

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

M.T., Appellant	)	
	)	
and	)	Docket No. 24-0457
	)	Issued: June 6, 2024
U.S. POSTAL SERVICE, POST OFFICE,	)	
Houston, TX, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 25, 2024 appellant filed a timely appeal from a September 28, 2023 merit decision and an October 25, 2023 nonmerit 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.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish greater than 33 percent permanent impairment of her right lower extremity and 31 percent permanent impairment of her left lower extremity, for which she has previously received schedule award compensation; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On May 31, 1997 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her right leg when ascending stairs while in the performance of duty. OWCP accepted that claim for bilateral knee and leg sprains; bilateral tear of medial meniscus of knee; and bilateral osteochondritis dissecans. Appellant underwent a “second OWCP-authorized arthroscopic right knee surgery on July 21, 2000,<sup>2</sup> bilateral knee unicompartmental replacement with Oxford prosthesis on March 20, 2013, bilateral knee manipulation under anesthesia and arthroscopic joint debridement on July 27, 2016. On May 2, 2003 she returned to work as a modified city carrier.<sup>3</sup>

By decision dated January 29, 2004, OWCP granted appellant a schedule award for 33 percent permanent impairment of the right lower extremity. The period of the award ran for 95.04 weeks from June 4, 2003 through March 30, 2005.<sup>4</sup>

In reports dated March 30, 2021 and April 24, 2023, Dr. Eugene C. Lou, a Board-certified orthopedic surgeon, noted appellant’s history of bilateral knee prosthetic unicompartmental arthroplasty and bilateral osteoarthritis of the knees. He presented essentially normal examination findings of the bilateral knees. Dr. Lou indicated that x-rays of both knees were unremarkable and revealed Oxford components in excellent position with no signs of loosening.

In an April 28, 2023 report, Dr. Raymond K. Glass, a chiropractor, reviewed medical reports from appellant’s treating physicians dated January 12, 2012 onwards. He recounted appellant’s surgical treatments including bilateral knee unicompartmental arthroplasty on March 20, 2013 and bilateral manipulation of the knees under anesthesia and arthroscopic joint debridement on July 27, 2016. On examination, Dr. Glass, after performing three measurements, observed bilateral knee flexion motion to 90 degrees 15 degrees extension lag. He indicated that appellant’s lower limb questionnaire revealed moderate-to-severe interference with activities of daily living with respect to both the right and left knees. Dr. Glass diagnosed bucket handle tear of medial meniscus bilateral, osteochondritis dissecans of right and left knees, and sprains of right and left knee, and concluded that appellant reached maximum medical improvement on or about June 4, 2019. He opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>5</sup> appellant had 31 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower

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<sup>2</sup> The date of the first arthroscopic procedure was not identified.

<sup>3</sup> Under OWCP File No. xxxxxx924, OWCP accepted an August 28, 2003 traumatic injury claim for lumbago with sciatica, left side; lumbago with sciatica, right side (L4-L5 & L5-S1); sprain of back, lumbar region; intervertebral disc disorder with myelopathy, lumbar region; and degenerative of lumbar or lumbosacral intervertebral disc. Appellant stopped work on October 14, 2003 and has not returned. She underwent OWCP-approved surgeries on December 15, 2008, March 21, 2011 and January 23, 2013. This claim has been combined with the current file, OWCP File No. xxxxxx984 with OWCP File No. xxxxxx984 serving as the master file.

<sup>4</sup> This schedule award was based on the December 11, 2003 report from Dr. Ronald H. Blum, Board-certified in internal medicine, the OWCP district medical adviser, regarding permanent impairment of the right knee due to partial and lateral meniscectomy and one millimeter cartilage loss.

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

extremity. He referenced applicable tables in the A.M.A., *Guides* and set forth impairment calculations for both the right and left lower extremities. On April 28, 2023 Dr. Glass forwarded a letter to Dr. Lou requesting that he sign the letter if he concurred with appellant's bilateral knee ratings.

On May 8, 2023 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

On June 9, 2023 OWCP referred appellant's case and a June 9, 2023 statement of accepted facts (SOAF) and list of questions to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. The June 9, 2023 SOAF stated that appellant underwent a second arthroscopic surgery of the right knee on July 21, 2000, but did not note appellant's subsequent surgical procedures. It noted, as preexisting or concurrent medical conditions, the conditions accepted under OWCP File No. xxxxxx924, but did not reference the existence of OWCP File No. xxxxxx924.

In a June 12, 2023 report, Dr. Harris noted his review of the SOAF and medical records. He indicated that there were no significant changes in appellant's condition from April 24, 2023, when she was seen by Dr. Lou, and April 28, 2023, when she was seen by Dr. Glass. He opined that appellant reached maximum medical improvement on April 24, 2023, when she was seen by Dr. Lou. Dr. Harris advised that the range of motion (ROM) rating method was not appropriate for impairment rating of appellant's accepted conditions of bilateral osteochondritis of the knees, medial meniscal tear and sprains under Section 16.7, page 543 of the A.M.A., *Guides*. He concurred with Dr. Glass' April 28, 2023 permanent impairment findings of 31 percent impairment to the right lower extremity and 31 percent impairment to the left lower extremity under the diagnosis-based impairment (DBI) methodology. He further opined that as appellant had previously been awarded 33 percent permanent impairment of the right lower extremity, there was no increase in appellant's right lower extremity impairment.

