2013, wherein Dr. Guterman determined that appellant had 11 percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. The rating included impairment due to appellant's right knee partial lateral meniscectomy (three percent) and muscle atrophy (eight percent). OWCP's district medical adviser (DMA) disagreed in part, and found only three percent right lower extremity permanent impairment due to appellant's partial lateral meniscectomy.¹²

By decision dated November 10, 2014, OWCP denied appellant's claim for an additional schedule award.

Appellant timely requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. He also submitted a December 2, 2014 impairment rating from Dr. Guterman, who found a combined 10 percent right lower extremity permanent impairment due to appellant's meniscectomy (3 percent) and primary knee joint arthritis (7 percent).¹³

By decision dated June 19, 2015, OWCP's hearing representative affirmed the November 10, 2014 decision. She found that, right knee degenerative changes (arthritis) was not an accepted condition, and therefore, Dr. Guterman's December 2, 2014 impairment rating had not warranted further review.¹⁴

⁹ Docket No. 08-1651 (issued December 5, 2008).

¹⁰ A.M.A., *Guides* (6th ed. 2009).

¹¹ Docket No. 12-1191 (issued November 20, 2012).

¹² Table 16-3, Knee Regional Grid.

¹³ A.M.A., *Guides* 509, 511 (6th ed. 2009).

¹⁴ The hearing representative also noted that Dr. Guterman had not provided x-ray evidence of three millimeter (mm) joint space narrowing or explain how the August 17, 1995 employment injury either caused or contributed to appellant's right knee degenerative joint disease.

Appellant appealed to the Board. By decision dated April 12, 2016, the Board set aside the June 19, 2015 decision and remanded the case for further medical development as OWCP had neglected to route Dr. Guterman's December 2, 2014 impairment rating to a DMA for review.¹⁵

On remand, a DMA found the record insufficient to establish permanent impairment due to right knee arthritis.¹⁶ Based on the right knee lateral meniscal tear, he found two percent right lower extremity permanent impairment.¹⁷

By decision dated August 10, 2016, OWCP denied appellant's claim for an additional schedule award.

Appellant appealed to the Board. By decision dated December 28, 2017, the Board set aside OWCP's August 10, 2016 decision and remanded the case to OWCP to refer him for a second opinion evaluation, as previously recommended by the DMA.¹⁸

On March 8, 2018 OWCP referred appellant, the case record, and a statement of accepted facts (SOAF) to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated April 10, 2018, Dr. DiLallo reviewed the record, including the SOAF, provided examination findings, and also reviewed recent right knee x-rays dated March 30, 2018. With respect to right knee arthritis, he noted that the latest x-ray revealed joint space measurements for the medial (5.7 mm), lateral (5.6 mm), and patellofemoral (5.6 mm) joints that exceeded the 3 mm or less cartilage interval required for an arthritis-based impairment rating.¹⁹ Dr. DiLallo found two percent right lower extremity permanent impairment based on the diagnosis of partial lateral meniscectomy.²⁰ The default rating for the class 1 diagnosis was two percent. Dr. DiLallo assigned a grade modifier of 1 for functional history (GMFH) based on appellant's antalgic gait with a limp.²¹ He also assigned a grade modifier of 1 for physical examination (GMPE).²² Lastly,

¹⁵ Docket No. 15-1502 (issued April 12, 2016).

¹⁶ The DMA recommended that OWCP refer appellant for a second opinion examination to properly address the extent of lower extremity impairment due to right knee arthritis.

¹⁷ *Supra* note 12.

¹⁸ Docket No. 16-1818 (issued December 28, 2017).

¹⁹ *Supra* note 12.

²⁰ A.M.A., *Guides* 509 (6th ed. 2009).

²¹ Table 16-6 at 516.

²² Upon physical examination, Dr. DiLallo reported that measurements of appellant's bilateral thighs at six inches above the patella revealed 69.5 centimeter (cm) on the right side and 67.5 cm on the left side. He further commented that appellant had prior surgery on the left side, and thus, it was not an appropriate comparison. Dr. DiLallo assigned a GMPE of zero (0). Table 16-7 at 517.

Dr. DiLallo assigned a grade modifier of zero for clinical studies (GMCS).²³ Based upon his net adjustment calculation, he found two percent right lower extremity permanent impairment.²⁴

By decision dated July 30, 2018, OWCP denied appellant's claim for an additional schedule award based on Dr. DiLallo's second opinion evaluation.

LEGAL PRECEDENT

The schedule award provisions of FECA,²⁵ and its implementing federal regulations,²⁶ 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. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.²⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.²⁸

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, 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 509.²⁹ After the class of diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using GMFH, GMPE, and GMCS. The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.³⁰ Under Chapter 2.3, evaluators are directed to provide rationale for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.³¹

²³ Table 16-8 at 519.

²⁴ In a supplemental report dated May 8, 2018, Dr. DiLallo clarified that the two percent rating was not in addition to the eight percent permanent impairment previously awarded.

²⁵ 5 U.S.C. § 8107.

²⁶ 20 C.F.R. § 10.404.

²⁷ *Id.* at § 10.404(a).

²⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

²⁹ *See supra* note 12509-11 (6th ed. 2009).

³⁰ A.M.A., *Guides* 515-22 (6th ed. 2009).

³¹ *Id.* at 23-28.

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP procedures for a schedule award claim provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of permanent impairment.³² The Board's should ask the DMA to verify the calculations of the attending physician or second opinion examiner and determine the percentage of impairment based on the standards outlined in the A.M.A., *Guides*.³³

The Board finds that OWCP neglected to refer Dr. DiLallo's April 10, 2018 second opinion examination report to a DMA for review. The Board's procedures specifically provide that, after the second opinion is received, the case should be referred to the DMA for review.³⁴ Dr. DiLallo's April 10, 2018 report, however, was not forwarded to a DMA for review, and thus, OWCP did not comply with its procedures.³⁵ For this reason, the Board will set aside the July 30, 2018 decision and remand the case to OWCP.

On remand, OWCP should have a DMA review Dr. DiLallo's April 10, 2018 impairment rating and provide an opinion concerning the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides*. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

³² *Supra* note 28 at Chapter 2.808.6f (March 2017).

³³ *Id.*

³⁴ *Id.* at Chapter 2.808.6e.

³⁵ *See D.P.*, Docket No. 16-1908 (issued May 22, 2017).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: May 22, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board