

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

M.T., Appellant)	
)	
and)	Docket No. 21-0169
)	Issued: October 14, 2021
U.S. POSTAL SERVICE, ARLINGTON POST OFFICE, Arlington, MA, Employer)	
)	

Appearances:

John L. DeGeneres, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On November 16, 2020 appellant, through counsel, filed a timely appeal from a June 22, 2020 merit decision and an October 30, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity and 63 percent permanent impairment of the right lower extremity, for which he received schedule award compensation; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 20, 2012 appellant, then a 61-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a permanent acceleration of osteoarthritis of both knees causally related to factors of his federal employment. He indicated that he had become aware of his condition and its relationship to his employment on January 12, 2012. OWCP accepted the claim for an aggravation of preexisting osteoarthritis of the bilateral knees.

On January 13, 2010 Dr. David Prybyla, a Board-certified orthopedic surgeon, performed a left partial knee replacement and a right total knee arthroplasty. OWCP subsequently authorized the surgery.³

In an impairment evaluation dated January 12, 2012, Dr. David C. Morley, Jr., a Board-certified orthopedic surgeon, diagnosed employment-related advanced knee arthritis. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ he identified the class of diagnosis (CDX) as a class 4 total knee replacement according to Table 16-3 on page 511. Dr. Morley found that a grade modifier for physical examination (GMPE) was not applicable as it was used to identify the class and a grade modifier for clinical studies (GMCS) was not applicable as it was used to identify the diagnosis. He found a grade modifier for functional history (GMFH) of three based on appellant's response to the lower limb questionnaire, but a grade modifier of zero as appellant had no gait derangement. As the numbers differed by more than two, Dr. Morley excluded the GMFH as it was not reliable. He found 67 percent permanent impairment for each lower extremity.

On December 18, 2012 OWCP referred appellant to Dr. Stanley Hom, a Board-certified orthopedic surgeon, for a second opinion examination.

In a supplemental report dated January 8, 2013, Dr. Morley opined that he should not have excluded a GMFH from his calculations, noting that the A.M.A., *Guides* at provided that the highest modifier of each component in determining the grade modifier should be used. He applied the net adjustment formula and found no change from the default impairment rating of 67 percent permanent impairment of each lower extremity.

³ On September 2, 2012 Dr. David K. Krohn, a Board-certified internist serving as a district medical adviser (DMA), opined that the knee replacements were medically necessary and causally related to appellant's employment.

⁴ A.M.A., *Guides* (6th ed. 2009).

In a January 14, 2013 report, Dr. Hom diagnosed bilateral degenerative joint disease of the knees status post left partial knee replacement and right total knee replacement. For the right knee, he identified the CDX as a class 3 total knee replacement with a fair result. Dr. Hom applied a GMFH of one due to appellant's gait disturbance, a GMPE of one based on his range of motion (ROM), and found that a GMCS was not applicable. He found 31 percent permanent impairment of the right knee. For the left knee, Dr. Hom identified the CDX as a class 2 total knee replacement. He found a GMFH, GMCS, and GMPE of zero, which equaled 21 percent left lower extremity impairment.

On February 22, 2013 appellant retired from employment.

OWCP determined that a conflict existed between Dr. Morley and Dr. Hom regarding the extent of appellant's permanent impairment of the lower extremities. It referred appellant to Dr. Richard W. Warnock, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 9, 2013, Dr. Warnock diagnosed status post right total knee replacement and status post left unicondylar knee replacement. He concurred with Dr. Hom's finding of 31 percent right lower extremity impairment and 21 percent left lower extremity impairment.

On November 5, 2013 OWCP requested that Dr. Warnock clarify his impairment rating.

On January 7, 2015 Dr. Slutsky, serving as a DMA for OWCP opined that appellant had 59 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity.

By decision dated February 6, 2015, OWCP granted appellant a schedule award for 59 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. The period of the award ran for 259.2 weeks from February 22, 2013 to February 10, 2018. OWCP used an effective pay rate date of February 22, 2013, the date that appellant had retired from the employing establishment.

On February 25, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated May 8, 2015, OWCP's hearing representative vacated the February 6, 2015 decision. She noted that Dr. Warnock had not responded to OWCP's November 5, 2013 report for clarification and instructed OWCP to refer appellant to a new impartial medical examiner (IME). The hearing representative further found that OWCP should verify that appellant resumed his usual employment after appellant's 2010 surgery and that he had continued to be exposed to work factors identified as causing his condition until his retirement.

