

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

C.B., Appellant	)	
	)	
and	)	<b>Docket No. 24-0757</b>
	)	<b>Issued: August 30, 2024</b>
DEPARTMENT OF THE AIR FORCE,	)	
TINKER AIR FORCE BASE,	)	
Oklahoma City, OK, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 10, 2024 appellant filed a timely appeal from a March 26, 2024 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>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than 10 percent permanent impairment of the left lower extremity (the leg), for which he previously received a schedule award; (2) whether OWCP properly determined the date of appellant's

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

<sup>2</sup> The Board notes that following the March 26, 2024 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 caserecord 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.*

maximum medical improvement (MMI); and (3) whether OWCP properly determined appellant's pay rate for schedule award purposes.

### **FACTUAL HISTORY**

On April 16, 2008 appellant, then a 22-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on April 10, 2008 he sustained a left knee injury when he attempted to stand from a crawling position while in the performance of duty. OWCP accepted the claim for left knee lateral collateral ligament sprain and tear of the left knee medial meniscus. Appellant received leave buy back for the period June 3 through 10, 2008. He underwent a June 3, 2008 left knee arthroscopy with partial medial meniscectomy. Appellant's claim was administratively closed on January 5, 2011 due to inactivity.

On January 25, 2023 appellant requested that his claim be reopened as his accepted conditions had worsened and he required medical treatment.

In letters dated January 25 and February 28, 2023, OWCP advised appellant that he should complete a notice of recurrence (Form CA-2a) and submit medical evidence.

On May 1, 2023 appellant filed a Form CA-2a for recurrence of medical treatment and time loss from work due to worsening of his accepted conditions. A date of recurrence was not provided, and no medical evidence was submitted.

In a May 1, 2023 letter, OWCP advised appellant that his case was reopened to allow for medical examination, as there was no discharge from care or indication that his accepted condition had resolved. It also informed him that while he had also checked that he was claiming time loss from work on the CA-2a form, he had also indicated that he had not stopped work after the recurrence. Therefore, it appeared that he was only claiming a recurrence of medical treatment.

By decision dated May 11, 2023, OWCP accepted appellant's claim for recurrence of additional medical care for his accepted conditions.

OWCP received medical evidence. An August 25, 2023 x-ray of appellant's left knee demonstrated no acute osseous pathology or significant degenerative changes.

In an August 31, 2023 report, Dr. John W. Ellis, an osteopathic physician Board-certified in family medicine, reviewed appellant's history of injury and noted appellant's accepted conditions. On physical examination of appellant's left knee, he reported that the left knee revealed well-healed arthroscopic scars consistent with meniscus surgery with no obvious joint deformities, mild effusion over the medial aspect of the knee and that he was "ligamentously stable." Dr. Ellis noted that patellofemoral crepitation was both audible and palpable with passive and active motion. He found there was decreased range of motion with flexion measuring 100 degrees and full extension with pain against resistance and tenderness to palpation over the medial joint line. In a separate lower extremity range of motion record, Dr. Ellis provided three measurements of left knee flexion of 101, 99, and 102 degrees, and three measurements of left knee contraction of 0 degrees. He reviewed appellant's August 25, 2023 x-rays and indicated there was a medial joint space of 4 millimeters (mm), lateral compartment of 5 mm, and mild joint space narrowing of the superior aspect of the patellofemoral joint. Dr. Ellis opined that appellant had reached MMI and required ongoing medical treatment of his accepted conditions.

