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

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| **R.L., Appellant** | ) | |
| **and** | ) | **Docket No. 21-1329** |
| | ) | **Issued: June 24, 2022** |
| **GOVERNMENT PUBLISHING OFFICE, Washington, DC, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On September 1, 2021 appellant, through counsel, filed a timely appeal from an August 3, 2021 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 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 more than two percent permanent impairment of the right lower extremity for which he previously received a schedule award.

## ***FACTUAL HISTORY***

On June 13, 2016 appellant, then a 41-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on June 11, 2016 his right knee "bent sideways" when he stepped on loose flooring, while in the performance of duty. He stopped work on June 14, 2016. OWCP accepted the claim for right knee sprain. It later expanded the acceptance of the claim to include complex tear of right medial meniscus and sprain of anterior cruciate ligament (ACL), right knee. On September 1, 2016 appellant underwent surgery for arthroscopic ACL reconstruction with bone patella-tendon autograft and partial medial meniscectomy of the right knee.

In a February 22, 2017 report, Dr. Vincent Rollo, Board-certified in orthopedic sports medicine and orthopedic surgery, noted that appellant was seen for follow up of his right knee ACL reconstruction approximately six months postsurgery. He found no swelling or deformity and noted that appellant related most of his knee pain had resolved and appellant denied any giving way of the knee.

On April 25, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an August 28, 2017 report, Dr. Robert Macht, a general surgery specialist, noted appellant's history of injury, medical treatment, and his physical examination findings. He provided an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3] Dr. Macht noted that appellant's knee was weak, he had stopped kneeling and squatting, and had difficulty going up stairs. Appellant occasionally used a brace, but denied use of a cane or crutch. Dr. Macht examined appellant and found flexion of the right knee limited to 120 degrees, noting that active range of motion (ROM) testing was repeated at least three times for accuracy. Appellant had mild positive anterior drawer sign and mild rotational instability. Dr. Macht found that appellant walked with a normal gait and that x-rays of the right knee revealed narrowing of the medial joint space to 2.6 millimeters. He diagnosed a traumatic injury to the right knee, with medial meniscectomy, ACL reconstruction, and joint space arthritic narrowing. Dr. Macht noted that, at the time of surgery, appellant had a near complete tear of the ACL and a tear of the medial meniscus, moderate-to-large knee joint effusion, small Baker's cyst, and contusion about the posterior, medial, and tibial plateau. He related that appellant filled out a lower limb questionnaire, his score was 16 out of 100, and this resulted in a grade modifier for functional history (GMFH) of 0 based upon Table 16-6, page 516 of the A.M.A., *Guides*. Dr. Macht noted that he found 2 centimeters of atrophy of the right thigh which resulted in a grade modifier for physical examination (GMPE) of 2 per Table 16-7, page 517. He explained that the knee regional grid contained multiple

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

diagnostic criteria for evaluating the knee and that the highest impairment would be the ACL injury. Dr. Macht referred to Table 16-3, page 510, and found a Class 1 impairment for the Class of Diagnosis (CDX) of the knee with mild laxity of the ACL, the GMFH was 1 lower and therefore a -1 assignment, the GMPE was 1 higher and, therefore, a +1 assignment, the total was a 0 adjustment score and, therefore, the default column was used to assign the impairment. He explained that the clinical studies used to confirm the diagnosis were not used in the assessment and, therefore, per Table 16-3, page 510, appellant had 10 percent permanent impairment of the right lower extremity. Dr. Macht opined that appellant reached maximum medical improvement (MMI) on March 13, 2017.

In a December 10, 2017 report, Dr. Jovito Estaris, Board-certified in occupational medicine and a district medical adviser (DMA), reviewed Dr. Macht's August 8, 2017 report, noted that it was inconsistent with Dr. Rollo's February 22, 2017 report, and recommended a second opinion examination.

On January 10, 2018 OWCP referred appellant for a second opinion examination with Dr. Stuart Gordon, Board-certified in orthopedic surgery, to clarify the cause and extent of appellant's injury-related impairment.

