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

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| **M.C., Appellant** | ) | |
| **and** | ) | **Docket No. 12-1175** |
| | ) | **Issued: December 11, 2012** |
| **DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Springfield, MO, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On May 7, 2012 appellant filed a timely appeal from the December 20, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) granting him a schedule award and the February 14, 2012 nonmerit decision of OWCP denying his reconsideration request. Pursuant to the Federal Employees' Compensation Act[1] (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 met his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award; and (2) whether OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

## ***FACTUAL HISTORY***

OWCP accepted that on March 24, 2010 appellant, then a 43-year-old correctional counselor, sustained left knee injuries in the form of a medial collateral ligament sprain and medial meniscus tear. On August 25, 2010 Dr. Clyde Parsons, III, an attending Board-certified orthopedic surgeon, performed a left partial medial meniscectomy. In a November 23, 2010 report, Dr. Parsons reported examination findings which included a mildly swollen left knee and tenderness over the left hamstring, medial femoral condyle and medial joint line. Appellant had good left knee extension, but lacked 10 degrees of flexion. Dr. Parsons stated that appellant had reached maximum medical improvement and posited that he had a 10 percent permanent impairment of his left leg "at the level of the knee." In a December 21, 2010 report, Dr. Parsons indicated that appellant had a "permanent partial impairment level of 10 percent at the knee."

On February 14, 2011 appellant filed a claim for a schedule award due to his accepted injuries.

By letter dated February 16, 2011, OWCP advised appellant that a detailed medical report from Dr. Parsons or other examining physician was necessary to explain the extent of his permanent impairment due to the accepted conditions. It advised that the physician's opinion of impairment must be explained in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

In a March 11, 2011 report, Dr. Parsons discussed the history of appellant's March 24, 2010 work injury and its subsequent treatment. He indicated that appellant was last seen on November 23, 2010 and noted that he had reached maximum medical improvement by that time. Dr. Parsons stated:

> "[Appellant] remains symptomatic with recent effusions in the knee and continues to take anti-inflammatory medications as well as analgesic medications. He has an antalgic gait with a mild limp on the left side and no external support. [Appellant] has lost motion in the left knee and lacks the last 10 degrees of flexion. The [A.M.A., *Guides*] was reviewed and his rating is 10 percent permanent partial impairment at the level of the knee, left lower extremity."

In a May 26, 2011 report, Dr. Daniel D. Zimmerman, a Board-certified internist serving as an OWCP medical adviser, discussed Dr. Parsons' treatment notes and examination findings and concluded that the 10 percent impairment rating provided by Dr. Parsons was not substantiated under the standards of the sixth edition of the A.M.A., *Guides*.[2] He made reference to Table 16-3 (Knee Regional Grid) beginning on page 509 of the sixth edition of the A.M.A., *Guides* and indicated that "meniscal injury" was the appropriate diagnosis category with two percent being the default value for appellant's partial medial meniscectomy. Dr. Zimmerman then referenced Table 16-6, Table 16-7 and Table 16-8 and concluded that appellant fell under

[2] Dr. Zimmerman indicated that Dr. Parsons did not justify his apparent basing of appellant's impairment on range of motion deficits of the left knee. Dr. Parsons did not make any specific reference to the standards of the A.M.A., *Guides.*

grade modifier 1 for functional history (noting that antalgic gate was not consistently reported), that he fell under grade modifier 1 for physical examination (due to mild palpatory pain) and that a clinical studies grade was not applicable. He applied the Net Adjustment Formula and found that its application did not cause any movement from the default value of two percent impairment.[3] Dr. Zimmerman concluded that appellant had a two percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides.*

In a June 7, 2011 award of compensation, OWCP granted appellant a schedule award for a two percent permanent impairment of his left leg. The award ran for 5.76 weeks from December 21, 2010 to January 30, 2011.

Appellant requested a review of the written record by an OWCP hearing representative. In a December 20, 2011 decision, the hearing representative affirmed OWCP's June 7, 2011 decision. She found that Dr. Parsons did not adequately explain how his impairment rating comported with the standards of the sixth edition of the A.M.A., *Guides* and determined that the weight of the medical evidence was represented by the well-rationalized opinion of Dr. Zimmerman.

In a January 13, 2012 letter, appellant requested reconsideration of his claim. He argued that his case should have been referred to Dr. Parsons to obtain clarification of his reports prior to being sent to Dr. Zimmerman for an impairment rating. Appellant asserted that if Dr. Parsons then provided additional information that was deemed to be inadequate, referral to a second opinion physician would be required prior to referral to an OWCP medical adviser.[4] He submitted numerous medical reports dated between March 2010 and June 2011, including reports of Dr. Parsons, which had previously been submitted and considered.

In a February 14, 2012 decision, OWCP denied appellant's reconsideration request.

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

The schedule award provision of FECA[5] and its implementing regulations[6] 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the

[3] Dr. Zimmerman further noted that there was no evidence of a deep vein thrombosis.

