

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

L.L., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
UPSTATE NEW YORK HEALTHCARE)
SYSTEM, BUFFALO VA MEDICAL CENTER,)
Buffalo, NY, Employer)
_____)

**Docket No. 24-0517
Issued: June 18, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 19, 2024 appellant filed a timely appeal from an April 1, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 1, 2024 decision, OWCP and the Board 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

On October 11, 2016 appellant, then a 56-year-old diagnostic radiologic technician, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 2016 she sustained right knee sprain when she slipped on a puddle of water in the hallway while in the performance of duty. By decision dated January 11, 2017, OWCP accepted the claim for right knee medial meniscus tear.

The record reflects that appellant underwent OWCP-authorized arthroscopy with partial medial and lateral meniscectomy and chondroplasty on April 17, 2017 performed by Dr. Donald P. Douglas, a Board-certified orthopedic surgeon. The operative report noted a preoperative diagnosis of right knee medial meniscus tear.

In a report dated December 22, 2021, Dr. Douglas noted an assessment of unilateral primary osteoarthritis of the right knee. He also indicated that appellant had 35 percent temporary impairment.

On December 18, 2023 appellant filed a claim for compensation (Form CA-7) requesting a schedule award.

In a December 18, 2023 development letter, OWCP requested that appellant submit a medical report addressing whether she had reached maximum medical improvement (MMI) and providing a permanent impairment evaluation using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It indicated that, to date, no medical evidence had been received in support of her claim for a schedule award. OWCP advised that, if appellant's physician was unable or unwilling to provide the required report, to notify it in writing and if her case met the essential elements for a schedule award claim, she would be scheduled to be seen by a second opinion specialist. It afforded her 30 days to submit the necessary medical evidence. No response was received.

By decision dated January 22, 2024, OWCP denied appellant's claim for a schedule award.

On February 5, 2024, appellant advised OWCP that her treating physician no longer accepted employing establishment patients.

On February 13, 2024 appellant requested reconsideration.

On March 12, 2024 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Michael A. Parentis, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of any permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. The appointment was scheduled for March 26, 2024.

³ A.M.A., *Guides* (6th ed 2009).

On March 28, 2024 OWCP was advised that appellant failed to attend the scheduled second opinion examination.

By decision dated April 1, 2024, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provisions 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷ 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.⁸

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁹

In evaluating lower extremity impairment, the sixth edition requires identifying the impairment class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹²

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* See also *N.A.*, Docket No. 23-0532 (issued January 24, 2024); *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (March 2017).

⁸ *N.A.*, *supra* note 6; *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *Supra* note 3 at 3, section 1.3.

¹⁰ *Id.* at 494-531.

¹¹ *Id.* at 411.

¹² *N.A.*, *supra* note 6; *S.C.*, Docket No. 22-0564 (issued March 27, 2023); see *M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

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.¹³ OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.¹⁴ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.¹⁵ If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.¹⁶

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.

In a report dated December 22, 2021, Dr. Douglas noted an assessment of unilateral primary osteoarthritis of the right knee. He also indicated that appellant had a 35 percent temporary impairment. However, because he did not relate that appellant had a permanent impairment of her right knee in accordance with the A.M.A., *Guides*, Dr. Douglas' opinion was insufficient to establish appellant's schedule award claim.¹⁷

On December 18, 2023 appellant filed a Form CA-7 for a schedule award. OWCP, on December 18, 2023, requested that appellant submit a permanent impairment evaluation from her physician addressing the date of MMI and extent of any employment-related permanent impairment using the A.M.A., *Guides*. Appellant, however, did not submit the requested medical evidence. Appellant advised that her physician was no longer treating employing establishment employees. She requested that OWCP schedule a second opinion evaluation. OWCP scheduled a second opinion evaluation with Dr. Parentis for March 26, 2024; however, appellant did not attend or attempt to reschedule the evaluation.

As noted above, appellant must submit an evaluation from a physician that supports a finding that she has reached MMI, and which includes a description of impairment in sufficient

¹³ *N.A., id.; C.T.*, Docket No. 22-0128 (issued February 15, 2023); *J.P.*, Docket No. 21-0801 (issued December 22, 2021); *N.S.*, Docket No. 21-0508 (issued September 22, 2021); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁴ *Supra* note 7 at Chapter 2.808.5 (March 2017).

¹⁵ *Id.* at Chapter 2.808.6a (March 2017).

¹⁶ *Id.* at Chapter 2.808.6a (March 2017).

¹⁷ *See P.M.*, Docket No. 24-0057 (issued April 15, 2024).

detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹⁸

As the medical evidence of record is insufficient to establish permanent impairment of a scheduled member or function of the body, 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.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁸ *N.A.*, *supra* note 6; *see J.P.*, *supra* note 13; *D.J.*, Docket No. 20-0017 (issued August 31, 2021); *B.V.*, Docket No. 17-0656 (issued March 13, 2018); *C.B.*, Docket No. 16-0060 (issued February 2, 2016); *P.L.*, Docket No. 13-1592 (issued January 7, 2014).