

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

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**E.M., Appellant** )  
)

**and** )

**U.S. POSTAL SERVICE, KILMER  
PROCESSING & DISTRIBUTION CENTER,  
Edison, NJ, Employer** )  
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**Docket No. 19-0664  
Issued: November 19, 2019**

*Appearances:*  
*Appellant, pro se*  
*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On February 4, 2019 appellant filed a timely appeal from a December 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has greater than 37 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

**FACTUAL HISTORY**

On April 18, 2007 appellant filed a notice of recurrence (Form CA-2a) alleging that on March 2, 2007 he sustained a recurrence of a medical condition causally related to his July 22,

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

1992 employment injury.<sup>2</sup> He noted that he stopped work on March 6, 2007 due to right knee pain and loss of range of motion (ROM). On July 17, 2007 OWCP accepted appellant's claim for recurrence of a medical condition, post-traumatic arthropathy right lower extremity.

On December 3, 2007 Dr. James M. Lee, an orthopedic surgeon and appellant's attending physician, performed a second right knee arthroscopy.<sup>3</sup>

In a March 22, 2008 letter, OWCP informed appellant that his April 18, 2007 claim should have been developed as a new traumatic injury claim, and that he was entitled to 45 days of continuation of pay.

On November 19, 2010 Dr. Lee performed an additional right knee arthroscopy.

On February 2, 2011 appellant filed a schedule award claim (Form CA-7). By decision dated December 28, 2012, OWCP granted him a schedule award for 30 percent permanent impairment of the right lower extremity due to his accepted right knee conditions. The period of the award was from September 30, 2011 through May 26, 2013.

On November 1, 2013 Dr. Lee recommended a total right knee replacement, which was performed on May 14, 2014 by Dr. Louis C. Almekinders, a Board-certified orthopedic surgeon. In a report dated October 20, 2014, he found that appellant had reached maximum medical improvement (MMI). On October 27, 2014 appellant filed an additional schedule award claim (Form CA-7).<sup>4</sup>

In a report dated March 29, 2016, Dr. Almekinders found that as a result of the total knee replacement appellant had 31 percent permanent impairment of the right lower extremity. On June 6, 2017 OWCP referred Dr. Almekinders' March 29, 2016 report to the district medical adviser (DMA), Dr. Michael M. Katz, a Board-certified orthopedic surgeon, for review and application of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> In a June 6, 2017 report, Dr. Almekinder determined that appellant had 25 percent permanent impairment of his right lower extremity due to his total knee replacement and therefore was not entitled to an additional schedule award.

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<sup>2</sup> Appellant has a previously accepted claim under OWCP File No. xxxxxx054 for right knee contusion, left wrist and hand contusion, and right leg traumatic arthropathy sustained when he tripped over a coworker while in the performance of duty on July 22, 1992.

<sup>3</sup> Appellant first underwent right knee arthroscopy on January 4, 1993.

<sup>4</sup> On October 3, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that on March 3, 2015 he sustained a recurrence of disability causally related to his March 2, 2017 employment injury. He alleged that the employing establishment failed to provide him with modified duty in keeping with his employment-related work restrictions. On November 27, 2015 appellant accepted a modified-duty position at the employing establishment. By decision dated February 23, 2016, OWCP determined that appellant's modified-duty position as a manager of distribution operations fairly and reasonably represented his wage-earning capacity. It reduced his wage-loss compensation benefits to zero based on his actual earnings in this position.

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

By decision dated September 21, 2017, OWCP denied appellant's claim for an additional schedule award finding that he had no more than 30 percent permanent impairment of his right knee for which he had previously received a schedule award.

On August 15, 2018 appellant requested reconsideration of the September 21, 2017 schedule award denial.

On September 26, 2018 OWCP referred appellant for a second opinion evaluation with Dr. Lawrence N. Larabee, Jr., a Board-certified orthopedic surgeon, and requested that he evaluate appellant's permanent impairment for schedule award purposes in accordance with the A.M.A., *Guides*. In his October 24, 2018 report, Dr. Larabee described appellant's history of injury and listed his right knee surgeries. He described appellant's findings on physical examination including an audible "pop" of the iliotibial (IT) band as it rubbed across the prosthesis. Appellant reported that this was painful and caused him to stop walking after 200 yards. He was unable to fully extend his right knee by 10 degrees and exhibited flexion of 110 degrees, internal rotation 5 degrees, and external rotation 5 degrees based on three ROM tests. In his left, unaffected knee, appellant had full extension as well as hyperextension of 5 degrees and flexion of 130 to 135 degrees. Dr. Larabee diagnosed status post right knee arthroplasty and multiple knee surgeries with loss of ROM of the right knee. He reported that appellant's date of MMI was October 20, 2014.

