

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

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| <b>L.B., Appellant</b>                    | ) |                                  |
|   | ) |                                  |
| <b>and</b>                                | ) | <b>Docket No. 13-1158</b>        |
|   | ) | <b>Issued: November 22, 2013</b> |
| <b>DEPARTMENT OF THE ARMY, HEALTH</b>     | ) |                                  |
| <b>SERVICES COMMAND, Fort Gordon, GA,</b> | ) |                                  |
| <b>Employer</b>                           | ) |                                  |
|   | ) |                                  |

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 15, 2013 appellant filed a timely appeal from a March 18, 2013 merit decision of the Office of Workers' Compensation Programs denying an increased schedule award and from a November 19, 2012 nonmerit decision finding she failed to establish clear evidence of error. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> 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 established that she is entitled to a greater than six percent permanent impairment of the left lower extremity, for which she received a schedule

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

<sup>2</sup> The Board notes that, following the March 18, 2013 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

award; and (2) whether OWCP properly denied her request for reconsideration of the denial of her recurrence claim on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

### **FACTUAL HISTORY -- ISSUE 1**

On August 23, 1992 appellant, then a 46-year-old food service worker, filed a traumatic injury claim alleging that on August 20, 1992 she injured her back while picking up a large mixing bowl. OWCP accepted the claim for sciatica, which was subsequently expanded to include the conditions of lumbar spinal stenosis, acquired spondylolisthesis and lumbosacral spondylosis without myelopathy. Appellant resigned from the employing establishment effective February 13, 1994 and is currently not working. She filed several claims for schedule awards.

This issue has previously been before the Board. In the first appeal, the Board issued an October 1, 1999 decision setting aside a September 24, 1997 OWCP decision. The Board found that appellant had submitted medical evidence regarding permanent impairment at a date subsequent to the prior schedule award decision and remanded the case to OWCP for further review.<sup>3</sup> On March 1, 2001 the Board affirmed a November 16, 1999 OWCP decision that appellant had not established that she was entitled to a schedule award for permanent impairment to any of her extremities.<sup>4</sup>

By decision dated September 17, 2003, the Board affirmed no more than a 5 percent permanent impairment of the left lower extremity and no more than a 25 percent permanent impairment of her right lower extremity.<sup>5</sup>

By decision dated July 16, 2004, the Board found that OWCP had failed to consider the merits of her request for an increased schedule award.<sup>6</sup> The Board, by decision dated June 1, 2005 affirmed its decisions dated October 6 and 14, 2004,<sup>7</sup> finding no more than six percent left lower extremity impairment. On December 1, 2011 the Board set aside a July 23, 2010 schedule award decision and remanded the case for further development of the medical opinion evidence.<sup>8</sup> The Board found the evidence of record did not contain a sufficiently reasoned medical opinion regarding the degree of impairment for appellant's left lower extremity using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.,

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<sup>3</sup> 51 ECAB 115 (1999).

<sup>4</sup> Docket No. 00-845 (issued March 1, 2001).

<sup>5</sup> Docket Nos. 03-1068 and 03-1342 (issued September 17, 2003). OWCP issued a schedule award for a 25 percent right leg permanent impairment on January 16, 2003 and a 5 percent left leg permanent impairment on March 7, 2003.

<sup>6</sup> Docket No. 04-919 (issued July 16, 2004).

<sup>7</sup> Docket No. 05-354 (issued June 1, 2005).

<sup>8</sup> Docket No. 11-517 (issued December 1, 2011).

*Guides*). The facts and circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

Pursuant to the Board's remand, on February 17, 2012 OWCP referred appellant to Dr. James F. Bethea, a Board-certified orthopedic surgeon, for a second opinion evaluation on the issue of whether appellant was entitled to an additional schedule award for her left lower extremity. In a March 5, 2012 report, Dr. Bethea reviewed medical evidence, the statement of accepted facts and conducted a physical examination. He diagnosed a history of sciatica and concluded that she had reached maximum medical improvement in 1992. A physical examination revealed morbid obesity, no calf atrophy, intact distal neurovascular status, positive flip test and limited lumbar flexion and extension. A review of a September 16, 2010 magnetic resonance imaging (MRI) scan revealed severe stenosis at L4-5 and bulging disc and facet arthropathy at L3-4, L4-5 and L5-S1. Dr. Bethea found nonexistent objective symptoms, that appellant's complaints were subjective and that an MRI scan revealed severe L4-5 stenosis unrelated to the accepted 1992 employment injury. Using the sixth edition of the A.M.A., *Guides*, he found no impairment in her lower extremities.

On April 3, 2012 OWCP's medical adviser reviewed the medical evidence of record, including Dr. Bethea's March 5, 2012 report and concluded that appellant had a zero percent left lower extremity impairment.

By decision dated April 10, 2012, OWCP denied appellant's claim for an additional schedule award for her left lower extremity.

