

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

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<b>R.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0239</b>
	)	<b>Issued: July 11, 2022</b>
<b>U.S. POSTAL SERVICE, WATERFORD POST OFFICE, Waterford, CT, Employer</b>	)	
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*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 2, 2021 appellant, through counsel, filed a timely appeal from a November 4, 2021 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.

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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.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of his right lower extremity, warranting a schedule award.

## FACTUAL HISTORY

On March 14, 2013 appellant, then a 54-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2013 he sustained right chest injuries when his employing establishment vehicle was involved in a motor vehicle accident and struck a tree while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for right C7 lateral process fracture, right T1 transverse process fracture, right 1<sup>st</sup> and 2<sup>nd</sup> rib fractures, right distal femur osteophyte fracture, and complex facial laceration involving right upper eyelid/forehead. It paid appellant wage-loss compensation for the period May 18 to 20, 2013. The employing establishment terminated appellant's employment, effective June 10, 2013.

On August 22, 2016 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a report dated October 25, 2016, Dr. Karen M. Garvey, Board-certified in internal medicine and occupational medicine, noted that appellant presented with intermittent forehead numbness, neck, upper back, and right knee pain. She indicated that appellant's physical examination revealed normal strength of the arms, back, legs, shoulders, and neck. Utilizing the diagnosis-based impairment method (DBI) of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> Dr. Garvey indicated that pursuant to Table 16-3, page 510, she assigned a class of diagnosis (CDX) of 1 for the diagnosis of right femur closed fracture. She applied a grade modifier for functional history (GMFH) of 0 using Table 16-6, page 516, a grade modifier for physical examination (GMPE) of 1 using Table 16-7, page 517, and a grade modifier for clinical studies (GMCS) of 2 using Table 16-8, page 519, to find a Class 1, Grade C, a five percent permanent impairment of appellant's right lower extremity. Dr. Garvey related that appellant had reached maximum medical improvement (MMI) on August 10, 2016.<sup>4</sup>

On April 4, 2017 OWCP routed Dr. Garvey's October 25, 2016 report, a statement of accepted facts (SOAF), and the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, serving as OWCP's district medical adviser (DMA) for review regarding appellant's right lower extremity permanent impairment.

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

<sup>4</sup> Dr. Garvey found appellant had an eight percent permanent impairment for his right eyelid laceration and full-thickness lacrimal passages and entropion, a 12 percent permanent impairment for penetrating wound of orbit without foreign body, a zero percent impairment for closed cervical vertebrae fracture without spinal cord injury, a zero percent permanent impairment for closed dorsal vertebrae fracture without spinal cord injury, and a zero percent impairment for right closed rib fracture. By decision dated May 1, 2018, OWCP granted appellant the sum of \$3,000.00 for permanent disfigurement of the face, head, or neck.

In a report dated April 17, 2017, Dr. Harris concurred with the five percent permanent impairment rating for appellant's right lower extremity and the date of MMI found by Dr. Garvey.

On August 21, 2018 OWCP referred the case record to Dr. Morley Slutsky, Board-certified in occupational medicine, serving as OWCP's DMA, for review of appellant's entitlement to a schedule award.

In an August 29, 2018 report, Dr. Slutsky reviewed the SOAF and medical evidence of record, including Dr. Garvey's October 25, 2016 report and requested that she be asked to provide a supplemental report reflecting appellant's physical examination findings of the right knee and hip. He advised that if Dr. Garvey could not provide appellant's physical examination findings OWCP should refer appellant for a second opinion examination.

In a letter dated October 10, 2018, counsel advised that Dr. Garvey had retired and would be unable to provide additional information. He requested that OWCP proceed with scheduling a second opinion examination.

On June 27, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF) and medical record, to Dr. John Goldberg, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant had a permanent impairment of the right lower extremity. In a July 22, 2019 report, Dr. Goldberg noted appellant's diagnoses of C7 lateral process fracture, T1 transverse process fracture, distal femoral osteophyte fracture, and permanent aggravation of right knee degenerative arthritis. He indicated that appellant had reached MMI. Dr. Goldberg concluded that appellant had 10 percent whole person permanent impairment, 24 percent lower extremity permanent impairment, and 4 percent permanent impairment of the cervical and thoracic spine.

