United States Department of Labor
Employees' Compensation Appeals Board

N.L., Appellant	)	
and	)	**Docket No. 19-1660**
	)	**Issued: January 26, 2021**
DEPARTMENT OF THE NAVY, NAVY FACILITIES ENGINEERING COMMAND, Colts Neck, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 1, 2019 appellant, through counsel, filed a timely appeal from a February 13, 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 over the merits of the case.[3]

[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.*

[3] The Board notes that following the February 13, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 15 percent permanent impairment of his right lower extremity, for which he previously received schedule award compensation.

FACTUAL HISTORY

This case has previously been before the Board.[4] 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 July 28, 2003 appellant, then a 48-year-old welder/boiler plant operator, filed a traumatic injury claim (Form CA-1), alleging that he injured his right knee on July 23, 2003 when kneeling on the floor of a box car while in the performance of duty. OWCP accepted the claim for right knee sprain, effusion of joint of the right lower leg, chondromalacia of right patella, aggravation of osteoarthritis of right leg, and tear of right medial cartilage or meniscus. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of September 18, 2003, and on the periodic rolls as of May 16, 2004.

On May 6, 2004 Dr. Marc S. Zimmerman, a Board-certified orthopedic surgeon, performed arthroscopic and chondroplastic surgery.

On June 3, 2011 appellant filed a schedule award claim (Form CA-7) and submitted a January 20, 2011 report in which Dr. David Weiss, an attending osteopath Board-certified in orthopedic surgery, advised that appellant had reached maximum medical improvement (MMI). Dr. Weiss noted his review of medical records and described right knee examination findings. He advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[5] under Table 16-3, Knee Regional Grid, appellant had a Class 2 right knee impairment, for grade IV chondromalacia, with a default rating of 20 percent. Dr. Weiss found a grade modifier for functional history (GMFH) of 3, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 4. He applied the net adjustment formula and concluded that appellant had 24 percent permanent impairment of the right lower extremity.

In a July 20, 2011 report, Dr. Craig Uejo, Board-certified in preventive and occupational medicine serving as a district medical adviser (DMA) disagreed with Dr. Weiss' impairment rating. He advised that appellant's rating should be based on a diagnosis of patellofemoral arthritis, instead of chondromalacia. Dr. Uejo found that, using the findings of a November 17, 2009 right knee magnetic resonance imaging (MRI) scan, under Table 16-3 for this diagnosis, appellant had a Class 1 rating, which had a default score of three percent.

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[4] Docket No. 12-1209 (issued December 4, 2012).

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

By decision dated July 21, 2011, OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity, for a total of 8.64 weeks, to run from January 20 to March 21, 2011.

On July 27, 2011 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. He submitted additional evidence including a November 8, 2011 x-ray that demonstrated moderate patellofemoral arthritis with no significant joint space narrowing within the medial or lateral compartments and minimal chondrocalcinosis within the medial compartment. No fracture, dislocation, or large suprapatellar joint effusion was identified.

In an updated November 15, 2011 report, Dr. Weiss provided additional explanation and advised that appellant's impairment right lower extremity rating remained at 24 percent.

By decision dated January 18, 2012, an OWCP hearing representative affirmed the July 21, 2011 schedule award decision. He found the evidence submitted subsequent to the hearing was repetitive in nature and that Dr. Uejo's report constituted the weight of the medical evidence.

On May 9, 2012 appellant, through counsel, filed an appeal with the Board. By decision dated December 4, 2012, the Board found the case not in posture for decision. The Board noted that, after appellant submitted additional evidence, OWCP failed to forward this to its DMA for review. The Board remanded the case to OWCP to forward the medical evidence submitted to an appropriate DMA for an opinion on the degree of appellant's right lower extremity impairment, to be followed by a merit decision regarding whether appellant was entitled to an increased schedule award.[6]

Following the Board's remand, in a February 17, 2013 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as DMA, agreed with Dr. Uejo that appellant had three percent right lower extremity permanent impairment. By decision dated February 20, 2013, OWCP found that appellant was not entitled to an increased schedule award.