In a May 9, 2012 letter, Dr. Kenneth M. Faile, a treating physician, stated that appellant was disabled from working due to her low back pain, which he attributed to her employment injury. He further noted that she has been totally disabled from working since 1993.

Appellant submitted progress notes and a report from Dr. Faile and an April 30, 2012 report from Dr. George A. Bitting, a treating physician, reiterating opinions from their prior reports.

By decision dated March 18, 2013, OWCP denied appellant's request for an additional schedule award.

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

The schedule award provision of FECA<sup>9</sup> and its implementing regulations<sup>10</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. The A.M.A., *Guides* has been adopted by the implementing regulations as the

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.<sup>11</sup> Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>12</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.<sup>13</sup> In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>14</sup>

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).<sup>15</sup> Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>16</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>17</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed through OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.<sup>18</sup>

### ANALYSIS -- ISSUE 1

The record reveals that OWCP granted appellant a schedule award for a six percent impairment of the left lower extremity. Pursuant to the Board's instructions OWCP referred

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<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

<sup>13</sup> *D.N.*, 59 ECAB 576 (2008); *Tommy R. Martin*, 56 ECAB 273 (2005); *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>14</sup> *D.H.*, 58 ECAB 358 (2007); *Veronica Williams*, 56 ECAB 367 (2005); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>15</sup> A.M.A., *Guides* (6<sup>th</sup> ed., 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>16</sup> *Id.* at pp. 383-419.

<sup>17</sup> *Id.* at page 411.

<sup>18</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); *Frantz Ghassan*, 57 ECAB 349 (2006).

appellant for a second opinion evaluation with Dr. Bethea to determine an impairment rating using the sixth edition of the A.M.A., *Guides*. The issue is whether appellant has established more than six percent impairment due to her August 20, 1992 employment injury.

Dr. Bethea's March 5, 2012 examination was normal, with intact motor and sensory function in both legs. An examination of the lower extremities revealed normal range of motion in all joints, no swelling or redness and no atrophy. Dr. Bethea concluded that appellant had no lower extremity impairment based on the normal findings on examination of the lower extremities. OWCP's medical adviser reviewed Dr. Bethea's report and concurred with his determination that appellant had a zero percent permanent impairment of the left lower extremity.

The Board finds that Dr. Bethea's report was well rationalized and provided a sufficient basis for a schedule award determination. The Board further finds that Dr. Bethea and OWCP's medical adviser properly considered the medical evidence under the standards of the A.M.A., *Guides* and properly concluded that appellant had no permanent impairment of the left lower extremities. Therefore, OWCP properly denied appellant's request for an additional schedule award.

Appellant 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.

### **FACTUAL HISTORY -- ISSUE 2**

On January 20, 2002 appellant filed a claim for recurrence. This issue has also previously been before the Board. The Board issued a decision on September 17, 2003 which affirmed that appellant had not met her burden of proof to establish a recurrence of disability causally related to her employment injury.<sup>19</sup>

Appellant filed another claim for recurrence on January 10, 2006, which was denied by OWCP's decision dated May 19, 2008. The Board, by order remanding case on May 15, 2009<sup>20</sup> set aside that decision as it was unclear as to the basis for the denial of the claim and contained no discussion of the medical evidence other than noting it was insufficient.

By letter dated May 26, 2009, OWCP advised appellant as to the definition of a recurrence and the evidence required to support her claim.

In a June 22, 2009 letter, Dr. Faile, a treating physician, stated that appellant's back pain and symptoms from her 1992 injury were continuing and had worsened.

In a June 24, 2009 attending physician's report, Dr. Bitting, a treating physician, diagnosed low back pain, sacroiliatic sciatica and lumbar radiculitis. He indicated that appellant

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<sup>19</sup> *Supra* note 5.

<sup>20</sup> Docket No. 08-1623 (issued May 15, 2009).

had reached maximum medical improvement and was unable to work. Under remarks, Dr. Bitting noted that she was unable to work and recommended a functional capacity evaluation test be performed.

On July 1, 2009 OWCP issued a decision denying modification. It found the evidence insufficient to establish that appellant sustained a recurrence of disability beginning January 10, 2006.

In a July 1, 2009 report, Dr. Bitting diagnosed sacroilitis, low back pain, sciatica, lumbar radiculitis and carpal tunnel syndrome. He provided physical findings and noted that a functional capacity evaluation test indicated that appellant was capable of performing sedentary duties. Dr. Bitting indicated that she was currently disabled and noted carpal tunnel syndrome as her current problem.

On July 9, 2009 appellant requested reconsideration.

On July 21, 2009 OWCP issued a corrected decision denying modification of the denial of appellant's recurrence claim.

In reports dated August 5 and September 2, 2009, Dr. Bitting provided physical findings and diagnosed sacroilitis, low back pain, sciatica, lumbar radiculitis and carpal tunnel syndrome.

By decision dated October 2, 2009, OWCP denied modification of the denial of appellant's recurrence claim.

Subsequent to the October 2, 2009 decision OWCP received progress notes from Dr. Faile containing physical findings and diagnoses included unstable low back pain and unstable bilateral leg neuropathy.

