

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

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<b>E.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0069</b>
	)	<b>Issued: October 19, 2022</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Bonner Springs, KS, Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On October 22, 2020 appellant, through counsel, filed a timely appeal from a May 21, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 21, 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.

## ISSUE

The issue is whether appellant has met her burden of proof to establish greater than two percent permanent impairment of the right lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

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

On December 27, 2008 appellant, then a 40-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she suffered an injury to her right knee when she slipped off of icy steps while in the performance of duty. She stopped work on December 27, 2008. On January 13, 2009 OWCP accepted appellant's claim for a tear of medial meniscus of knee, current right, and a tear of anterior cruciate ligament (ACL), right.

In a January 29, 2009 medical report, Dr. Don Miskew, a Board-certified orthopedic surgeon, performed an arthroscopic partial medial meniscectomy of the right knee to treat appellant's condition. In a duty status report (Form CA-17) of even date he advised work restrictions for her to follow.

On January 10, 2010 appellant filed a claim for a schedule award (Form CA-7).

In a January 22, 2010 development letter, OWCP advised appellant of the deficiencies of her claim and requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related condition, a date of maximum medical improvement (MMI), a final rating of permanent impairment, and a discussion of the rationale for the calculation of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> It afforded her 30 days to submit the necessary evidence.

In a February 1, 2010 letter, Dr. Miskew opined that, secondary to appellant's right knee injury, she had incurred seven percent disability of her right lower extremity and three percent whole person per the fourth edition of the A.M.A., *Guides*.

In a March 11, 2010 permanent impairment evaluation Dr. Daniel Zimmerman, Board-certified in internal medicine and serving as district medical adviser (DMA), reviewed the medical evidence of record and a statement of accepted facts (SOAF). He determined that, based on the sixth edition of the A.M.A., *Guides*, appellant had two percent permanent impairment of her right lower extremity.

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<sup>4</sup> Docket No. 11-1331 (issued February 16, 2012).

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

By decision dated March 19, 2010, OWCP granted a schedule award for two percent permanent impairment for appellant's right lower extremity. The award ran for 5.76 weeks from February 1 to March 13, 2010 and was based on the March 11, 2010 medical report from DMA Dr. Zimmerman.<sup>6</sup>

In a May 28, 2010 medical report, Dr. William Grant, Board-certified in internal medicine, reviewed the history of appellant's employment injury and her subsequent treatment for her accepted right knee conditions. Referencing the sixth edition of the A.M.A., *Guides* he determined that she had 19 percent permanent impairment of her right lower extremity.

On January 10, 2011 appellant, through counsel, requested reconsideration of OWCP's March 19, 2010 schedule award decision.

In a February 4, 2011 report, DMA Dr. Zimmerman noted his review of Dr. Grant's medical report and contended that Dr. Grant did not provide rationale for how he arrived at his impairment rating and that he did not perform his evaluation of appellant in accordance with the A.M.A., *Guides*.

By decision dated March 31, 2011, OWCP denied modification of its March 19, 2010 decision.

On May 10, 2011 appellant appealed to the Board. By decision dated February 16, 2012, the Board affirmed OWCP's March 31, 2011 decision, finding that the medical evidence of record was insufficient to establish greater than the two percent permanent impairment previously awarded.

On September 4, 2019 appellant filed a Form CA-7 claim for an increased schedule award.

In a September 16, 2019 development letter, OWCP advised appellant that it had received no evidence in support of her September 4, 2019 claim for an increased schedule award. It requested medical evidence containing a detailed description of her permanent impairment specific to the accepted work-related condition, a date of MMI, a final rating of permanent impairment, and a discussion of the rationale for the calculation of the impairment under the sixth edition of the A.M.A., *Guides*. OWCP afforded appellant 30 days to submit the necessary evidence.

On October 16, 2019 OWCP referred appellant, the medical evidence of record and a SOAF to Dr. Joseph Sankoorikal, Board-certified in physical medicine for a second opinion evaluation.