On February 25, 2013 appellant, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. By decision dated April 8, 2013, a hearing representative noted that, after preliminary review, the case was not in posture for decision. She found that the evidence of record required further development regarding appellant's accepted conditions. The hearing representative remanded the case for OWCP to schedule a second opinion impairment evaluation.[7]

OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 14, 2013 report, Dr. Black noted his review of the record, including the statement of accepted facts (SOAF), and provided examination findings. He advised that under Table 16-3 of the A.M.A., *Guides*, appellant had three percent right lower extremity permanent impairment for a diagnosis of patellofemoral arthritis. In a June 4, 2013 report, a DMA

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[6] *Supra* note 4.

[7] In 2013 appellant relocated from Pennsylvania to Florida.

agreed with Dr. Black's conclusion that appellant had three percent right lower extremity permanent impairment.[8]

By decision dated June 6, 2013, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the three percent previously awarded.

On June 17, 2013 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated August 6, 2013, a hearing representative noted that, after preliminary review, the case was not in posture for decision. She remanded the case for OWCP to ask its DMA to provide full calculations and explanation of the rating found, to be followed by a *de novo* decision.

In an August 8, 2013 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Black's report. He provided calculations under Table 16-3 of the A.M.A., *Guides* for a diagnosis of patellofemoral arthritis with full-thickness deficit, appellant had three percent right lower extremity permanent impairment.

By decision dated August 12, 2013, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the three percent previously awarded.

On August 19, 2013 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review that was held on January 16, 2014. At the conclusion of the hearing, the hearing representative issued a summary decision, contained in the hearing transcript. She found that a conflict in medical evidence had been created between the opinions of Dr. Weiss and Dr. Black and remanded the case for OWCP to schedule an impartial evaluation regarding the degree of appellant's permanent impairment of his right lower extremity.[9]

On March 4, 2014 OWCP referred appellant to Dr. Robert B. McShane, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[10] In a March 24, 2014 report, Dr. McShane noted the history of injury and his review of the medical record, including diagnostic studies. He noted that an August 14, 2003 right knee MRI scan revealed degenerative changes at the patellofemoral compartment, which were seen again during the 2004 arthroscopic surgery and MRI scans dated November 27, 2004 and January 24, 2007.[11] Dr. McShane described lower extremity physical examination findings and indicated that appellant's current complaints were the sequelae of significant preexisting degenerative process. He advised that he concurred with the opinion of Dr. Black rather than Dr. Weiss. Dr. McShane referenced Table 16-3 of the A.M.A., *Guides,* and found that appellant had grade 1 full-thickness patellofemoral arthritis. He applied

[8] The DMA's signature is illegible.

[9] In correspondence dated January 31, 2014, the hearing representative referenced a new report from Dr. Becan and indicated that her summary decision began on page 22, line 22 of the January 16, 2014 hearing transcript. However, a review of the hearing transcript indicates that no additional exhibits were received and that the summary decision begins on page 14, line 22 of the transcript.

[10] The record contains an ME023 form and bypass log.

[11] Copies of the May 6, 2004 operative report and MRI scans dated August 14, 2003, November 17, 2004, and January 24, 2007 are found in the case record.

the net adjustment formula and concluded that appellant had three percent right lower extremity permanent impairment.

By decision April 8, 2014, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the three percent previously awarded.

On April 14, 2014 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review.

June 14, 2014 x-rays of appellant's right knee demonstrated medial compartment and patellofemoral compartment osteoarthritis with joint space narrowing.

Following an August 14, 2014 hearing, counsel submitted a September 8, 2014 report in which Dr. Weiss noted that he had reviewed June 16, 2014 x-rays which showed bone-on-bone changes.[12] He reiterated that, under Table 16-3 of the A.M.A., *Guides*, with grade modifiers, appellant had 24 percent permanent impairment of the right lower extremity. Dr. Weiss did not reexamine appellant.

