

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

R.W., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
DISTRIBUTION DEPOT, Richmond, VA,
Employer**

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**Docket No. 10-1964
Issued: June 22, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2010 appellant filed a timely appeal from a July 8, 2010 decision of the Office of Workers' Compensation Programs granting her a schedule award. Pursuant to the Federal Employees' Compensation Act,¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she is entitled to a greater than 18 percent left lower extremity impairment and 10 percent right lower extremity impairment, for which she received schedule awards.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 13, 2003 appellant, then a 57-year-old supply technician, filed a traumatic injury claim alleging that on August 5, 2003 she injured both knees when she slipped and fell while coming down the warehouse steps. OWCP accepted the claim for bilateral knee contusions which was later expanded to include bilateral patellofemoral syndrome and aggravation of bilateral knee osteoarthritis.

By decision dated January 25, 2005, OWCP granted appellant a schedule award for five percent permanent impairment of the right lower extremity and five percent impairment of the left lower extremity. The period of award was from October 1, 2004 to January 25, 2005.

By decision dated May 31, 2005, OWCP's hearing representative affirmed the January 25, 2005 schedule award determination.

On October 6, 2006 appellant filed a claim for an increased schedule award.

In a November 13, 2006 report, Dr. Felix M. Kirven, a treating Board-certified orthopedic surgeon, concluded that appellant has 20 percent right lower extremity impairment and a 20 percent impairment of the left lower extremity impairment due to loss of cartilage space of the patellofemoral joint and quadriceps muscle atrophy using Chapter 17 pages 523 to 563 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On February 1, 2007 Dr. Willie B. Thomson, an OWCP medical adviser, reviewed Dr. Kirven's reports and concluded that appellant had no more than five percent impairment of her right lower extremity and five percent impairment of the left lower extremity. He noted that the only basis for an impairment rating based on Dr. Kirven's reports would be crepitus in the patellofemoral joint. Using Table 17-31, page 544, he concluded that appellant had five percent impairment of each lower extremity.

In a June 19, 2007 report, Dr. Steve C. Blasdel, a second opinion Board-certified orthopedic surgeon, concluded that appellant had no additional impairment above what she had been previously awarded.

By decision dated August 3, 2007, OWCP denied appellant's request for an additional schedule award.

In a January 10, 2008 letter, appellant stated that appeal rights had not been attached to the August 3, 2007 decision and that she was requesting reconsideration.

By decision dated March 21, 2008, OWCP denied her claim on the grounds that the evidence was insufficient to establish that she sustained an injury as defined by FECA.

On December 11, 2008 the Board issued an order remanding the case in Docket No. 08-1343 for a *de novo* decision as the March 21, 2008 decision did not discharge OWCP's

responsibility to explain the disposition for the basis of the decision which appellant could understand.²

On February 23, 2009 Dr. Lawrence A. Manning, an OWCP medical adviser, reviewed the medical evidence of record and concluded that appellant was not entitled to an additional schedule award. He noted that Table 17-2, page 526 of the A.M.A., *Guides* (fifth edition) precluded the combination of impairments for arthritis and atrophy.

By decision dated March 18, 2009, OWCP denied appellant's request for an additional schedule award for her bilateral lower extremities on the grounds that the medical evidence was insufficient to warrant an additional award.

On October 7, 2009 appellant filed a claim for a schedule award.

On December 27, 2009 OWCP received a March 29, 2009 report from Dr. Kirven in which he reported an x-ray interpretation showed two millimeters of cartilage space in the left knee and five millimeters of cartilage space in the right knee. He concluded that appellant had a 10 percent impairment of the right knee and a 10 percent impairment of the left knee.

In a March 5, 2010 report, Dr. Kirven diagnosed patella femoral syndrome with bilateral knee pain and loss of range of motion with resultant decreased cartilage space on radiographic studies. A physical examination revealed 0 to 95 degrees of knee range of motion, valgus alignment, lateral patella subluxation, grinding of the patella, no joint line tenderness and negative Lachman, anterior and posterior drawer. Dr. Kirven reported that the right quadriceps muscles measured 57 centimeters and the left muscles measured 58 centimeters. In concluding, he found 20 percent impairment in each lower extremity using the sixth edition of the A.M.A., *Guides* and that appellant had reached maximum medical improvement on March 5, 2010.

On a March 8, 2010 permanent impairment worksheet, Dr. Kirven noted diagnoses of patellofemoral syndrome and knee pain. For both knees, he noted 15 percent impairment based on a grade C and modifiers of C for functional history (Table 16-3, page 511), 2 for physical examination, 2 for clinical studies and 2 for AAO9 score. Dr. Kirven reported a total diagnosis-based impairment of 15 percent to which he added 5 percent impairment for range of motion, resulting in a total 20 percent right lower extremity impairment. For the left knee summary, he noted a 20 percent regional impairment based on a 15 percent diagnosis-based impairment.

In a June 24, 2010 report, Dr. Christopher Brigham, an OWCP medical adviser Board-certified in occupational medicine, reviewed Dr. Kirven's impairment rating and concluded that appellant had an 18 percent left lower extremity impairment and 10 percent right lower extremity impairment. Using the criteria found in the A.M.A., *Guides* (sixth edition) Table 16-3, page 511,

² Docket No. 08-1343 (issued March 21, 2008).