Dr. Larabee provided a November 20, 2018 addendum report utilizing the diagnosis-based impairment (DBI) method to determine impairment and found that appellant had 37 percent permanent impairment of the right lower extremity pursuant to the A.M.A., *Guides*. Under Table 16-3, Knee Regional Grid, page 511 of the A.M.A., *Guides*, Dr. Larabee identified the diagnosis of fair result of the total knee replacement a class 3 impairment with a default rating of 37 percent. He assigned grade modifier of 3 for functional history (GMFH) under Table 16-6, page 516 due to appellant's difficulty walking. Under Table 16-7, page 517, Dr. Larabee assigned a grade modifier 3 for physical examination (GMPE) based on appellant's loss of range of motion. He assigned grade modifier 3 for clinical studies (GMCS) in accordance with Table 16-8, page 591 as the clinical studies confirmed the diagnosis of severe pathology. Using the net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he calculated that appellant had a net adjustment of 0, which equaled a grade C or 37 percent impairment rating.

On November 27, 2018 OWCP referred Dr. Larabee's report to the DMA. In a report dated November 27, 2018, the DMA agreed with Dr. Larabee's impairment rating for total knee replacement with a fair result and a default value of 37 percent permanent impairment.<sup>6</sup> He found that Dr. Larabee accurately determined appellant's GMFH<sup>7</sup> and GMCS at 3.<sup>8</sup> The DMA further noted that the GMPE was not applicable as it was used to rate the class of the total knee replacement.<sup>9</sup> After applying the net adjustment formula, he determined that appellant had 37

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<sup>6</sup> A.M.A., *Guides* 511, Table 16-3.

<sup>7</sup> *Id.* at 516, Table 16-6.

<sup>8</sup> *Id.* at 519, Table 16-8.

<sup>9</sup> *Id.* at 521.

percent permanent impairment of his right lower extremity entitling him to a schedule award. As appellant had previously received schedule awards totaling 30 percent of the right lower extremity due to his right knee conditions, the DMA found that appellant was entitled to an additional award of 7 percent permanent impairment of the right lower extremity. He determined that the date of MMI was October 24, 2018 the date of Dr. Larabee's examination upon which impairment was based.

By decision dated December 20, 2018, OWCP granted appellant a schedule award for a total of 37 percent impairment of his right lower extremity which constituted an additional 7 percent increase to his previous schedule awards of 30 percent permanent impairment of the right lower extremity.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>10</sup> and its implementing federal regulations<sup>11</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>12</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>13</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>14</sup> 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>15</sup>

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.<sup>16</sup> 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 the GMFH, GMPE, and GMCS. The net

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<sup>10</sup> 5 U.S.C. § 8107.

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> *J.H.*, Docket No. 18-1207 (issued June 20, 2019); *K.P.*, Docket No. 18-0777 (issued November 13, 2018); *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

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

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>15</sup> *Id.*; *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>16</sup> A.M.A., *Guides* 509-11 (6<sup>th</sup> ed. 2009).

adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>17</sup> Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 37 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

In a November 20, 2018 report, Dr. Larabee, OWCP's second opinion physician, found that appellant had 37 percent impairment of his right lower extremity due to a fair result of his total knee replacement. He utilized the DBI method for rating appellant's permanent impairment. Under Table 16-3, Knee Regional Grid, page 511 of the A.M.A., *Guides*, Dr. Larabee identified the diagnosis of total knee replacement as a class 3 impairment with default rating of 37 percent. He applied GMFH, GMPE, and GMCS of 3 to the net adjustment formula, which resulted in a net adjustment of 0, which equaled 37 percent permanent impairment of the right lower extremity.

On November 27, 2018 Dr. Katz, a DMA, noted appellant's accepted conditions and reviewed the medical record, including the clinical findings of Dr. Larabee. He agreed with Dr. Larabee's 37 percent right lower extremity impairment rating, but noted an error in the application of the net adjustment formula in that GMPE should not have been included as it was used to rate the class of the total knee replacement.<sup>19</sup> This error did not impact the final grade of the impairment.

The DMA determined that MMI was October 24, 2018 the date of Dr. Larabee's examination upon which the impairment rating was based. On appeal appellant contested the date of MMI asserting that it should be October 20, 2014 and that compensation be recalculated to reflect the period of award from October 20, 2014. It is well settled that MMI arises at the point at which an injury has stabilized and will not improve further.<sup>20</sup> The Board has also noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in a payment of less compensation benefits.<sup>21</sup> The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the medical evaluation which is accepted as definitive by OWCP.<sup>22</sup> Payment of an increased award based on additional impairment may be considered at a later date.<sup>23</sup> Dr. Larabee's

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<sup>17</sup> *Id.* at 515-22.

<sup>18</sup> *Id.* at 23-28.

<sup>19</sup> *Id.* at 521.

<sup>20</sup> *Supra* note 13 at Chapter 3.700.3.1.a(1)(b).

<sup>21</sup> *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *Mark A. Halloway*, 55 ECAB 321, 325 (2004).

<sup>22</sup> *Id.*; *supra* note 13 at Chapter 2.808.7.b.

<sup>23</sup> *Supra* note 19.

report formed the basis of the most recent definitive permanent impairment rating. The Board therefore finds that appellant reached MMI for the calculation of this award on October 24, 2018 and that he has not met his burden of proof to establish entitlement to an increased schedule award.<sup>24</sup>

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 his burden of proof to establish greater than 37 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2019  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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<sup>24</sup> *Supra* note 20.