In a February 16, 2010 report, Dr. Bitting provided physical findings and diagnosed facet syndrome, lumbar radiculitis, lumbar spinal stenosis, low back pain, sciatica and sacroilitis.

In progress notes dated July 7, 2010, Dr. Faile diagnosed unstable low back pain, unstable arthritis and unstable bilateral leg neuropathy.

On September 24, 2010 Dr. Faile reported seeing appellant for low back pain due to her employment injury. A review of an MRI scan revealed that appellant's spinal stenosis had worsened. Dr. Faile diagnosed leg pain and pain radiating from her back into her legs with some paresthesia.

In progress notes dated November 30, 2010, January 25, September 20 and December 5, 2011, Dr. Faile diagnosed low back pain and reported seeing appellant for her chronic low back pain.

In a letter dated June 10, 2012, appellant requested reconsideration of the previous denial of her recurrence claim.

By decision dated July 3, 2012, OWCP denied reconsideration on the denial of appellant's recurrence claim. It found that the request was untimely and that she had failed to establish clear evidence of error with respect to her request.

In a letter dated October 30, 2012, appellant again requested reconsideration of the denial of her recurrence claim. She reiterated her argument that OWCP erred in considering the claim as a recurrence when her disability was a continuation from her originally accepted condition of sciatica. Appellant again alleged that her disability had never ceased from the time she left her job in November 1993, which was due to her inability to perform her job as a result of her employment injury.

By decision dated November 19, 2012, OWCP denied reconsideration on the denial of appellant's recurrence claim. It found that the request was untimely and that she failed to establish clear evidence of error with her request.

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

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of FECA.<sup>21</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>22</sup> When an application for review is untimely, OWCP undertakes a limited review to determine whether the application presents clear evidence that OWCP's final merit decision was in error.<sup>23</sup> Its procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth under section 10.607 of OWCP regulations<sup>24</sup> if the claimant's application for review shows clear evidence of error on the part of OWCP.<sup>25</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>26</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>27</sup> The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to

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<sup>21</sup> See *J.W.*, 59 ECAB 507 (2008); *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>22</sup> 20 C.F.R. § 10.607; see *B.W.*, Docket No. 10-323 (issued September 2, 2010); *A.F.*, 59 ECAB 714 (2008); *Gladys Mercado*, 52 ECAB 255 (2001).

<sup>23</sup> *D.G.*, 59 ECAB 455 (2008); *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>24</sup> *Supra* note 22.

<sup>25</sup> See *M.L.*, Docket No. 09-956 (issued April 15, 2010); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>26</sup> *Andrew Fullman*, 57 ECAB 574 (2006); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>27</sup> *F.R.*, Docket No. 09-575 (issued January 4, 2010); *S.D.*, 58 ECAB 713 (2007); *Joseph R. Santos*, 57 ECAB 554 (2006).

produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>28</sup>

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>29</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.<sup>30</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>31</sup> A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.<sup>32</sup> As appellant's October 30, 2012 request for reconsideration of the denial of her recurrence claim was submitted more than one year after the last merit decision, issued on October 2, 2009, it was untimely. Consequently, she must demonstrate clear evidence of error by OWCP in denying her claim for a recurrence.<sup>33</sup>

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. The request does not show on its face that OWCP's denial of her claim for a recurrence of disability was erroneous. In addition, appellant presented no evidence with her request establishing that her disability was causally related to her accepted employment injury. The reports from Drs. Bitting and Faile do not address or explain how appellant was totally disabled due to her accepted employment injury. Appellant has not shown how OWCP committed any error in denying her claim for a recurrence of disability. Nothing in her October 30, 2012 request for reconsideration remotely suggests that OWCP's October 2, 2009 decision was erroneous in finding that she had not established that her recurrence of disability

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<sup>28</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *D.D.*, 58 ECAB 206 (2006); *Robert G. Burns*, *supra* note 25.

<sup>29</sup> *James Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (October 2011).

<sup>30</sup> *See M.L.*, *supra* note 25; *G.H.*, 58 ECAB 183 (2006); *Jack D. Johnson*, 57 ECAB 593 (2006).

<sup>31</sup> 20 C.F.R. § 10.607(a).

<sup>32</sup> *Robert F. Stone*, 57 ECAB 393 (2005).

<sup>33</sup> *Supra* note 31; *see D.G.*, *supra* note 23; *Debra McDavid*, 57 ECAB 149 (2005).



was due to her accepted employment injury. Consequently, OWCP properly denied appellant's reconsideration request as it was untimely and failed to establish clear evidence of error. For reasons stated above, the Board finds that the evidence does not establish clear evidence of error on the part of OWCP.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she has more than a six percent impairment of her left lower extremity. The Board further finds that OWCP properly denied appellant's request for reconsideration of the denial of her claim for recurrence as it was untimely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 18, 2013 and November 19, 2012 are affirmed.

Issued: November 22, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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