By decision dated October 27, 2014, the hearing representative found the case not in posture for decision. He noted that Drs. Weiss, Black, and McShane all calculated impairment using the same diagnosed condition, patellofemoral arthritis, but whereas Drs. Black and McShane identified a full-thickness articular cartilage defect with a default range of 1 to 5 percent, Dr. Weiss determined that no cartilage interval remained, yielding a default range of 16 to 24 percent. On remand OWCP was to secure the actual x-ray films from November 8, 2011 and June 16, 2014, and return the record to Dr. McShane for further review, to be followed by a *de novo* decision.

On December 2, 2014 OWCP forwarded Dr. Weiss' September 8, 2014 report and a disc containing the November 8, 2011 and June 16, 2014 x-rays to Dr. McShane. In a December 11, 2014 report, Dr. McShane advised that, after review of the 2011 and 2014 x-rays, appellant had a minimal remaining cartilage interval at the patellofemoral joint and only mild degenerative changes in the weight-bearing portion.[13] In a February 27, 2015 report, he again advised that, under Table 16-3 of the A.M.A., *Guides*, appellant had patellofemoral arthritis with a full-thickness articular cartilage defect for three percent impairment.

On March 10, 2015 Dr. H.P. Hogshead, Board-certified in orthopedic surgery serving as a DMA, agreed with Dr. McShane's analysis under Table 16-3 of the A.M.A., *Guides* and concluded that appellant had three percent right lower extremity permanent impairment.

By decision March 12, 2015, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the three percent previously awarded.

On March 17, 2015 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 24, 2015.

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[12] Dr. Zimmerman had continued to treat appellant following the May 2004 arthroscopic surgery. Serial right knee x-rays were also done. Dr. Zimmerman did not provide an impairment rating.

[13] Dr. McShane also reviewed x-rays of the left knee.

In a September 24, 2015 report, Dr. Weiss noted that he had reviewed Dr. McShane's March 24, 2014 and February 27, 2015 reports. He maintained that it was unclear whether Dr. McShane had actually measured appellant's remaining cartilage interval and that it was unclear what diagnostic study he used in his analysis. Dr. Weiss indicated that he had used a November 8, 2011 x-ray which revealed bone-on-bone arthritis with no cartilage and this substantiated a class 2 impairment. He reiterated that, after net adjustment, appellant had 24 percent permanent impairment of the right lower extremity.

In a November 1, 2015 report, Dr. Lisa Marie Sheppard, a Board-certified radiologist, noted her review of the June 16, 2014 right knee x-ray. She indicated that standing erect images were obtained and measurements taken of the joint spaces in the anteroposterior (AP) and lateral projections of the right knee, with a lateral joint space superior to inferior measurement of 7.8 millimeters (mm), and a medial joint space of 7.9 mm. Dr. Sheppard continued that in the lateral projection on the right side, the patellofemoral joint space was completely obliterated and the measurement was zero.[14]

By decision dated December 9, 2015, the hearing representative remanded the case to OWCP for further medical development. It was to obtain clarification from Dr. McShane with regard to cartilage measurements.

In a January 6, 2016 report, Dr. McShane indicated that his opinion that appellant had three percent permanent impairment of the right lower extremity was unchanged.

By decision dated February 8, 2016, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the three percent previously awarded.

On February 17, 2016 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. Following a May 26, 2016 hearing, by decision dated August 5, 2016, an OWCP hearing representative found that a conflict in medical opinion remained and remanded the case to OWCP for further development of the medical evidence. The hearing representative found that Dr. McShane's report did not fully evaluate all of appellant's right knee conditions, and he did not present his permanent impairment rating in accordance with the A.M.A, *Guides*, which required citation to the applicable tables, and medical rationale in support of his calculations.