On August 12, 2019 OWCP routed Dr. Goldberg's July 22, 2019 report, a SOAF, and the case file to Dr. Slutsky for review as to whether appellant sustained a permanent impairment of the right lower extremity due to his accepted conditions.

In a report dated August 24, 2019, Dr. Slutsky reviewed Dr. Goldberg's report and noted that he failed to provide complete physical examination findings and any of the key factors needed to rate appellant's permanent impairment.

On September 27, 2019 OWCP referred appellant, together with a SOAF, list of questions, and medical record, to Dr. Stephen Silver, a Board-certified orthopedic surgeon, for a second opinion evaluation.

A November 5, 2019 magnetic resonance imaging (MRI) scan of appellant's right knee demonstrated complex medial meniscus body and posterior horn tearing and mild-to-moderate patellofemoral/medial compartment osteoarthritis with a small joint effusion.

In a report dated October 7, 2019, Dr. Silver noted his review of the SOAF, appellant's medical records and performed a physical examination. He diagnosed right knee degenerative joint disease, rule out medial meniscal tear. Appellant's right knee physical examination revealed negative anterior drawer, pivot shift, and posterior sign, pain on patella-femoral ballottement, and considerable medial joint line tenderness. He advised that he was unable to provide an impairment

rating until he had reviewed the right knee MRI scan. In a December 9, 2019 addendum, Dr. Silver advised that after reviewing the November 5, 2019 MRI scan that appellant was not amenable to a permanent impairment rating at that time as he had not reached MMI.

By decision dated August 21, 2020, OWCP denied appellant's claim for a schedule award for his right lower extremity, finding that the evidence of record was insufficient to establish permanent impairment due to his accepted employment injury as MMI had not been reached.

On August 31, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 2, 2020.

By decision dated January 28, 2021, OWCP's hearing representative vacated the August 21, 2020 decision and remanded the case for referral to a new second opinion physician to provide an assessment of appellant's work-related right lower extremity condition, any resulting impairment, and whether he had reached MMI.

On February 2, 2021 OWCP referred appellant, together with a list of questions, SOAF, and medical record, to Dr. Robert Moskowitz, a Board-certified orthopedic surgeon, for a second opinion evaluation, to provide an assessment of appellant's right lower extremity permanent impairment.

In a report dated March 9, 2021, Dr. Moskowitz indicated that he had reviewed the SOAF, the medical record, appellant's history of injury, and performed a physical examination. He noted that appellant's physical examination reflected full right knee range of motion (ROM), no visual or palpable right knee joint effusion, and no joint line tenderness. A review of imaging tests revealed right tibial femoral joint osteoarthritis, primarily on the medial side and patellofemoral osteoarthritis, which were preexisting conditions and unrelated to the accepted March 13, 2013 employment injury. Dr. Moskowitz opined that appellant reached MMI on October 25, 2016. Using Table 16-3, page 510, he concluded that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides* using the diagnosis of patellar fracture due to the lack of any abnormal examination findings.

On April 9, 2021 OWCP routed Dr. Moskowitz' March 9, 2021 report, a SOAF, and the case file to Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as OWCP's DMA, for review as to whether appellant sustained permanent impairment of his right lower extremity as a result of his accepted conditions.

In a report dated April 23, 2021, Dr. Hammel concurred with Dr. Moskowitz' impairment rating. Using the sixth edition of the A.M.A., *Guides*, he found zero percent permanent impairment for the right lower extremity. Dr. Hammel explained that he utilized the DBI method for rating appellant's permanent impairment for the accepted diagnosis of right distal femur osteophyte fracture. He found appellant had zero percent permanent impairment using the DBI method as appellant had only minor physical examination findings and his right knee ROM was full. Thus, Dr. Hammel concluded that appellant had zero percent permanent impairment for the accepted right distal femur osteophyte fracture. He found March 9, 2021, the date of Dr. Moskowitz' examination, to be the date of MMI.

