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

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| **G.S., Appellant** | ) | |
| **and** | ) | **Docket No. 20-0210** |
| | ) | **Issued: December 31, 2020** |
| **DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Reno, NV, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

### ***JURISDICTION***

On November 4, 2019 appellant, through counsel, filed a timely appeal from a September 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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.*

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish permanent impairment of his right lower extremity, warranting a schedule award.

## ***FACTUAL HISTORY***

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

On June 18, 2012 appellant, then a 65-year-old aviation safety inspector, filed a traumatic injury claim (Form CA-1) alleging that on that date he twisted his right knee when getting up from his chair while at work. He did not stop work. On March 22, 2013 OWCP accepted appellant's claim for sprain of the right knee and lateral collateral ligament on the right.[4]

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

On February 25, 2016 OWCP denied appellant's schedule award claim. It found that the second opinion physician, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, provided a rationalized opinion and the medical evidence did not support permanent impairment of appellant's right knee, causally related to the accepted employment injury.

By decision dated November 14, 2016, an OWCP hearing representative affirmed the February 25, 2016 decision. On January 3, 2017 appellant appealed to the Board.

By decision dated July 25, 2018, the Board affirmed the November 14, 2016 decision.[5] The Board found that the opinion of Dr. Swartz, the second opinion physician, was entitled to the weight of the evidence.[6] The Board also found that the opinion of Dr. Michael E. Hebrard, Board-certified in physical medicine and rehabilitation, was insufficient to establish that appellant had a permanent impairment of a scheduled member or function of the body for schedule award purposes. The Board noted that Dr. Hebrard diagnosed osteoarthritis of the right knee, which was not an accepted condition, that he had not provided an impairment rating for the accepted condition of sprain of the right knee, lateral collateral ligament on the right, and that he had not explained how appellant's osteoarthritis was related to the accepted work incident. As such, the Board found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to his accepted medical condition.

[3] Docket No. 17-0481 (issued July 25, 2018).

[4] The record reflects that appellant had a nonwork-related, preexisting right knee condition. Additionally, appellant had a prior work-related right lower extremity claim under OWCP File No. xxxxxx825. In that traumatic injury claim, he alleged that on June 1, 2011 while climbing and walking down a mountain range of 6,800 feet to investigate an aircraft accident, he strained his right lower calf. The claims have not been administratively combined.

[5] *Supra* note 2.

[6] *D.B.*, Docket No. 17-1444 (issued January 11, 2018).

On June 21, 2019 appellant, through counsel, requested reconsideration. He submitted another Form CA-7 schedule award claim and forwarded new medical evidence.

A December 12, 2018 report from Dr. Mark A. Seldes, a Board-certified family practitioner, noted appellant's history of injury, medical treatment, and physical examination findings. He indicated that on June 18, 2012 appellant "stood, went to walk and his foot or toe caught on the carpet while he was walking and he fell down and twisted his right knee. The patient states that he struggled to try to standup." Dr. Seldes noted that Dr. Swartz, the second opinion physician, "left out the incident, in which [appellant] stood up from his chair, tripped forward and fell, twisting his right knee, then becoming unable to stand…." He indicated that he disagreed with Dr. Swartz that the work incident caused only a temporary aggravation and opined that a temporary aggravation was an exacerbation. Dr. Seldes explained that appellant's knee never resolved to the baseline and opined that appellant had an acute injury on June 18, 2012, that caused a permanent aggravation of his underlying osteoarthritis. He also explained that age-related osteoarthritic conditions would normally affect both knees, but appellant had a valgus deformity of 15 degrees on the right knee not present on the left knee, and that Dr. Swartz did not discuss the valgus deformity. Dr. Seldes opined that the "injury on [June 18, 2012], caused an aggravation injury to [appellant's] right knee. It has progressed."

Dr. Seldes provided one set of range of motion measurements for the right knee and diagnosed severe right knee osteoarthritis, lateral meniscal tear of the right knee joint, and medial meniscal tear in the right knee joint. He indicated that appellant was placed on crutches and since the injury had to wear a brace as well as use a cane to help with his ambulation. Dr. Seldes explained that this was consistent with the magnetic resonance imaging scan showing complete cartilage loss in the lateral compartment in the right knee. He found that appellant reached maximum medical improvement on December 12, 2018.