In an October 31, 2019 impairment evaluation, Dr. Sankoorikal reviewed the medical evidence of record and the SOAF and noted his examination findings. He noted that appellant reached MMI in February 2009 for her diagnoses of an ACL tear, a medial meniscus tear and contusion of the medial femoral condyle, status postarthroscopic partial medial meniscectomy of the right knee, and had since resumed regular-duty work. Referencing page 509 of the sixth edition

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<sup>6</sup> On March 29, 2010 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. However, OWCP subsequently notified her that her telephonic hearing, scheduled for July 1, 2010, had been cancelled.

of the A.M.A., *Guides*, Dr. Sankoorikal categorized appellant's injury as a class one meniscal injury and granted a grade modifier for functional history (GMFH) of one, a grade modifier for physical examination (GMPE) of one, and a clinical studies grade modifier (GMCS) of 1. Using the net adjustment formula, he calculated two percent permanent impairment of her right lower extremity.

On November 21, 2019 OWCP referred the medical evidence of record and a SOAF to Dr. Herbert White Jr., Board-certified in occupational medicine and serving as a DMA, for a review of the medical record and an impairment evaluation.

In a November 26, 2019 impairment evaluation Dr. White reviewed the medical record and SOAF concerning her diagnoses of a right medial meniscus tear and a right cruciate ligament sprain. Referring to page 509, Table 16-3 of the sixth edition of the A.M.A., *Guides*, he categorized appellant's injury as a class one meniscal injury and calculated two percent right lower extremity permanent impairment, agreeing with Dr. Sankoorikal's evaluation.

In a December 11, 2019 diagnostic report, Dr. Scott Sher, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's right knee, finding no evidence of an acute ACL tear, maceration of the posterior horn and body of the medial meniscus, moderate degenerative changes of the medial compartment and minimal degenerative changes of the lateral compartment, as well as a para-meniscal cyst located lateral to the posterior horn.

In a December 12, 2019 letter, OWCP again requested that DMA Dr. White review the impairment rating provided by Dr. Sankoorikal in his October 31, 2019 report. In his December 18, 2019 addendum, Dr. White again expressed his agreement with Dr. Sankoorikal's determination of a two percent right lower extremity impairment. He noted that appellant had previously received a schedule award for two percent permanent impairment of her right lower extremity and determined that she had incurred no additional impairment.

By decision dated January 16, 2020, OWCP denied appellant's claim for an increased schedule award.

On January 27, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 17, 2020 impairment evaluation Dr. Stephen Wilson, a Board-certified orthopedic surgeon, detailed his September 23, 2019 evaluation of appellant's right knee. He reviewed the history of her December 27, 2008 employment injury as well as her subsequent medical treatment and the December 11, 2019 MRI scan of her right knee. Dr. Wilson diagnosed right knee chondromalacia, diffuse full thickness cartilage loss of the medial compartment, meniscus derangement, a bucket handle tear of the medial meniscus, and other tear of the medial meniscus. He observed that appellant had previously received a schedule award of two percent permanent impairment of the right lower extremity as a result of her injuries and requested that, due to obvious changes in her symptomology, that her schedule award be increased. Per Table 16-3 of the A.M.A., *Guides*, Dr. Wilson opined that her condition had worsened in the sense that she now had diffuse full thickness cartilage of the medial compartment, minimal degenerative changes of the lateral compartment and chronic deficiency of the ACL. He reasoned that the new MRI scan of appellant's right knee placed her in a class one with a mid-range default value of seven

percent permanent impairment. Dr. Wilson granted a GMFH of two, a GMPE of two, and a GMCS of two. Using the net adjustment formula, he determined that appellant had a nine percent right lower extremity impairment.

On March 31, 2020 an OWCP hearing representative determined that the claim for an increased schedule award was not in posture for a hearing, reasoning that Dr. Wilson's February 17, 2020 medical report was sufficient to require further development of the case file.

In an April 10, 2020 letter, OWCP requested that Dr. Sankoorikal review the December 11, 2019 MRI scan of appellant's right knee as well as Dr. Wilson's February 17, 2020 medical report and opine on whether their findings were causally related to the accepted employment incident and appellant's subsequent January 2009 surgery. It provided that if Dr. Sankoorikal found that the MRI scan results and diagnosis of arthritis were causally related to the 2008 injury then he should incorporate the evidence into his impairment rating. If he did not find causal relationship OWCP requested that he explain whether the new medical evidence would alter his earlier impairment assessment.