By decision dated May 14, 2021, OWCP denied appellant's claim for a schedule award for his right lower extremity, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member due to his accepted work injury.

On May 21, 2021 appellant, through counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on September 13, 2021.

By decision dated November 4, 2021, OWCP's hearing representative affirmed the May 14, 2021 decision regarding appellant's claim for a schedule award.<sup>5</sup>

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>6</sup> and its implementing regulations<sup>7</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 of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.<sup>8</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.<sup>9</sup>

The sixth edition of the A.M.A., *Guides* provides the DBI method of evaluation utilizing the World Health Organization's *International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement*.<sup>10</sup> Under the sixth edition, the evaluator identifies the impairment for the diagnosed condition CDX, which is then adjusted by grade modifiers of GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) +

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<sup>5</sup> The hearing representative also instructed OWCP to issue a formal decision regarding appellant's entitlement to schedule award compensation for his right eye impairment. The Board notes that as OWCP has not issued a decision on appellant's claim for a schedule award for an eye impairment, this issue is not presently before the Board. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a); *see also* *M.B.*, Docket No. 20-0552 (issued May 14, 2021); *T.T.*, Docket No. 18-1622 (issued May 14, 2019); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>10</sup> A.M.A., *Guides*, page 3, section 1.3.

(GMCS - CDX).<sup>11</sup> Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnosis from regional grids and calculations of modifier scores.<sup>12</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>13</sup>

### ANALYSIS

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

Appellant initially submitted an October 25, 2016 report from his treating physician, Dr. Garvey, who opined that appellant had five percent permanent impairment of his right lower extremity. OWCP also obtained second opinion reports dated July 22, 2019 from Dr. Goldberg, who opined that appellant had 24 percent permanent impairment of the right lower extremity, and an October 7, 2019 report from Dr. Silver, who opined that appellant's permanent impairment could not be rated as he had not reached MMI. However, Dr. Goldberg's report did not provide complete physical examination findings and Dr. Silver indicated that appellant had not yet reached MMI. These reports, therefore, provided an insufficient basis for evaluating appellant's permanent impairment of the right lower extremity.<sup>14</sup>

After initial development of appellant's schedule award claim, pursuant to the January 28, 2021 remand of the case by OWCP's hearing representative, on March 9, 2021 OWCP referred appellant for a second opinion evaluation by Dr. Moskowitz. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Moskowitz determined that appellant had zero percent permanent impairment of the right lower extremity due to his accepted right distal femur osteophyte fracture. He opined that appellant had normal ROM of the right knee and no objective physical examination findings of permanent impairment due to the diagnosis of right distal femur osteophyte fracture.

OWCP then properly referred the medical record to the DMA, Dr. Hammel, who provided an April 23, 2021 report. Using the DBI rating method of the A.M.A., *Guides*, Table 16-3 at page 510, the DMA concurred with Dr. Moskowitz' opinion that appellant had zero percent permanent impairment of the right lower extremity attributable to his accepted diagnosis of right distal femur osteophyte fracture.

The Board finds that both Dr. Moskowitz and Dr. Hammel properly applied the A.M.A., *Guides*, Table 16-3 at page 510, and provided rationale to explain their opinions that appellant had zero percent permanent impairment of the right lower extremity, as appellant had no significant objective abnormal findings at MMI. Accordingly, the weight of the medical opinion evidence is

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<sup>11</sup> *Id.* at 494-531.

<sup>12</sup> *Supra* note 8; *see M.B.*, *supra* note 8; *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>13</sup> *Supra* note 9 at Chapter 2.808.6(f) (March 2017); *B.B.*, Docket No. 18-0782 (issued January 11, 2019).

<sup>14</sup> *See M.P.*, Docket No. 10-1005 (issued January 13, 2011).

accorded to Dr. Moskowitz' March 9, 2021 second opinion report and the April 23, 2021 report of Dr. Hammel. As such, the Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for his accepted right distal femur osteophyte fracture.

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 impairment.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 4, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2022  
Washington, DC

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

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

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