[4] Appellant provided excerpts from OWCP procedure, which he felt supported his arguments.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

appropriate standard for evaluating schedule losses.[7] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[8]

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 knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.[9] After the Class of Diagnosis (CDX) is determined from the Knee Regional Grid (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).[10] Under 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.[11]

## ***ANALYSIS -- ISSUE 1***

OWCP accepted that appellant sustained a left medial collateral ligament sprain and left medial meniscus tear. On August 25, 2010 Dr. Parsons, an attending Board-certified orthopedic surgeon, performed a left partial medial meniscectomy, which was authorized by OWCP. In a June 7, 2011 award of compensation, OWCP granted appellant a schedule award for a two percent permanent impairment of his left leg. The award was based on the May 26, 2011 report of Dr. Zimmerman, a Board-certified internist who served as an OWCP medical adviser. Dr. Zimmerman had evaluated the findings of record, including the November 23, December 21, 2010 and March 11, 2011 reports of Dr. Parsons, an attending Board-certified orthopedic surgeon.

In his May 26, 2011 report, Dr. Zimmerman properly determined that Dr. Parsons' finding that appellant had a 10 percent permanent impairment of his left leg was not valid because he did not explain how this rating was derived in accordance with the standards of the sixth edition of the A.M.A., *Guides.* He thoroughly discussed Dr. Parsons' examination findings and explained his conclusion that appellant had a two percent permanent impairment of his left leg under the sixth edition of the A.M.A., *Guides*.

Dr. Zimmerman properly referenced Table 16-3 beginning on page 509 of the sixth edition of the A.M.A., *Guides* and indicated that "meniscal injury" was the appropriate diagnosis category with two percent being the default value for appellant's partial medial meniscectomy.[12]

[7] *Id*.

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

[10] *Id* at 515-22.

[11] *Id.* at 23-28.

[12] A.M.A., *Guides* 509, Table 16-3.

He then correctly referenced Table 16-6, Table 16-7 and Table 16-8 and concluded that appellant fell under grade modifier 1 for functional history, that he fell under grade modifier 1 for physical examination and that a clinical studies grade was not applicable.[13] Dr. Zimmerman provided explanations for why he chose these grade modifiers. He applied the Net Adjustment Formula and found that its application did not cause any movement from the default value of a two percent impairment, which represented appellant's total left leg impairment.

On appeal, appellant argued that OWCP's procedure dictated that OWCP should have sent his case to Dr. Parsons for clarification of his impairment rating before sending it to Dr. Zimmerman. He further argued that, if Dr. Parsons did not provide adequate information, OWCP was then required to send his case to a second opinion physician for evaluation of his impairment.

The Board finds that OWCP's action to refer the medical records to Dr. Zimmerman was properly given the need for a well-rationalized impairment rating.[14] In his reports, Dr. Parsons provided a 10 percent impairment rating, but he offered no reference to the sixth edition of the A.M.A., *Guides* in support of his conclusion. Dr. Zimmerman was able to review Dr. Parsons' findings and he provided a well-explained impairment rating based on these findings. OWCP procedure provides that an OWCP medical adviser should refer a case to an attending physician if the medical evidence does not contain the required elements for a schedule award impairment calculation.[15] In this case, the required elements were present, including recent examination findings pertaining to the left leg and there was no need for referral to an attending physician or a second opinion physician.

For these reasons, appellant did not show that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award. He may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[16] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute

[13] *Id.* at 516, 517 and 519, Table 16-6, Table 16-7 and Table 16-8.

[14] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(d) (September 2010).

[15] *Id.* at Chapter 2.810.8(i) (September 2010). If the attending physician does not adequately respond, the case would then be sent to a second opinion physician for further evaluation. *Id.*

[16] Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

relevant and pertinent new evidence not previously considered by OWCP.[17] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[19] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[20] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[21] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[22]

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

In his January 13, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He argued that his case should have been referred to Dr. Parsons or a second opinion physician for an impairment rating prior to being referred to Dr. Zimmerman and he submitted excerpts from OWCP's procedure which he felt supported this argument. However, appellant did not explain how OWCP's procedure supported his argument in this regard and therefore he did not present a legal contention with a reasonable color of validity.[23]

The Board notes that the underlying issue in this case was whether appellant submitted medical evidence showing that he has more than a two percent permanent impairment of his left leg. That is a medical issue which must be addressed by relevant medical evidence.[24] A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit new and relevant medical evidence in this case.

Appellant submitted numerous medical reports dated between March 2010 and June 2011, including reports of Dr. Parsons. However, these reports had previously been

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.608(b).

[20] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[21] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[22] *John F. Critz*, 44 ECAB 788, 794 (1993).

[23] *Id*.

[24] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

submitted and considered by OWCP and therefore the resubmission of these reports would not require reopening of his claim for merit review.[25]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award. The Board further finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 14, 2012 and December 20, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 11, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[25] *See supra* note 20.