

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

R.B., Appellant	)	
	)	
and	)	<b>Docket No. 22-0954</b>
	)	<b>Issued: December 29, 2022</b>
U.S. POSTAL SERVICE, ENGLEWOOD POST	)	
OFFICE, Chicago, IL, Employer	)	
	)	

*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 June 6, 2022 appellant, through counsel, filed a timely appeal from a May 17, 2022 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 issuance of the May 17, 2022 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 permanent impairment of her right lower extremity, warranting a schedule award.

## FACTUAL HISTORY

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

On August 25, 2006 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sprained ligaments in both knees as a result of performing repetitive work duties, including walking up stairs and carrying weight. She noted that she first became aware of her condition on August 3, 2006 and realized its relationship to her federal employment on August 21, 2006. OWCP initially accepted appellant's claim for bilateral knee sprain. It subsequently expanded its acceptance of her claim to include lateral and medial meniscus tears, internal derangement, synovitis/tenosynovitis, old bucket handle tear of the medial meniscus of the left knee, and aggravation of preexisting left knee osteoarthritis. Appellant underwent a series of OWCP-authorized surgeries including a left knee abrasion arthroplasty with partial synovectomy on January 24, 2007, left knee arthroscopic excision of a torn medial and lateral meniscus, chondroplasty, partial synovectomy, and debridement of a partial tear of the anterior cruciate ligament (ACL) on September 18, 2007, left knee arthroscopy with chondroplasty, debridement of a partial tear involving the ACL, and partial synovectomy of the left knee on November 20, 2008, arthroscopy with chondroplasty and removal of loose bodies of the left knee on November 6, 2013, and left knee arthroscopy with resection of a tear of the lateral meniscus on July 13, 2017.

By decisions dated January 25 and May 11, 2010 and March 26, 2015, OWCP granted appellant schedule awards totaling 13 percent permanent impairment of the left lower extremity.

On January 30, 2018 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

OWCP subsequently received an April 9, 2018 medical report from Dr. Neil Allen, a Board-certified internist and neurologist. Dr. Allen found that appellant had 3 percent permanent impairment of the right lower extremity due to the accepted right knee sprain/strain and 20 percent permanent impairment of the left lower extremity due to OWCP-authorized left knee total medial and lateral meniscectomies under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

On May 29, 2018 Dr. Jovito Estaris, Board-certified in occupational medicine serving as an OWCP district medical adviser (DMA), reviewed Dr. Allen's report. He determined that appellant had 13 percent diagnosed-based impairment (DBI) of the left lower extremity due to her accepted left knee partial lateral medial meniscectomies and zero percent range of motion (ROM)

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<sup>4</sup> Docket No. 19-1719 (issued March 8, 2021).

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

permanent impairment of the left lower extremity under the sixth edition of the A.M.A., *Guides*. As the DBI method provided the higher rating, the DMA concluded that appellant had 13 percent permanent impairment of the left lower extremity. Regarding impairment to the right lower extremity, he determined that her accepted bilateral knee sprain had resolved many years ago and, thus, no permanent impairment rating was warranted. The DMA concluded that maximum medical improvement (MMI) was reached on April 9, 2018 the date of Dr. Allen's impairment evaluation.

OWCP, by letter dated June 7, 2018, requested that Dr. Allen review the report of the DMA, Dr. Estaris.

In a July 7, 2018 addendum report, Dr. Allen reviewed the impairment ratings of the DMA, Dr. Estaris, and agreed that appellant had 13 percent permanent impairment of the left lower extremity. However, he disagreed with the DMA's zero percent right lower extremity permanent impairment rating and continued to maintain that she had three percent permanent impairment of that extremity.

On July 18, 2018 OWCP requested that its DMA, Dr. Estaris, review Dr. Allen's addendum report.

In a July 23, 2018 report, the DMA continued to opine that appellant had no right lower extremity permanent impairment and no more than 13 percent permanent impairment of the left lower extremity.

By decision dated January 10, 2019, OWCP denied appellant's claim for an increased schedule award.

On January 15, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 14, 2019.