On March 15, 2017 OWCP referred appellant to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[15] In an April 26, 2017 report, Dr. Elkins noted his review of the medical record including diagnostic studies, the SOAF, and appellant's complaints of right knee pain. He described right knee examination findings and advised that in accordance with Table 16-3 of the A.M.A., *Guides,* for a diagnosis of patellofemoral arthritis,

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[14] Dr. Sheppard also provided measurements for appellant's left knee.

[15] An impartial evaluation was initially scheduled with Dr. Phuc Vo. A series of memoranda of telephone calls (Form CA-110) indicated that Dr. Vo required prepayment for the examination. It was, therefore, cancelled. An impartial medical evaluation was next scheduled with Dr. James D. Glenn. A Form CA-110 dated February 27, 2017 indicated that Dr. Glenn's office manager cancelled the appointment due to the size of the case record. Both Dr. Vo and Dr. Glenn are Board-certified orthopedic surgeons.

appellant had a class 2 impairment of 15 percent. Dr. Elkins indicated that there were no grade modifiers.

In a June 7, 2017 report, Dr. James W. Butler, Board-certified in occupational medicine serving as DMA, noted his review of the medical record including Dr. Elkins' report. He advised that Dr. Elkins did not correctly apply the criteria and tables of the sixth edition of the A.M.A., *Guides*. Dr. Butler specifically noted that Dr. Elkins based his impairment rating on a 1 mm cartilage interval whereas Dr. Sheppard advised that appellant had zero cartilage interval which would place appellant in class 2, level 2, for 20 percent permanent impairment. He also noted that Dr. Elkins did not apply grade modifiers and did not measure atrophy. Dr. Butler also did not indicate a date of MMI.

On June19, 2017 OWCP wrote Dr. Elkins, asking for clarification based on the DMA's report, which was attached. In a July 12, 2017 addendum report, Dr. Elkins advised that he did not ignore appellant's functional history, just questioned it because his functional complaints outweighed his objective findings. He noted that appellant stated that he could only walk 10 minutes which would preclude him from most activities, and that his severe complaints of pain did not jive with his objective findings on x-ray, which indicated severe patellar chondromalacia, but the rest of his joint measured approximately eight mm of space in the medial and lateral compartment. Dr. Elkins noted that other examiners disagreed on the degree of appellant's impairment, and that he classified appellant's impairment based on weight bearing joint measurements and patellar to femoral spacing. He advised that, while appellant's weight bearing joint spaces were decreased, they were not class 4. Dr. Elkins indicated that his evaluation was based on objective findings, as any rating should be, noting that visual atrophy could not be judged because of appellant's obesity. He also opined that weakness was a subjective test with objective corroboration, and he could not determine if appellant's weakness was totally physiological. Dr. Elkins wrote that, for this reason, he felt that data to be used for grade modifiers was inaccurate, and therefore the modifiers were not used. He continued that he reviewed his calculations using objective data only and, noting appellant's lack of correlation between subjective complaints and objective findings and symptom magnification, no modifiers were used. Dr. Elkins reiterated his conclusion that, under Table 16-3 of the sixth edition of the A.M.A., *Guides*, for a diagnosis of patellofemoral arthritis, the average rating for 1 mm cartilage interval was 15 percent. Dr. Elkins concluded that his original calculation is accurate, based on the art of medicine as well as the science, and that MMI was reached on August 7, 2013.

By decision dated August 10, 2017, OWCP granted a schedule award for an additional 12 percent permanent impairment of the right lower extremity, for a total of 34.56 weeks, to run from August 7, 2013 to April 5, 2014.

On August 16, 2017 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. Appellant was not present at the January 17, 2018 hearing. Counsel asserted that, even though the DMA found that Dr. Elkins misapplied the A.M.A., *Guides*, he did not change his opinion in his supplemental report. Therefore, his report was not sufficient to carry the special weight of the medical evidence, and the case should be remanded for further development of appellant's entitlement to an increased schedule award. Counsel further maintained that Dr. Elkins was improperly selected as an impartial medical specialist, noting that appellant had initially been scheduled for an appointment with Dr. Glenn, but the appointment was cancelled with no justification provided. The record was held open for 30 days.

