

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

_____)	
T.B., Appellant)	
)	
and)	Docket No. 20-1413
)	Issued: July 1, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Jacksonville, FL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 20, 2020 appellant filed a timely appeal from a June 30, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted because he had a greater permanent impairment of his right knee because he had a full knee replacement, which OWCP did not approve. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 25 percent permanent impairment of his right lower extremity for which he previously received a schedule award.

FACTUAL HISTORY

This case was previously been before the Board.⁴ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 2, 2006 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 1, 2006 he twisted his right knee when he failed to notice a step down on the sidewalk while in the performance of duty. OWCP accepted the claim for sprain of the lateral collateral ligament, right knee medial meniscus tear, and right knee traumatic arthropathy of the lower leg.

On June 26, 2006 appellant underwent an OWCP-approved partial medial meniscectomy, right knee, which was performed by Dr. E. Jean Dabezies, Jr., a Board-certified orthopedic surgeon. On December 21, 2006 he underwent a right knee medial unicompartamental arthroplasty, also performed by Dr. Dabezies.

On April 5, 2007 appellant filed a claim for a schedule award (Form CA-7). By decision dated May 29, 2007, OWCP granted appellant a schedule award for 25 percent permanent impairment of the right lower extremity (leg). The award ran for 72 weeks during the period April 6, 2007 to August 21, 2008.

On January 10, 2013 appellant underwent a total knee arthroplasty with a postoperative diagnosis of failed unicompartamental arthroplasty, right knee. This procedure was also performed by Dr. Dabezies.

On February 22, 2014 appellant filed a Form CA-7 for an increased schedule award. By decision dated June 3, 2014, OWCP denied appellant's claim for an additional schedule award.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 30, 2020 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.*

⁴ Docket No. 14-1640 (issued December 8, 2014).

On July 7, 2014 appellant filed a request for reconsideration. By decision dated July 10, 2014, OWCP denied appellant's request for reconsideration.

On July 21, 2014 appellant appealed to the Board. By decision dated December 8, 2014, the Board affirmed OWCP's June 3 and July 10, 2014 decisions.⁵ The Board found that appellant had not met his burden to establish more than 25 percent impairment of his right lower extremity for which he previously received a schedule award. The Board further found that OWCP properly denied appellant's reconsideration request.

On November 16, 2019 appellant again filed a Form CA-7 for an increased schedule award.

Progress reports from Dr. Dabezies, Jr., dated November 17, 2015, October 4, 2016, September 27, 2017, September 21, 2018, and September 18, 2019 were received. In the September 18, 2019 report, Dr. Dabezies indicated that appellant was six years postoperative unicompartmental to total revision of right knee, and nine months status post left total knee arthroplasty. Appellant reported pain with the right knee and difficulty ascending stairs. His physical examination revealed stable posterior total knee arthroplasty in good alignment and position with no changes from previous x-rays. Mild effusion was noted in both knees, with good stability bilaterally with some anterior-posterior laxity on the right compared to the left, due to appellant's multiple right knee procedures. Dr. Dabezies provided an impression right knee pain. He opined that appellant had limitation of his right knee, but it was stable. Dr. Dabezies, however, did not provide a permanent impairment rating, related to appellant's accepted right knee condition, in any of his reports.

In a December 9, 2019 developmental letter, OWCP requested that Dr. Dabezies address whether appellant had additional permanent impairment of his right lower extremity greater than the 25 percent impairment he was previously awarded, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁶ and whether he had reached maximum medical improvement. Dr. Dabezies was requested to provide his opinion within 30 days. He did not respond.

By decision dated February 25, 2020, OWCP denied appellant's claim for an increased schedule award, finding that appellant was entitled to no more than 25 percent permanent impairment of the right lower extremity (leg) previously received. It noted that no additional medical evidence was received.

On March 13, 2020 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. By decision dated June 30, 2020, an OWCP hearing representative affirmed OWCP's February 25, 2020 decision as appellant had not provided evidence from a physician supporting that he sustained greater than the 25 percent permanent impairment of the right lower extremity previously received.

⁵ See *id.*

⁶ A.M.A., *Guides* (6th ed. 2009).

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.⁷ 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.⁸ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁹

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.¹⁰ Under the sixth edition, the evaluator identifies the impairment for the class of diagnosis (CDX), which is then adjusted by the grade modifier for functional history (GMFH), the grade modifier for physical examination (GMPE), and the grade modifier for clinical studies (GMCS).¹¹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹²

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.¹³ OWCP's 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, 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*.¹⁴

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

⁸ *Id.* at § 10.404; *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ 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).

¹⁰ A.M.A., *Guides* (6th ed. 2009), section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹¹ *Id.* at 493-556.

¹² *Id.* at 521.

¹³ *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *See J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *see also B.J.*, Docket No. 19-0960 (issued October 7, 2019).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 25 percent permanent impairment of his right lower extremity for which he previously received a schedule award.

Preliminary, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its December 8, 2014 decision, affirming OWCP's finding that appellant established no more than 25 percent permanent impairment of the right lower extremity for which he previously received a schedule award. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

In support of his request for an increased schedule award, appellant submitted progress reports from Dr. Dabezies dated November 17, 2015, October 4, 2016, September 27, 2017, September 21, 2018, and September 18, 2019, which only reflected his continuing treatment of appellant's right knee conditions. He did not provide any impairment calculations in conformance with the A.M.A., *Guides*.

The Board finds that Dr. Dabezies' September 18, 2019 report did not provide findings which indicated that appellant may be entitled to an increased award. There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that he has greater permanent impairment of his right lower extremity than that previously awarded. Accordingly, appellant has not established that he is entitled to an increased schedule award.

On appeal appellant contends that the severity of his continuing condition entitles him to an increased schedule award. As noted above, there is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that he has greater permanent impairment of his right lower extremity than that previously awarded.

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 more than 25 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

¹⁵ *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *D.B.*, Docket No. 17-1444 (issued January 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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