By decision dated July 12, 2019, OWCP's hearing representative affirmed the January 10, 2019 schedule award decision.

On August 12, 2019 appellant, through counsel, appealed to the Board. By decision dated March 8, 2021,<sup>6</sup> the Board affirmed in part and set aside in part the July 12, 2019 decision. The Board found that appellant had not met her burden of proof to establish greater than 13 percent permanent impairment of her left lower extremity for which she previously received schedule award compensation. The Board determined, however, that a conflict existed in the medical opinion evidence between Dr. Allen and the DMA, Dr. Estaris, regarding whether her work-related bilateral knee sprain had resolved and whether she had permanent impairment to the right lower extremity causally related to the accepted injury. The Board remanded the case for referral of appellant to an impartial medical examiner (IME) to resolve the conflict in medical opinion evidence.

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

On August 31, 2021 OWCP referred appellant, together with a statement of accepted facts, the medical record, and a series of questions, for an impartial medical evaluation with Dr. Thomas Akre, a Board-certified orthopedic surgeon.

In a September 24, 2021 report, Dr. Akre noted appellant's history of injury. He also reviewed the medical record, including x-ray and magnetic resonance imaging (MRI) scan findings. Dr. Akre noted that a 2007 right-knee x-ray report showed mild medial compartment arthritis of the right knee. He further noted that x-rays performed in 2019 showed moderate arthritis in the right knee and advanced lateral compartment arthritis in the left knee. Dr. Akre performed right-knee x-rays on the date of his examination, which revealed only mild arthritis. He also reviewed a November 9, 2011 right knee MRI scan, which showed a small effusion, otherwise normal. A 2017 right knee MRI scan showed a subchondral cyst, which was more consistent with arthritic changes rather than ligament or meniscal injuries, which demonstrated a completely resolved sprain and no persistent problems except for some arthritis. Dr. Akre indicated that a 2019 right knee MRI scan showed some marrow edema in the patella femoral, which was more consistent with patellofemoral syndrome and arthritis showing patella chondromalacia and posterior lateral proximal tibia arthritis in the lateral compartment and MRI scan test results of the right and left knees. He advised that these findings were consistent with arthritic changes. Dr. Akre related that arthritis is a known fact of life and was very likely to progress over a 15-year period. He further related that it is also a known degenerative condition in the normal population and was not work-related condition. Dr. Akre agreed with the May 29, 2018 findings of the DMA, Dr. Estaris, that appellant's accepted right knee sprain had resolved and that she had reached MMI. He noted that there was no evidence of persistent problems related to the accepted right knee condition. Dr. Akre disagreed with Dr. Allen's finding that the accepted right knee sprain was the reason for appellant's persistent problems. He maintained that her current conditions were related to progressive patellofemoral syndrome and osteoarthritis, which were more consistent with general wear and arthritic changes as supported by MRI scan findings. Dr. Akre opined that, based on the sixth edition of the A.M.A., *Guides*, appellant had zero percent permanent impairment of the right lower extremity. He concluded that MMI was reached on February 20, 2009 the date of an impairment evaluation performed by Dr. Allen.

By decision dated November 5, 2021, OWCP denied appellant's claim for a schedule award for the right lower extremity. It found that the opinion of Dr. Akre, as the IME, represented the special weight of the medical evidence.

On November 17, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant, through counsel, subsequently submitted an undated addendum report from Dr. Allen reviewing Dr. Akre's September 24, 2021 report. Dr. Allen maintained that Dr. Akre based his opinion on an insufficient examination consisting only of minimal palpatory findings. He related that all available objective data must be considered to formulate a robust opinion. Dr. Allen further maintained that Dr. Akre had not provided sufficient evidence to support his opinion. He indicated that his prior impairment rating remained unchanged and that it was in accordance with the A.M.A., *Guides* and FECA transmittal No. 17-02 which states that "rated impairment should reflect the total loss for the scheduled member at the time of the rating examination." Dr. Allen further indicated that "[t]here were no provisions for apportionment under FECA and that an impairment assessment should include both work-related impairment, as well as nonindustrial impairment of the same scheduled member."