In a January 12, 2018 report, Dr. Weiss noted that Dr. Sheppard had found complete obliteration of the right knee patellofemoral joint, which placed appellant in the "no cartilage interval" category. He advised that a GMCS was not appropriate because it had been used to place appellant in the appropriate class. Dr. Weiss found that appellant had a class 2 grade 4 permanent impairment of the right lower extremity of 20 percent. He applied the net adjustment formula, finding an adjustment of zero, and concluded that appellant's total right lower extremity permanent impairment was 20 percent.

By decision dated April 2, 2018, an OWCP hearing representative found that it had not been established that Dr. Elkins had been improperly selected as an impartial medical specialist Dr. Glenn had cancelled the appointment. She, however, set aside the August 10, 2017 decision. The hearing representative remanded the case for OWCP to obtain an additional opinion from its DMA as to whether Dr. Elkins correctly applied the criteria/tables of the A.M.A., *Guides* and whether further information was needed from him.

In an April 28, 2018 report, Dr. Butler serving as DMA, noted his review of the reports of Dr. Elkins and Dr. Weiss dated July 12, 2017 and January 12, 2018, respectively. The DMA noted that Dr. Elkins was the last person to actually examine appellant and determined that appellant's functional history was not consistent with the examination findings and other history and, therefore, disregarded functional history as a grade modifier. As to a GMPE, Dr. Butler noted that Dr. Elkins indicated that appellant was so obese, he could not properly examine him, and that he assigned a 1 mm cartilage interval, based on weight bearing joint measurements, which was criteria of the A.M.A., *Guides*. The DMA concluded that Dr. Elkins appropriately discounted the physical examination and functional history modifiers and correctly noted that the clinical studies modifier could not be used. Dr. Butler set the date of MMI as July 12, 2017, indicating this was the date of Dr. Elkins' evaluation.

By decision dated May 30, 2018, OWCP found that appellant was not entitled to a right lower extremity schedule award greater than the 15 percent previously awarded.

On June 7, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. At the November 29, 2018 hearing, counsel asserted that the opinion of Dr. Butler, the DMA, contradicted himself, noting that he in his initial report found that Dr. Elkins misapplied the A.M.A., *Guides*, yet in his supplemental report found that he appropriately applied the A.M.A., *Guides*.

Dr. Zimmerman, who had continued to follow appellant periodically submitted a January 17, 2019 treatment note in which he noted appellant's complaint of right knee pain, particularly with increased activity. Right knee examination demonstrated no effusion, lack of 15 degrees of full flexion and 10 degrees of extension, with some pain on McMurray's test and positive patellar inhibition, but no click, no laxity, and a negative Lachman's. He advised that right knee x-rays that day demonstrated marked narrowing of the lateral portion of the patellofemoral compartment and that the joint space was minimally narrowed medially.[16] Dr. Zimmerman did not provide an impairment evaluation.

[16] A copy of the x-ray report is found in the record.

By decision dated February 13, 2019, OWCP's hearing representative affirmed the May 30, 2018 decision. She found that the DMA provided medical rationale to support his conclusion that appellant did not have greater right lower extremity impairment than the 15 percent previously awarded.

LEGAL PRECEDENT

The schedule award provision 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.[17] 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.[18] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[19]

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.[20] 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 adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[21]

ANALYSIS

The Board finds this case is not in posture for decision because a conflict in medical opinion remains regarding the degree of appellant's right lower extremity impairment.

OWCP determined that a conflict arose between Dr. Weiss, who provided an impairment evaluation for appellant, and Dr. McShane, the second opinion physician, regarding the extent of appellant's permanent impairment of the right lower extremity. It ultimately referred him to Dr. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Elkins indicated that his evaluation was based on objective findings, as any rating should be, noting that visual atrophy could not be judged because of appellant's obesity. He also

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[17] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[18] 20 C.F.R. § 10.404; *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[19] *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).

[20] *Supra* note 5 at 509-11.