Dr. Ellis provided permanent impairment ratings pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> Utilizing the diagnosis-based impairment (DBI) rating methodology, he determined that under Table 16-3, page 509 appellant had two percent left lower extremity permanent impairment for the class of diagnosis (CDX) of partial medial meniscus tear with meniscectomy. In his worksheets, Dr. Ellis reported that appellant had an assigned Class 1 impairment, a grade modifier for functional history (GMFH) of 1, a grade modifier for physical examination (GMPE) of 1, and a grade modifier for clinical studies (GMCS) of 1. In his net adjustment calculation, he indicated that the GMCS was not applicable. Dr. Ellis found a net adjustment of zero which resulted in a two percent left lower extremity permanent impairment. He also utilized the range of motion (ROM) rating methodology and found under Table 16-23, page 549 that appellant had 10 percent permanent impairment of the left lower extremity. Dr. Ellis opined that appellant had 10 percent left lower extremity permanent impairment based upon ROM rating methodology as that method produced the higher rating and must be used pursuant to Table 2-1 of the A.M.A., *Guides*.

On September 28, 2023 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 12, 2023 OWCP referred appellant's case and a December 12, 2023 statement of accepted facts (SOAF) to Dr. William Tontz, Jr., a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an impairment rating in conformity with the A.M.A., *Guides*.

In a December 23, 2023 report, Dr. Tontz noted his review of the medical record, including Dr. Ellis' report, which he indicated was dated February 14, 2022.<sup>4</sup> He opined that appellant reached maximum medical improvement on February 14, 2022, per Dr. Ellis' assessment. Dr. Tontz also concurred with Dr. Ellis' final impairment rating of 10 percent. He explained that the ROM rating method was allowed for the diagnosis of knee injury status post partial medial meniscectomy per Table 16-3 of the A.M.A., *Guides* and produced the higher impairment rating over the DBI rating methodology.

By decision dated March 26, 2024, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity (the leg). The period of the award ran for 288 days for the period February 14 through September 3, 2022, and was based on the impairment findings of Dr. Ellis and the DMA. OWCP utilized June 3, 2008 as the effective date of pay rate.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>5</sup> and its implementing federal regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent

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

<sup>4</sup> This appears to be a typographical error as there is no medical report of record dated February 14, 2022.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

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. Through its implementing regulations, OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</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>9</sup>

Chapter 16 of the sixth edition of the A.M.A., *Guides*, pertaining to the lower extremities, provides that DBI is the primary method of calculation for the lower limb and that most impairments are based on the DBI where impairment class is determined by the diagnosis and specific criteria as adjusted by a GMFH, a GMPE, and/or a GMCS. It further provides that alternative approaches are also provided for calculating impairment for peripheral nerve deficits, complex regional pain syndrome, amputation, and ROM. ROM is primarily used as a physical examination adjustment factor.<sup>10</sup> The A.M.A., *Guides*, however, also explain that some of the diagnosis-based grids refer to the ROM section when that is the most appropriate mechanism for grading the impairment. This section is to be used as a stand-alone rating when other grids refer to this section or no other diagnosis-based sections of the chapter are applicable for impairment rating of a condition.<sup>11</sup>

In determining permanent impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knees, reference is made to Table 16-3 (Knee Regional Grid).<sup>12</sup> Under that table, after the diagnosis and the CDX is determined, a default grade value is identified, the net adjustment formula is then applied. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>13</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 permanent

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<sup>7</sup> *Id.* See also *V.J.*, Docket No. 1789 (issued April 8, 2020); *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>8</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

<sup>9</sup> *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>10</sup> A.M.A., *Guides* 497, section 16.2.

<sup>11</sup> *Id.* at 543; see also *M.D.*, Docket No. 16-0207 (issued June 3, 2016); *D.F.*, Docket No. 15-0664 (issued January 8, 2016).

<sup>12</sup> *Id.* at 509-11.

<sup>13</sup> *Id.* at 515-22.

impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>14</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of the left lower extremity (the leg), for which he previously received a schedule award.

On September 28, 2023 appellant filed a claim for a schedule award. He submitted an August 31, 2023 report from Dr. Ellis. Dr. Ellis reported appellant's physical examination findings and opined that appellant had 10 percent permanent impairment of the left lower extremity based on ROM rating methodology, which yielded the higher impairment rating than the 2 percent DBI rating for partial medial meniscectomy.