Dr. Brigham reported that a two-millimeter cartilage interval measurement resulted in a class 2³ rating with a default score of 20 percent for the left knee. He utilized the adjustment grid and grade modifiers at page 516, Table 16-3a and Table 6-6, page 516: Functional History Adjustment, Lower Extremities, a grade modifier of zero was appropriate, with mild problems. According to section 16-3b, page 517 and Table 16-7, page 517: Physical Examination Adjustment, Lower Extremities, he assigned a grade modifier of one for mild motion loss. Under section 16-3c, page 518 and Table 16-8, page 519: Clinical Studies Adjustment, Lower Extremities, grade modifier was not used since clinical studies confirmed the diagnosis. OWCP's medical adviser utilized the net adjustment formula and determined that the net adjustment was minus one, which resulted in grade B, which correlated to an 18 percent impairment for the left lower extremity. For the right lower extremity, Dr. Brigham reported that a five-millimeter cartilage interval measurement resulted in a nonratable impairment for arthritis using Table 16-3, page 516. Using this same table, he determined that the diagnosis of right knee contusion was ratable. However, Dr. Brigham pointed out that under Table 16, 23, page 549: knee motion impairments, appellant would have a higher rating. Thus, he found that a 0 to 95 degree knee range of motion correlated to a 10 percent impairment right lower extremity impairment. OWCP's medical adviser opined that appellant reached maximum medical improvement on March 5, 2010, the date of Dr. Kirven's evaluation.

By decision dated July 8, 2010, OWCP granted appellant a schedule award for an additional 13 percent impairment of the left lower extremity and a schedule award for an additional 5 percent impairment of the right lower extremity resulting in a total 18 percent left lower extremity impairment and a 10 percent right lower extremity impairment.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, OWCP adopted the

³ Dr. Brigham noted a class 1 with a default score of 20 percent based on a two-millimeter cartilage interval. However, a default of 20 percent based on a two-millimeter cartilage interval for primary knee joint arthritis is class 2 based on Table 16-3, page 511. Thus, the class 1 noted by Dr. Brigham in his report appears to be a typographical error.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

In addressing lower extremity impairments, the sixth edition identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁸ The net adjustment formula is GMFH - CDX + GMPE - CDX + GMCS - CDX.⁹

The OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS

OWCP accepted appellant's claim for knee contusions which was later expanded to include bilateral patellofemoral syndrome and aggravation of bilateral knee osteoarthritis. On July 8, 2010 it issued a schedule award granting appellant an additional 13 percent impairment of the left lower extremity and an additional 5 percent impairment of the right lower extremity resulting in a total 18 percent impairment of the left lower extremity and a 10 percent impairment of the right lower extremity. On March 5, 2010 Dr. Kirven concluded that appellant had a 20 percent impairment of each lower extremity. In reaching this determination, he did not reference specific tables used although he did note the use of modifiers and a grade. Dr. Kirven's opinion as to a 20 percent permanent impairment in each lower extremity is of limited probative value without additional explanation as to the tables he used and how he arrived at his calculation. The Board finds that his opinion as to the degree of impairment is of diminished probative value and not sufficient to create a conflict under 5 U.S.C. § 8123(a).¹¹

OWCP's medical adviser utilized findings made by Dr. Kirven in his March 5, 2010 report to find appellant was entitled to an additional 13 percent impairment of appellant's left lower extremity and an additional five percent impairment for her right lower extremity. He based the rating on a two-millimeter cartilage interval on the left side by applying the guidelines

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁸ A.M.A., *Guides* (6th ed. 2009) at 494-531, *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

⁹ *Id.* at 521

¹⁰ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). *See C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

¹¹ *See Mary L. Henninger*, 52 ECAB 408 (2001) (the medical evidence as to the degree of permanent impairment was not based on proper identification and application of specific tables in the A.M.A., *Guides* and was not sufficient to create a conflict under 5 U.S.C. § 8123(a)). *See also J.G.*, Docket No. 09-1128 (issued December 7, 2009) (An attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

at Table 16-3 at page 511 of the A.M.A., *Guides* which yielded 20 percent impairment. Dr. Brigham then applied the grade modifiers described in Tables 16-6 through 16-8 and the net adjustment formula.¹² He advised that this would equate to a net adjustment of minus one which included grade modifiers of one for physical examination, zero for physical studies and not applicable for clinical studies. Dr. Brigham utilized the net adjustment formula and determined the class 2, grade B impairment for the left lower extremity, with a net adjustment of minus one, would equate to an 18 percent impairment for the left leg or an additional 13 percent left leg permanent impairment. For the right leg, Dr. Brigham determined that the five-millimeter cartilage interval would not provide a ratable impairment, but that her right knee contusion was ratable. Using Table 16-23, page 549, he determined that appellant had 10 percent right lower extremity impairment based on her motion loss of 0 to 95 degrees flexion.

The Board finds that OWCP properly determined that appellant was only entitled to an additional 13 percent impairment of the left lower extremity and an additional 5 percent impairment for her right lower extremity, for which she received schedule awards based on Dr. Brigham's June 24, 2010 report.

CONCLUSION

The Board finds that appellant has not established entitlement to a greater than 18 percent left lower extremity impairment and 10 percent right lower extremity impairment, for which she received schedule awards.

¹² See A.M.A., *Guides* 515-21.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 8, 2010 is affirmed.

Issued: June 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board