[21] *Id*. at 515-22.

opined that weakness was a subjective test with objective corroboration, and he could not determine if appellant's weakness was totally physiological. Dr. Elkins wrote that, for this reason, he felt that data to be used for grade modifiers was inaccurate, and therefore the modifiers were not used. He continued that he reviewed his calculations using objective data only and, noting appellant's lack of correlation between subjective complaints and objective findings and symptom magnification, no modifiers were used.

The record reflects that Dr. Weiss, who examined appellant on January 11, 2011, initially advised that under Table 16-3, appellant had 24 percent permanent right lower extremity impairment for patellofemoral arthritis. Dr. McShane calculated three percent permanent impairment based on a class 1 full-thickness cartilage defect. On July 21, 2011 OWCP granted appellant a schedule award for three percent permanent impairment of his right lower extremity.

Following further development of the claim, appellant was ultimately referred to Dr. Elkins for an impartial medical examination to resolve the conflict in the case. On April 26, 2017 Dr. Elkins reported that under Table 16-3, appellant had a grade 2 impairment of 15 percent for a diagnosis of patellofemoral arthritis. In a July 12, 2017 supplemental report, he provided further explanation regarding why he did not apply grade modifiers to his calculation and indicated that appellant had a 1 mm cartilage defect. Dr. Butler, serving as DMA, reviewed both of Dr. Elkins' reports. OWCP then granted appellant a schedule award for an additional 12 percent right lower extremity impairment by decision dated August 10, 2017.

Upon further reflection, in a January 12, 2018 report, Dr. Weiss indicated that appellant had 20 percent total impairment based on a class 2 assignment for no cartilage interval. He based this upon his evaluation and Dr. Sheppard's review of a June 16, 2014 right knee x-ray. On April 2, 2018 an OWCP hearing representative vacated the August 10, 2017 decision. OWCP secured a supplemental report from its DMA, Dr. Butler, and on May 30, 2018 found that appellant was not entitled to schedule award compensation greater than the 15 percent previously awarded. By decision dated February 13, 2019, an OWCP hearing representative affirmed the May 30, 2018 decision.

Although all physicians agree that appellant's right lower extremity impairment should be calculated under Table 16-3 for a diagnosis of patellofemoral arthritis, a difference in opinion remains regarding the degree of the cartilage defect on which the class of impairment is based. Dr. Weiss found that no cartilage remained, and Dr. Elkins indicated that appellant had a 1 mm defect. As such, Dr. Elkins' opinion cannot carry the special weight of the medical evidence and serve as a basis for the schedule award.[22] Consequently, the Board finds that further development of the medical evidence is required to determine the extent of appellant's permanent right knee impairment for schedule award purposes.[23] The Board will, therefore, remand the case to OWCP to further develop the medical evidence as to the extent of appellant's right lower extremity permanent impairment. On remand it shall refer appellant to a specialist in the appropriate field of medicine for an impartial evaluation and report which includes a rationalized opinion as to the

[22] *See V.H.*, Docket No. 18-0848 (issued February 25, 2019).

[23] *J.M.*, Docket No. 19-0114 (issued June 12, 2019).

extent of appellant's right lower extremity permanent impairment. The specialist shall obtain right knee x-rays and provide an opinion in accordance with section 16.3c of the A.M.A., *Guides*.[24]

Given the varying opinions provided in the application of the net adjustment formula, OWCP should also request additional information pertaining to the use and assignment of grade modifiers.[25] Following this and such further development deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's schedule award claim.[26]

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 26, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[24] *Supra* note 5 at 518. This section provides that imaging studies are used to grade arthritis, and indicates that cartilage interval or joint space is the best indicator of disease stage and impairment of the lower extremity. It further provides that the estimate for the patellofemoral joint is based on a "sunrise view" taken at 40 degrees flexion or on a true lateral view.

[25] *M.M.*, Docket No. 18-0235 (issued September 10, 2019).

[26] *E.S.*, Docket No. 20-0559 (issued October 29, 2020).