In a December 23, 2023 report, Dr. Tontz noted his review of the medical record, including Dr. Ellis' report, which he indicated was dated February 14, 2022, and concurred with Dr. Ellis's DBI permanent impairment rating of 2 percent and ROM permanent impairment rating of 10 percent. He indicated that Table 16-3 of the A.M.A., *Guides* allowed the use of the ROM rating methodology for the diagnosis of partial knee meniscus meniscectomy and, therefore, appellant had 10 percent permanent impairment of the left lower extremity as the ROM methodology yielded the higher impairment rating. However, the Board has previously found that Table 16-3 of the A.M.A., *Guides* does not provide for use of the ROM methodology to rate a claimant's lower extremity impairment, given appellant's accepted diagnosis.<sup>15</sup> The Board has explained that, Table 16-3, Knee Regional Grid -- Lower Extremity Impairment, only allows for one rating methodology, the DBI methodology, for meniscal injury.<sup>16</sup> Therefore an impairment rating based on the ROM rating methodology was improper.

Dr. Tontz concurred with Dr. Ellis' DBI permanent impairment rating of two percent. The Board notes that Dr. Ellis properly utilized the DBI rating method to find that, under Table 16-3 (Knee Regional Grid) on page 509, appellant's partial medial meniscectomy of the left knee, fell under a Class 1 impairment with a default value of grade C or two percent. Dr. Ellis reported that appellant had a GMFH of 1, a GMPE of 1, and a GMCS of 1. He properly excluded GMCS from the net adjustment formula, as it was used for class placement. Dr. Ellis utilized the net adjustment formula,  $(GMFH - CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) = 0$ , which resulted in a grade C or two percent permanent impairment of the left lower extremity related to appellant's partial medial meniscectomy. The Board finds Dr. Ellis' DBI calculations were in conformance with the A.M.A., *Guides*, to which Dr Tontz concurred.

As there is no medical evidence of record, in conformance with the A.M.A., *Guides*, establishing a greater percentage of permanent impairment than the 10 percent permanent

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<sup>14</sup> See *D.J.*, Docket No. 19-0352 (issued July 24, 2020).

<sup>15</sup> *C.E.*, Docket No. 24-0422 (issued June 20, 2024).

<sup>16</sup> *J.H.*, Docket No. 21-1215 (issued May 5, 2022).

impairment of the left lower extremity previously awarded, the Board finds that appellant has not met his burden of proof.<sup>17</sup>

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.

### **LEGAL PRECEDENT -- ISSUE 2**

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>18</sup> The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.<sup>19</sup> The date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>20</sup> The Board also has noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI if OWCP selects a retroactive date.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined the date of MMI for appellant's schedule award.

On March 26, 2024 OWCP granted appellant a schedule award for 10 percent left lower extremity permanent impairment which ran for 288 days for the period February 14 through September 3, 2022. However, the Board finds that the March 26, 2024 schedule award decision sets forth an incorrect date of MMI of February 14, 2022. OWCP's medical adviser, Dr. Tontz, reported that appellant reached MMI on February 14, 2022, per Dr. Ellis' assessment. The record reflects that Dr. Ellis performed appellant's permanent impairment evaluation on August 31, 2023. There is no evidence to support that Dr. Ellis performed an impairment evaluation on February 14, 2022.<sup>22</sup> As Dr. Tontz reported that appellant reached MMI when he was evaluated by Dr. Ellis, the Board finds that appellant's date of MMI was therefore August 31, 2023.<sup>23</sup>

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<sup>17</sup> See *A.R.*, Docket No. 21-0346 (issued August 17, 2022).

<sup>18</sup> See *N.A.*, Docket No. 12-1299 (issued September 16, 2013); *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>19</sup> *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

<sup>20</sup> Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 3.700.3.a (January 2010).