By decision dated September 28, 2023, OWCP granted appellant a schedule award for 31 percent permanent impairment of the left lower extremity. It noted that since she previously received a schedule award 33 percent permanent impairment to the right lower extremity, no additional impairment for the right lower extremity was payable. The period of the award ran for 89.28 weeks from April 28, 2023 through January 11, 2025. OWCP accorded the weight of the medical evidence to the medical findings and report of Dr. Glass dated April 28, 2023 and Dr. Harris' DMA report of June 23, 2023.

On October 19, 2023 appellant requested reconsideration of the September 28, 2023 schedule award decision. She contended that she was denied an impairment rating for her right knee replacement. Appellant submitted the June 12, 2023 cover page of Dr. Harris's report.

By decision dated October 25, 2023, OWCP denied appellant's request for reconsideration of the merits of her schedule award claim pursuant to 5 U.S.C. § 8128(a).

## LEGAL PRECEDENT -- ISSUE 1

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>6</sup>

The schedule award provisions of FECA<sup>7</sup> and its implementing 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. 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>9</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</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>11</sup>

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the *World Health Organization's International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement*.<sup>12</sup> In determining impairment for 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 foot/ankle and knee, the relevant portions of the lower extremity for the present case, reference is made to Table 16-2 through Table 16-4 beginning on page 501.<sup>13</sup> After the class of diagnosis (CDX) is determined from each of these tables (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE) and grade modifier for clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>14</sup> Under

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<sup>6</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>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017).

<sup>11</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> A.M.A., *Guides*, page 3, section 1.3.

<sup>13</sup> See A.M.A., *Guides* 501-11 (6<sup>th</sup> ed. 2009).

<sup>14</sup> *Id.* at 515-22.

Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.<sup>15</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's DMA providing rationale for the percentage of impairment specified.<sup>16</sup>

### ANALYSIS -- ISSUE 1

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

In reports dated March 30, 2021 and April 24, 2023, Dr. Lou provided essentially normal bilateral knee physical examination findings. He did not provide a permanent impairment rating. As Dr. Lou did not provide a rating of permanent impairment in accordance with the A.M.A., *Guides*, his reports were insufficient to establish permanent impairment.<sup>17</sup>

In an April 24, 2023 report, Dr. Glass, a chiropractor, provided appellant's examination findings, and a permanent impairment rating. Since he did not diagnose a subluxation as demonstrated by x-rays, he is not considered a physician under FECA.<sup>18</sup> The Board has explained that an evaluation by a chiropractor regarding permanent impairment of an extremity is of no probative medical value to a schedule award issue.<sup>19</sup>

On June 9, 2023 OWCP referred appellant's case and a June 9, 2023 statement of accepted facts (SOAF) to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*.

The Board notes that the June 9, 2023 SOAF provided to Dr. Harris was incomplete. The SOAF did not reference appellant's relevant bilateral knee surgeries other than her second arthroscopic surgery of the right knee on July 21, 2000. It also did not indicate that the preexisting or concurrent medical conditions noted on the SOAF were from OWCP File No. xxxxxx924, a subsidiary claim. OWCP's procedures and Board precedent dictate that, when an DMA for OWCP, second opinion specialist, or impartial medical examiner renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in

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<sup>15</sup> *Id.* at 23-28.

<sup>16</sup> *See supra* note 11 at Chapter 2.808.6(f) (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

<sup>17</sup> *See D.S.*, Docket No. 18-0336 (issued May 29, 2019); *I.T.*, Docket No. 18-1049 (issued December 31, 2018).

<sup>18</sup> *See A.V.*, Docket No. 16-0369 (issued March 11, 2016); *Jack B. Wood*, 40 ECAB 95, 109 (1988).

<sup>19</sup> *J.W.*, Docket No. 13-1212 (issued September 20, 2013) (reports from a chiropractor regarding an impairment to the upper extremity were of no probative value.)

forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>20</sup>

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>21</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>22</sup>

The Board will therefore set aside OWCP's September 28, 2023 decision and remand the case to OWCP. OWCP shall prepare an updated SOAF and refer appellant for a second opinion evaluation to properly determine the employment-related permanent impairment to the lower extremities, to be followed by further review by the DMA. After such further development as is necessary, OWCP should issue a *de novo* decision.<sup>23</sup>

### CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

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<sup>20</sup> See *R.S.*, Docket No. 23-1093 (issued March 12, 2024); *N.P.*, Docket No. 19-0296 (issued July 25, 2019); *M.D.*, Docket No. 18-0468 (issued September 4, 2018).

<sup>21</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>22</sup> *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>23</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25 and September 28, 2023 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 6, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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