On January 26, 2016 OWCP referred appellant to Dr. Neal Rockowitz, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated February 11, 2016, Dr. Rockowitz opined that appellant had 37 percent permanent impairment of the right lower extremity and 21 percent permanent impairment of the left lower extremity. In a supplemental report November 5, 2016, he found 31 percent permanent impairment of the right lower extremity and 21 percent permanent impairment of the left lower extremity.

On March 15, 2018 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, found that appellant had 34 percent permanent impairment of the right lower extremity and 25 percent permanent impairment of the left lower extremity.

On July 26, 2018 the employing establishment advised that appellant had returned to his usual employment after his 2010 surgery and provided his pay rate effective February 23, 2013 as \$1,086.69.

By decision dated August 7, 2018, OWCP found that, based on Dr. Katz' review, appellant had no more than the previously awarded 59 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity.

On August 14, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, OWCP's hearing representative vacated the August 7, 2018 decision. The hearing representative found that OWCP had impermissibly accorded the weight of the evidence to the DMA rather than the IME, noting that a DMA could not resolve a conflict in medical opinion. She further determined that OWCP should clarify the date of maximum medical improvement (MMI) and obtain a supplemental report from Dr. Rockowitz regarding his impairment rating.

On December 14, 2018 OWCP requested that Dr. Rockowitz clarify his impairment rating. In a response dated March 13, 2019, Dr. Rockowitz advised that he had fully answered the questions posed in his prior two reports.

OWCP, on March 25, 2019 referred appellant to Dr. Francis K. Tindall, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 8, 2019, Dr. Tindall diagnosed status post right knee replacement with limited ROM and status post left knee unicondylar knee replacement with good results. He found 31 percent permanent impairment of the right lower extremity and 21 percent permanent impairment of the left lower extremity.

On August 27, 2019 Dr. Katz reviewed Dr. Tindall's report and concurred with his impairment rating.

By decision dated September 6, 2019, OWCP found that appellant had no more than the previously awarded 31 percent permanent impairment of the left lower extremity and 59 percent permanent impairment of the right lower extremity.

On September 24, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated November 13, 2019, OWCP's hearing representative vacated the September 6, 2019 decision. The hearing representative found that OWCP had not resolved the conflict in opinion between Dr. Morley and Dr. Hom and instructed OWCP to refer appellant for a new referee examination.

On May 5, 2020 OWCP referred appellant to Dr. Ralph Purcell, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated June 11, 2020, Dr. Purcell discussed appellant's complaints of pain in the knees, particularly on the right side, reduced motion, and stiffness. He noted that appellant had undergone a right total knee revision in 2019. On examination Dr. Purcell found diffuse swelling with no effusion and mild clicking of the right knee with passive motion. He further found intact lower extremity sensation and strength and no knee warmth, erythema, erythematous streaking, or instability. Dr. Purcell measured left knee flexion of zero to 100 degrees and right knee flexion of 25 to 80 degrees. He diagnosed status post bilateral knee arthritis, status post left partial knee replacement, status post right total knee replacement with subsequent revision, and status post manipulation of the right knee under anesthesia. For the right knee, Dr. Purcell identified the CDX according to Table 16-3 on page 511 as a class 4 knee replacement, which yielded a default value of 67 percent. He identified the left knee CDX as a class 3 knee replacement, which yielded a default value of 37. Dr. Purcell found a GMCS was not applicable. He applied a GMFH of two for the right knee and one for the left knee and a GMPE of three for the right knee and two for the left knee. Dr. Purcell further determined that the GMFH for the right knee should be increased to three and the GMPE should be increased to four due to additional pathology. Utilizing the net adjustment formula, he found 63 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. Dr. Purcell further found 42 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity using the ROM method.

By decision dated June 22, 2020, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the right lower extremity. The period of the award ran for 11.52 weeks from June 4 to August 23, 2020 at an effective pay rate date of February 22, 2013, the date of his retirement.

On August 26, 2020 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Purcell had incorrectly based his GMFH solely on gait derangement rather than subjective findings from the American Academy of Orthopedic Surgeons (AAOS) questionnaire. He argued that Dr. Purcell should have used the AAOS inventory as it yielded a higher GMFH, as found by Dr. Morley. Counsel contended that appellant had 67 percent permanent impairment of the right lower extremity and 34 percent permanent impairment of the left lower extremity.

By decision dated October 30, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁵ and its implementing federal regulations,⁶ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁷ 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.⁸

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).⁹ Under the sixth edition, the evaluator identifies the CDX, which is then adjusted by GMFH, GMPE and/or GMCS.¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹³ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ Where a case is referred to an IME for the purpose

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

⁷ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

⁸ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* at 411.

¹² *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹³ 5 U.S.C. § 8123(a).