In response, Dr. Sankoorikal provided an April 17, 2020 letter where he opined that the December 11, 2019 MRI scan findings were in fact causally related to appellant's December 27, 2008<sup>7</sup> employment injury and her subsequent surgery in 2009. He reasoned that there was an element of the natural progression of arthritis, but that there was "definitely a relationship between the injury and the MRI [scan] findings." Dr. Sankoorikal's stated that his evaluation and recommendations would remain the same and that his reasoning was "solely based on the history taking as well as the examination done on October 31, 2019."

By decision dated May 21, 2020, OWCP denied appellant's claim for an increased schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>8</sup> and its implementing federal regulations<sup>9</sup> 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

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<sup>7</sup> Dr. Sankoorikal noted that appellant sustained her injury in 2006, however, this appears to be a typographical error.

<sup>8</sup> *Supra* note 2.

<sup>9</sup> 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.<sup>10</sup> 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.<sup>11</sup>

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).<sup>12</sup> Under the sixth edition, the evaluator identifies the class of diagnosis (CDX), which is then adjusted by the GMFH, GMPE, and GMCS.<sup>13</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).<sup>14</sup> Evaluators are directed to provide reasons for their impairment rating, including the choice of diagnoses from regional grids and the calculation of the modifier score.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>16</sup>

### ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its February 16, 2012 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.<sup>17</sup>

OWCP accepted appellant's claim for a tear of medial meniscus of knee, current, right and a tear of anterior cruciate ligament, right. On March 19, 2010 it granted appellant a schedule award for two percent permanent impairment of her right lower extremity based on the opinion of Dr. Sankoorikal. On September 4, 2019 appellant filed a Form CA-7 claim for an increased schedule award.

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<sup>10</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

<sup>11</sup> *See G.W.*, Docket No. 19-0430 (issued February 7, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> A.M.A., *Guides* 494-531.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 521.

<sup>15</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>16</sup> *Supra* note 10 at Chapter 2.808.6(f) (March 2017).

<sup>17</sup> *See M.D.*, Docket No. 20-0007 (issued May 13, 2020); *D.B.*, Docket No. 17-1444 (issued January 11, 2018).

In support of her claim, appellant submitted a February 17, 2020 impairment evaluation from Dr. Wilson who examined appellant and diagnosed right knee chondromalacia, diffuse full thickness cartilage loss of the medial compartment, meniscus derangement, a bucket handle tear of the medial meniscus, and other tear of the medial meniscus. He determined that, under the sixth edition of the A.M.A., *Guides*, the new MRI scan of her right knee placed her in a class one with a mid-range default value of seven percent. Dr. Wilson found a GMFH of two, a GMPE of two, and a GMCS of two. Using the net adjustment formula, he found that appellant had nine percent right lower extremity permanent impairment.

Consistent with its procedures,<sup>18</sup> OWCP properly referred the matter to a DMA for an opinion regarding appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.<sup>19</sup> It specifically requested that the DMA review the December 11, 2019 diagnostic study as well as Dr. Wilson's February 17, 2020 impairment evaluation. OWCP also asked that if he did determine that the medical findings were causally related to the 2008 injury, then he should incorporate the evidence into his impairment rating.

Dr. Sankoorikal, serving as DMA, in an April 17, 2020 response, opined that the December 11, 2019 MRI scan findings were in fact causally related to appellant's December 27, 2008 employment injury and her subsequent surgery in 2009. He reasoned that there was an element of the natural progression of arthritis, but that there was "definitely a relationship between the injury and the MRI [scan] findings." Dr. Sankoorikal maintained that his evaluation and recommendations would remain the same and that his reasoning was solely based on his October 31, 2019 evaluation.

As Dr. Wilson and Dr. Sankoorikal calculated different permanent impairment ratings for the right lower extremity, the Board finds that there is a conflict in the medical opinion evidence requiring referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).<sup>20</sup>

The Board will, therefore, remand the case to OWCP for referral to an impartial medical specialist to resolve the conflict in the medical opinion as to the extent of appellant's right lower extremity permanent impairment. Following this and any further development as is deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

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

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<sup>18</sup> *Id.*

<sup>19</sup> *Supra* note 18.

<sup>20</sup> 5 U.S.C. § 8123(a); *see S.S.*, Docket No. 19-0766 (issued December 23, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 19, 2022  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board