

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

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<b>F.S., Appellant</b> )	)	
)	)	
<b>and</b> )	)	<b>Docket No. 23-0707</b>
)	)	<b>Issued: January 22, 2024</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b> )	)	
<b>BUREAU OF PRISONS, COLEMAN FEDERAL</b> )	)	
<b>CORRECTIONAL COMPLEX, Coleman, FL,</b> )	)	
<b>Employer</b> )	)	
_____ )	)	

*Appearances:*  
*Appellant, pro se*  
*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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On April 20, 2023 appellant filed a timely appeal from a March 20, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 20, 2023 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 her burden of proof to establish greater than two percent permanent impairment of the left lower extremity, for which she previously received a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board on a different issue.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On January 7, 2020 appellant, then a 42-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on January 4, 2020 she injured her left knee when removing property from a cell while in the performance of duty.<sup>4</sup> She did not stop work.

On March 9, 2022 OWCP accepted the January 4, 2020 claim for sprain of the left anterior cruciate ligament (ACL) and complex tear of medial meniscus of the left knee. It paid appellant wage-loss compensation on the supplemental rolls from May 27 through November 30, 2020.

On November 21, 2022 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

In a November 28, 2022 letter, Dr. Nam Dinh, a Board-certified orthopedic surgeon, indicated that appellant had three percent impairment rating under a 1996 state Uniform Permanent Impairment rating schedule. He noted that she had a torn meniscus subsequent to arthroscopic surgery in February 2011 and opined that she did not require additional surgery.

In a further letter dated January 9, 2023, Dr. Dinh reiterated his three percent impairment rating and opined that appellant had reached maximum medical improvement (MMI) on November 17, 2022. He diagnosed a complex tear of the medial meniscus and sprain of the ACL in the left knee. Dr. Dinh explained that the rating was based upon residual pain in the knee with activity and indicated that "the permanent impairment is classified as Class 1, Grade E, three percent LEI, after consulting the [diagnosis-based impairment] (DBI) and [range of motion] (ROM) references in the guide."

On January 10, 2023 OWCP referred appellant to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA) and requested that he evaluate her

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<sup>3</sup> *Order Remanding Case*, Docket No. 21-0428 (issued October 28, 2021).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx829. Appellant subsequently filed a claim for a May 22, 2020 traumatic injury to the left knee under OWCP File No. xxxxxx813, which OWCP denied. She also has a prior claim for an October 21, 2011 traumatic injury to the left knee under OWCP File No. xxxxxx304, which OWCP denied. OWCP previously accepted a September 5, 2010 traumatic injury claim for a left knee sprain under OWCP File No. xxxxxx882 and a November 30, 2010 traumatic injury claim for a left knee sprain and derangement of lateral meniscus under OWCP File No. xxxxxx398. Appellant received a schedule award for two percent permanent impairment of the left lower extremity under OWCP File No. xxxxxx398. The period of that award ran for 5.76 weeks from February 9 through March 20, 2012. OWCP has administratively combined OWCP File Nos. xxxxxx882, xxxxxx398, xxxxxx304, xxxxxx829, and xxxxxx813, with the latter serving as the master file.

permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

In a report dated January 19, 2023, Dr. Fellars noted that Dr. Dinh did not properly rate appellant's lower extremity impairment as he did not rely upon the edition of the A.M.A., *Guides*.<sup>6</sup> He noted that there was limited clinical information available and no documented motion loss, but that diagnostic studies revealed that she had undergone a partial medial meniscectomy. Using Table 16-3, page 509, the Knee Regional Grid, Dr. Fellars identified the class of diagnosis (CDX) for partial medial meniscectomy as a Class 1 impairment. He referenced Table 16-6, page 516, and applied a grade modifier for functional history (GMFH) of 1. Using Table 16-7, page 517, Dr. Fellars applied a grade modifier for physical examination (GMPE) of 1. Using Table 16-8, page 519, he applied a grade modifier for clinical studies (GMCS) of 1. Dr. Fellars then applied the net adjustment formula and found two percent permanent impairment of the left lower extremity. He noted that appellant had reached MMI on November 28, 2022.

Thereafter, OWCP further developed the record. On February 16, 2023 it provided Dr. Dinh with a statement of accepted facts (SOAF), the January 19, 2023 report by Dr. Fellars, and a previous permanent impairment evaluation by Dr. Farr, who evaluated appellant's left knee for permanent impairment under OWCP File No. xxxxxx398. OWCP requested that he review the materials and comment upon Dr. Fellars' rating of two percent permanent impairment of the left lower extremity.

By letter dated February 27, 2023, Dr. Dinh amended his prior report and concurred with Dr. Fellars' rating of two percent permanent impairment of the left lower extremity under the A.M.A., *Guides*.

By decision dated March 20, 2023, OWCP denied appellant's claim for an increased schedule award.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>7</sup> and its implementing federal regulations,<sup>8</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>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Supra* note 1.

<sup>8</sup> 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.<sup>9</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>10</sup>

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): A Contemporary Model of Disablement*.<sup>11</sup> Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by a GMFH, a GMPE, and GMCS.<sup>12</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>14</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 percentage of permanent impairment using the A.M.A., *Guides*.<sup>15</sup>

### ANALYSIS

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

OWCP's procedures provide that, if a claimant requests a schedule award, the claims examiner should review the case file for evidence which shows that the impairment has reached a permanent and fixed state, describes the impairment in sufficient detail to visualize the character and degree of disability, and gives a percentage of impairment based upon a specific diagnosis. If a claimant has not submitted an impairment evaluation, it should request a detailed report that includes history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment calculation was reached.<sup>16</sup>

Dr. Dinh, in his November 28, 2022 and January 9, 2023 letters, provided permanent impairment ratings for appellant's left lower extremity. However, he did not provide a history of her clinical presentation, physical examination findings, functional history, clinical studies, objective tests, or an analysis of his findings. Although the DMA, Dr. Fellars, in his January 19, 2023 report found two percent permanent impairment of the left lower extremity, he noted that

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<sup>9</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 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>10</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>11</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3.

<sup>12</sup> *Id.* at 494-531.

<sup>13</sup> *Id.* at 411.

<sup>14</sup> *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>15</sup> *Supra* note 9 at Chapter 2.808.6(f) (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

<sup>16</sup> *Id.* at Chapter 2.808.6(a)(1) (March 2017).

there was limited clinical information available and no documented motion loss, but the diagnostic studies revealed that she had undergone a partial medial meniscectomy.

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>17</sup> Once OWCP undertook development of the evidence, it had an obligation to do a complete job and obtain a proper evaluation and a report that would resolve the issue in this case.<sup>18</sup>

On remand, OWCP shall refer appellant, along with the case record and SOAF, to an appropriate specialist for a second opinion evaluation, including an appropriate physical examination to determine the extent of her left lower extremity permanent impairment for schedule award purposes and a rationalized opinion as to whether any impairment found is duplicative or in addition to the previous award under OWCP File No. xxxxxx398.<sup>19</sup> After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding her claim for an additional schedule award for left lower extremity impairment.

### **CONCLUSION**

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

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<sup>17</sup> See *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>18</sup> See 5 U.S.C. § 8101(19); *P.T.*, Docket No. 21-0138 (issued June 14, 2021); *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>19</sup> 20 C.F.R. § 10.404(d); see *A.R.*, Docket No. 21-0346 (issued July 1, 2021); *D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 20, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: January 22, 2024  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board