¹⁴ *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁵

OWCP's procedures provide that, if a case has been referred to an IME to resolve a conflict regarding permanent impairment, it is unnecessary to route the file to a DMA as long as the IME explains his or her impairment rating and cites to the appropriate tables and the A.M.A., *Guides*. The DMA should not resolve the conflict in medical opinion.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity and 63 percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation.

OWCP determined that a conflict in medical opinion existed between Dr. Morley and Dr. Hom regarding the extent of appellant's permanent impairment of the lower extremities. Following development, it properly referred appellant, pursuant to section 8123 of FECA,¹⁷ to Dr. Purcell, a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict.

On June 11, 2020 Dr. Purcell found full sensation and strength of the lower extremities with no instability, warmth, or erythema, and diffuse swelling and mild clicking of the right knee with passive motion. He measured ROM of zero to 100 degrees flexion of the left knee and 25 to 80 degrees flexion of the right knee. For the right knee, Dr. Purcell identified the CDX as a class 4 knee replacement, which yielded a default value of 67 percent. He applied a GMFH of three and a GMPE for four and determined that a GMCS was not applicable. Using the net adjustment formula yielded 63 percent impairment.¹⁸ For the left knee, Dr. Purcell identified the CDX as a class 3 knee replacement, for a default value of 37 percent. He applied a GMFH of one and a GMPE for two and determined that a GMCS was not applicable. Using the net adjustment formula yielded 31 percent impairment.¹⁹

The Board finds that OWCP properly accorded the special weight of the evidence to the well-reasoned report of Dr. Purcell.²⁰ Dr. Purcell accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions as to permanent

¹⁵ *V.K.*, Docket No. 18-1005 (issued February 1, 2019); *D.M.*, Docket No. 17-1411 (issued June 7, 2018).

¹⁶ *Supra* note 7 Chapter 2.808.6(g) (February 2013).

¹⁷ *Supra* note 8.

¹⁸ Utilizing the net adjustment formula, (GMFH - CDX) + (GMPE - CDX), or (3-4) + (4-4) = -1, yielded an adjustment one place to the left on the table and 63 percent impairment.

¹⁹ Utilizing the net adjustment formula, (GMFH - CDX) + (GMPE - CDX), or (1-3) + (2-3) = -3, yielded a downward adjustment of three and 31 percent impairment.

²⁰ The Board notes that Dr. Purcell alternatively rated appellant's impairment using ROM, however, Table 16-3 does not provide ROM as an alternate method of rating impairments.

impairment which comport with his physical findings.²¹ As his report is detailed, well-rationalized, and based on the proper factual background, his opinion is entitled to the special weight accorded an IME.²² Dr. Purcell explained his impairment rating and cited the appropriate tables and pages of the A.M.A., *Guides*, and thus OWCP did not need to refer his report for review by a DMA.²³ The Board thus finds that the evidence establishes that appellant has no more than 31 percent permanent impairment of the left lower extremity and 63 percent permanent impairment of the right lower extremity.²⁴

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.²⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁶

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.²⁷ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁸ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.²⁹

²¹ See *G.S.*, Docket No. 18-0827 (issued May 1, 2019).

²² *Id.*

²³ *Supra* note 17.

²⁴ See *P.P.*, Docket No. 20-1228 (issued February 5, 2021).

²⁵ 5 U.S.C. § 8128(a).

²⁶ 20 C.F.R. § 10.606(b)(3); see also *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

²⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP decision for which review is sought. *Supra* note 7 at Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²⁸ *Id.* at § 10.608(a); see also *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

²⁹ *Id.* at § 10.608(b); *K.S.*, Docket No. 18-1022 (issued October 24, 2018).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Initially, the Board finds that OWCP properly considered correspondence from appellant's counsel as a request for reconsideration and not as a claim for an increased schedule award.³⁰ The underlying issue on reconsideration is whether the medical evidence demonstrates a greater permanent impairment than that previously awarded. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).³¹

On reconsideration counsel argued that Dr. Purcell had inaccurately found GMFH based only on gait derangement rather than subjective findings from an AAOS questionnaire. However, this argument is duplicative of the findings made by Dr. Morley in his January 12, 2012 report which is previously of record. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.³² Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).³³

The Board further finds that appellant did not submit any relevant or pertinent new evidence not previously considered. As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).³⁴

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.³⁵

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity and 63 percent permanent impairment of the right lower extremity, for which he previously received schedule award compensation. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

³⁰ See *K.W.*, Docket No. 19-0553 (issued November 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

³¹ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

³² See *A.W.*, Docket No. 21-0298 (issued August 26, 2021); *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

³³ 20 C.F.R. § 10.606(b)(3)(i) and (ii). See also *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

³⁴ *Id.* at § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

³⁵ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the October 30 and June 22, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 14, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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