<sup>21</sup> *P.S.*, Docket No. 22-1051 (issued May 4, 2023); *James E. Earle*, 51 ECAB 567 (2000).

<sup>22</sup> See *supra* note 4.

<sup>23</sup> *P.S.*, *supra* note 21; *G.G.*, Docket No. 12-1106 (issued November 2, 2012).

Accordingly, the Board modifies OWCP's March 26, 2024 decision to find that appellant reached MMI on August 31, 2023 and that the period of his schedule award should begin on that date.<sup>24</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8102 of FECA<sup>25</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of the pay rate.<sup>26</sup> Section 8101(4) provides that monthly pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>27</sup> OWCP procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.<sup>28</sup>

Where an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his or her compensation increased based on his pay at the time of this first recurrence of disability.<sup>29</sup>

In applying section 8101(4), the statute requires OWCP to determine monthly pay by determining the date of the greater pay rate, based on the date of injury, date of disability, or the date of recurrent disability. The Board has held that rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).<sup>30</sup> Where an injury is sustained over a period of time, the date of injury is the date of last exposure to the employment factors causing the injury.<sup>31</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> 5 U.S.C. § 8102.

<sup>26</sup> *See id.* at §§ 8105-8107.

<sup>27</sup> *Id.* at § 8101(4). *J.S.*, Docket No. 17-1277 (issued April 20, 2018); *K.B.*, Docket No. 13-0569 (issued June 17, 2013).

<sup>28</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.9005a(3) (September 2011).

<sup>29</sup> *Supra* note 1 at § 8101(4); *J.S.*, *supra* note 27; *see Jon L. Hoagland*, 57 ECAB 635 (2006).

<sup>30</sup> *Robert A. Flint*, 57 ECAB 369, 374 (2006).

<sup>31</sup> *See Barbara A. Dunnavant*, 48 ECAB 517 (1997).

### ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined appellant's pay rate for schedule award purposes.

Appellant contends that his payrate should be based on his date of recurrence as OWCP had accepted his recurrence claim on May 11, 2023. On May 11, 2023 OWCP accepted appellant's claim for a recurrence of the need for medical treatment.

As noted in determining the appropriate rate of pay for schedule award purposes, OWCP must determine the greater pay rate based on the date of injury, date of disability, or the date on which disability recurred.<sup>32</sup> A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.<sup>33</sup>

There is no evidence that appellant suffered any qualifying dates of disability which would entitle him to a recurrent pay rate. OWCP previously paid appellant leave buy back from June 3 through 10, 2008. There is no evidence of any qualifying dates of disability thereafter. Therefore, appellant suffered no qualifying dates of disability which would entitle him to a recurrent pay rate.<sup>34</sup>

OWCP properly calculated his pay rate for compensation purposes based on the date of disability, June 3, 2008.<sup>35</sup>

### CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of the left lower extremity (the leg), for which he previously received a schedule award. The Board also finds that the date of MMI for schedule award purposes is modified to reflect August 31, 2023. The Board further finds that OWCP properly determined appellant's pay rate for schedule award purposes.

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<sup>32</sup> 5 U.S.C. § 8101(4).

<sup>33</sup> *Id.*; *A.W.*, Docket No. 19-0557 (issued November 18, 2019); *J.R.*, Docket No. 14-1728 (issued June 17, 2015); *see C.M.*, Docket No. 08-1119 (issued May 13, 2009); *supra* note 8 at Chapter 2.900.5(a)(4) (September 2011).

<sup>34</sup> *See A.W.*, *id.*; *D.R.*, Docket No. 16-0378 (issued November 16, 2016).

<sup>35</sup> *A.W.*, *id.*; *J.S.*, *supra* note 29; *see T.K.*, Docket No. 13-1833 (issued March 10, 2014).



**ORDER**

**IT IS HEREBY ORDERED THAT** the March 26, 2024 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 30, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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