In a January 25, 2018 report, Dr. Gordon noted that appellant had objective findings limited to scars and a mild half-grade of weakness of the right lower extremity at the knee, versus the left, and otherwise had symmetric girth with no atrophy, and full ROM bilaterally. For the medial meniscus injury, he referred to the A.M.A., *Guides*, Table 16-3, page 509, found a Class 1 impairment for the CDX with GMFH of 1, grade modifier for clinical studies (GMCS) of 1, and GMPE of 1, resulting in a Grade C, for 2 percent permanent impairment of the right lower extremity. Regarding the ACL injury, Dr. Gordon referred to Table 16-3, page 510, and found a Class 1 impairment for the CDX, with a GMFH of 1, GMCS of 1, and GMPE of 1, resulting in a Grade C for 10 percent impairment of the right lower extremity. He referred to the Combined Values Chart and found 12 percent permanent impairment of the right lower extremity.

In a report dated October 5, 2019, Dr. Estaris, the DMA, explained that Dr. Gordon improperly applied the A.M.A., *Guides*, as he based his impairment rating on a combination of the ratings for two diagnoses, rather than using the higher of the two ratings. The DMA also noted that when Dr. Gordon provided the impairment rating for the ACL injury, he found no evidence of laxity, no posterior instability, pivot shift, or Lachman, and intact quadriceps mechanism. He also noted that Dr. Gordon found that appellant had full ROM bilaterally and, therefore, no impairment. The DMA explained that the proper CDX, cruciate ligament injury with no instability, was a Class 0 for an impairment value of 0 percent. He also noted that MMI was reached on January 25, 2018, the date of the examination by Dr. Gordon, finding that the right knee was stable. For the CDX, partial medial meniscectomy, the DMA referred to Table 16-3 page 509, and found a Class 1 impairment with a default value of 2 percent. He referred to Table 16-6, page 616, functional history and provided a GMFH of 1 for difficulty with stairs. The DMA also referred to Table 16-7, page 517, for physical examination, and provided a GMPE of 1 for patellofemoral crepitus, full ROM, and no atrophy. He noted that clinical studies were not used because the MRI scan of the right knee showed medial meniscus tear. The DMA applied the net adjustment formula (GMFH-CDX) + (GMPE-CDX) and found (1-1) + (1-1) = 0, no net adjustment, CDX 1, Grade C = 2 percent permanent impairment of the right lower extremity. He

explained that, since the ACL rating was 0 and the medial meniscus rating was 2, the higher rating for the medial meniscus should be used, and the proper impairment rating was two percent.

By decision dated September 4, 2020, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. The award ran for 5.76 weeks for the period January 25 through March 6, 2018.

On September 16, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On November 4, 2020 OWCP's hearing representative completed a preliminary review and determined that the case was not in posture for a hearing because there was a conflict in the medical opinion evidence between Dr. Macht and Dr. Gordon regarding appellant's right knee instability. It also explained that the conflict could not be resolved by the DMA and remanded the case for a resolution of the conflict.

On November 13, 2020 OWCP referred appellant, together with an updated SOAF and a list of questions, to Dr. Robert Saltzman, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a January 6, 2021 report, Dr. Saltzman, serving as the impartial medical examiner (IME) reviewed appellant's history of injury and treatment. He noted that appellant had a prior medial meniscus tear and other injuries to the right knee and then suffered a rupture of his ACL and further tearing of the medial meniscus during the work injury. Dr. Saltzman also noted that appellant underwent successful surgery and currently had no complaints of instability regarding the knee. He further noted that Dr. Rollo did not find any evidence of instability on his examination, nor did Dr. Gordon. Dr. Saltzman noted that Dr. Macht found atrophy on his evaluation, which was not present on the examination five months later by Dr. Gordon, or during the current examination 3½ years later. He noted that Dr. Rollo indicated that appellant was doing very well at the time of his February 22, 2017 examination and that MMI was reached on that date. Regarding the ACL injury, Dr. Saltzman referred to Table 16-3, page 510, of the A.M.A., *Guides*, and found that appellant did not have any instability on physical examination and no functional instability with his activities. He explained that this warranted a Class 0, for no instability, and 0 percent impairment of the right lower extremity due to the CDX, ACL injury. Regarding the CDX, medial meniscus injury, the IME referred to Table 16-3, page 509, and found a Class 1, with GMFH of 1, GMCS of 1, and GMPE of 1, resulting in a Grade C or two percent permanent impairment of the right lower extremity. Dr. Saltzman explained that, using the higher of the two ratings for the diagnosis-based impairments, appellant had two percent right lower extremity permanent impairment.