By decision dated May 17, 2022, the prior OWCP's hearing representative affirmed the November 5, 2021 decision.

### **LEGAL PRECEDENT**

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>7</sup>

The schedule award provisions of FECA<sup>8</sup> and its implementing 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. 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>10</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>11</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>12</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based impairment (DBI) method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.<sup>13</sup> Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS).<sup>14</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>15</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary

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<sup>7</sup> See *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>11</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Chapter 2.808.5.a (March 2017).

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

<sup>13</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), page 3, section 1.3(a).

<sup>14</sup> *Id.* at 494-531.

<sup>15</sup> *Id.* at 411.

shall appoint a third physician who shall make an examination.<sup>16</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>17</sup> Where 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 on a proper factual and medical background, must be given special weight.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right lower extremity, warranting a schedule award.

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata*, absent further review by OWCP under section 8128 of FECA. It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 12, 2019 decision as the Board considered that evidence in its March 8, 2021 decision.<sup>19</sup>

In the prior appeal, the Board found a conflict in medical opinion between Dr. Allen, appellant's attending physician, and Dr. Estaris, the DMA for OWCP, regarding the extent and degree of appellant's permanent impairment of the right lower extremity. On remand OWCP properly referred her to Dr. Akre, pursuant to 5 U.S.C. § 8123(a), for an impartial medical evaluation.

In a September 24, 2021 report, Dr. Akre opined that appellant had zero percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. He discussed her history of injury and reviewed her medical record, including diagnostic test results. Dr. Akre noted that x-ray and MRI scan findings, including his own x-ray findings revealed arthritic changes in the right knee and a completely resolved accepted right knee sprain. He explained that the arthritic changes were not due to the accepted work-related injury, but rather due to a degenerative condition that occurred in the normal population and would likely progress over many years. Dr. Akre agreed with the May 29, 2018 findings of the DMA, Dr. Estaris, that appellant's accepted right knee sprain had resolved and that she had reached MMI. He disagreed with Dr. Allen's opinion that her current right knee problems were due to the accepted right knee sprain, noting that her progressive patellofemoral syndrome and osteoarthritis were more consistent with general wear and arthritic changes. Dr. Akre concluded that appellant had zero percent right lower extremity permanent impairment.

The Board finds that Dr. Akre's September 24, 2021 report is entitled to the special weight of the medical evidence and establishes that appellant had no permanent impairment of the right

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<sup>16</sup> 5 U.S.C. § 8123(a). See *M.E.*, Docket No. 21-0281 (issued June 10, 2022); *R.C.*, Docket No. 18-0463 (issued February 7, 2020); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016).

<sup>17</sup> See *M.E.*, *id.*; *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

<sup>18</sup> *M.E.*, *id.*; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>19</sup> *M.S.*, Docket No. 20-1095 (issued March 29, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

lower extremity.<sup>20</sup> His opinion was based on a proper factual and medical history, which he reviewed, and his essentially normal examination findings. Moreover, Dr. Akre provided medical rationale for his impairment rating.

Dr. Allen, in an undated addendum report, maintained that Dr. Akre's September 24, 2021 opinion was not supported by sufficient evidence as it was based on an inadequate examination consisting only of minimal palpatory findings. He, however, was on one side of the conflict resolved by Dr. Akre. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME, or to create a new conflict.<sup>21</sup> Dr. Allen's report is, therefore, insufficient to overcome the special weight accorded to Dr. Akre's opinion or to create a new conflict in medical opinion.<sup>22</sup> As the medical evidence of record is insufficient to establish permanent impairment of the right lower extremity, the Board finds that appellant has not met her burden of proof.

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 permanent impairment.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her right lower extremity, warranting a schedule award.

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<sup>20</sup> See *M.E.*, *supra* note 17; *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

<sup>21</sup> See *R.H.*, Docket No. 19-1503 (issued February 2, 2022); *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *M.R.*, *id.*; *S.S.*, Docket No. 17-1361 (issued January 8, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

<sup>22</sup> See *R.H.*, *M.R.*, and *S.S.*, *id.*; *K.R.*, Docket No. 16-0542 (issued December 21, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2022 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 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