Dr. Seldes referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[7] and noted that Table-16-3 at page 511, Knee Regional Grid, severe right knee osteoarthritis with no cartilage interval in the lateral compartment, resulted in a class IV class of diagnosis (CDX) with a grade C severity, and 50 percent right lower extremity permanent impairment. He noted that he used a grade modifier for functional history (GMFH) of 3 because appellant had pain and instability in the right knee and had to wear a brace and use a cane for ambulation. Dr. Seldes also noted a grade modifier for clinical studies (GMCS) was not used and he used a grade modifier for physical examination (GMPE) of 3 because appellant had severe palpatory findings with observed moderate or greater abnormalities. He used the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX)[8] and found that appellant had 50 percent permanent impairment of the right lower extremity due to the severe osteoarthritis and zero millimeter cartilage in the lateral compartment to the right knee.

OWCP also received a September 27, 2018 report from Dr. Hebrard who also disagreed with the second opinion physician report of Dr. Swartz. Dr. Hebrard noted that Dr. Swartz

[7] A.M.A., *Guides* (6th ed. 2009).

[8] *Id*. at 521.

indicated that the osteoarthritis of the right knee was preexisting and the June 18, 2012 incident "temporarily aggravated [appellant's] right knee." He opined that the aggravation caused by the work incident had not resolved and that, were it not for the work injury, the degenerative condition of appellant's right knee would not have been accelerated.

By decision dated September 5, 2019, OWCP denied modification of the July 25, 2018 decision.

## ***LEGAL PRECEDENT***

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.[9] 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.[10] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[11]

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*).[12] Under the sixth edition, the evaluator identifies the impairment for the CDX, which is then adjusted by GMFH, GMPE, and GMCS.[13] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[14] It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[15] However, where there is no

[9] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[10] *Id*. at § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[12] A.M.A., *Guides* (6th ed. 2009), section 1.3, *The International Classification of Functioning, Disability and Health* (*ICF*): A Contemporary Model of Disablement.

[13] *Id.* at 493-556.

[14] *Id*. at 521.

[15] *T.W.*, Docket No. 16-1818 (issued December 28, 2017); *see B.M.*, Docket No. 09-2231 (issued May 14, 2010); *supra* note 11 at Chapter 3.700.3(a)(3) (January 2010); *Dale B. Larson*, 41 ECAB 481 (1990); *Beatrice L. High*, 57 ECAB 329 (2006) (OWCP's procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function).

demonstrated permanent impairment due to an accepted workplace injury, the claim is not ripe for consideration of any preexisting impairment.[16]

## ***ANALYSIS***

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right lower extremity, warranting a schedule award.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its July 25, 2018 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.[17]

In a December 12, 2018 report, Dr. Seldes provided an impairment rating for severe osteoarthritis, however, he did not provide an impairment rating for the accepted condition of sprain of the right knee, lateral collateral ligament on the right. Therefore, this report is insufficient to establish permanent impairment of an accepted condition in the claim.[18]

In his September 27, 2018 report, Dr. Hebrard did not provide an impairment rating related to appellant's accepted right knee condition. Thus, this report is insufficient to establish entitlement to a schedule award.[19]

As appellant has not submitted medical evidence sufficient to establish permanent impairment of his right lower extremity due to his accepted condition, the Board finds that he has not established entitlement to a schedule award.[20]

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 permanent impairment of his right lower extremity, warranting a schedule award.

[16] *M.F.*, Docket No. 16-1089 (issued December 14, 2016); *Thomas P. Lavin*, 57 ECAB 353 (2006).

[17] *See M.D.*, Docket No. 20-0007 (issued May 13, 2020); *D.B.*, *supra* note 6.

[18] *See supra* note 17.

[19] *Id*.

[20] *See J.D.*, Docket No. 19-1207 (issued February 3, 2020); *J.A.*, Docket No. 17-1846 (issued March 27, 2018).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board