By decision dated March 1, 2021, OWCP denied appellant's claim for an additional award. It explained that the medical evidence of record was insufficient to establish greater than the two percent permanent impairment previously awarded.

On March 8, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 25, 2021. During the hearing, he discussed the stability of his knee, noting that it sometimes felt weak, like

it was going to give out, and that it sometimes hyperextended. Appellant also indicated that he wore a knee brace intermittently.

By decision dated August 3, 2021, OWCP's hearing representative affirmed the March 1, 2021 decision. He accorded the special weight of the medical evidence to the January 6, 2021 report from Dr. Saltzman, the IME.

## ***LEGAL PRECEDENT***

The schedule award provisions of FECA[4] and its implementing regulations[5] 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. However, FECA does not specify the manner in which the percentage of loss of a member 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 has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (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: A Contemporary Model of Disablement*.[9] *I*n evaluating lower extremity impairment, the sixth edition requires identifying the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

Section 8123(a) of FECA which provides that, 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 (known as a referee physician or impartial medical

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*; *see D.C.,* Docket No. 20-0916 (issued September 14, 2021); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

[10] *Id*. at 494-531.

[11] *See M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

specialist) who shall make an examination.[12] 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.[13] When there exists opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

## ***ANALYSIS***

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

OWCP properly found a conflict in the medical opinion evidence between Dr. Macht, appellant's attending physician, who found that appellant had residual instability of the right knee, and Dr. Gordon, the second opinion physician, who found that appellant had no right knee instability. It properly referred appellant to Dr. Saltzman, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in medical opinion.

In a January 6, 2021 report, Dr. Saltzman reviewed appellant's history of injury and medical treatment. He noted that appellant had suffered a medial meniscus tear and a rupture of his ACL and had undergone successful surgery. Dr. Saltzman found no instability of the right knee. He also noted that Dr. Rollo did not find any evidence of instability on his examination, nor did Dr. Gordon. Dr. Saltzman also found no atrophy and explained that, while Dr. Macht found atrophy on his examination, Dr. Gordon did not find atrophy on his examination five months later. Regarding the CDX, ACL injury, Dr. Saltzman referred to Table 16-3 on page 510 of the A.M.A., *Guides*, and explained that, because appellant did not have any instability on physical examination and no complaints of functional instability with his activities, this warranted a Class 0 for no instability, and 0 percent impairment of the right lower extremity. Regarding the CDX, medial meniscus injury, he referred to Table 16-3, page 509, and found a Class 1, with functional status of 1, GMCS of 1, and GMPE of 1, resulting in two percent permanent impairment of the right lower extremity. Dr. Saltzman opined that, using the higher of the two ratings, appellant had two percent right lower extremity impairment.

As noted above, when a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15] Dr. Saltzman's opinion was based on a proper factual

[12] 5 U.S.C. § 8123(a); *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[13] 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

[14] *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *A.E.*, *supra* note 12; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[15] *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

and medical history and his examination findings. He utilized the A.M.A., *Guides* and provided a well-rationalized explanation for his opinion and the impairment rating. Accordingly, OWCP properly accorded special weight to the IME's report.[16]

The record contains no other probative, rationalized medical opinion, which supports that appellant had a right lower extremity impairment greater than two percent, based upon a proper application of the A.M.A., *Guides*. As such, the Board finds that appellant has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

## ***CONCLUSION***

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

[16] *See R.R.*, Docket No. 21-0212 (issued November 3, 2021); *V.G.*, Docket No. 19-1728 (issued September 2, 2020); *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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