



On appeal he asserts that the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), should have been used in calculating his schedule award.

### **FACTUAL HISTORY**

On July 25, 2007 appellant, then a 59-year-old forestry technician, sustained a left rotator cuff tear when he fell off a ramp and hurt his shoulder. He stopped work on February 29, 2008 when Dr. John Faggard, a Board-certified orthopedic surgeon, performed arthroscopic repair. Appellant returned to modified duty on May 12, 2008, and to full duty on July 23, 2008.

On March 4, 2009 appellant filed a schedule award claim. In an October 8, 2008 report, Dr. Faggard advised that appellant had reached a fixed and stable condition. He provided shoulder range of motion findings and advised that, in accordance with the A.M.A., *Guides*, appellant had a 16 percent impairment of the left upper extremity. In an April 30, 2009 report, Dr. Morley Slutsky, Board-certified in occupational medicine and an OWCP medical adviser, reviewed the record, including Dr. Faggard's October 8, 2008 report. Under the sixth edition of the A.M.A., *Guides*,<sup>3</sup> appellant had a one percent permanent impairment of the left upper extremity.

By decision dated June 15, 2009, appellant was granted a schedule award for a one percent impairment of the left upper extremity, for 3.12 weeks, to run from October 8 to 29, 2008.

On June 2, 2010 appellant requested reconsideration, arguing that OWCP disregarded his physician's impairment rating and that the fifth edition of the A.M.A., *Guides* should have been used to rate impairment. He submitted a print-out from OWCP's website noting that effective May 9, 2009, the sixth edition of the A.M.A., *Guides* was adopted for schedule award determinations. In a brief report, Dr. Faggard stated that appellant's impairment rating of 16 percent was made using the fifth edition of the A.M.A., *Guides*.

In a nonmerit decision dated June 21, 2010, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>4</sup> Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>5</sup> This section provides that the application for reconsideration must be submitted

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.608(a).

in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

### ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated June 21, 2010 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's schedule award claim.<sup>8</sup>

With his June 2, 2010 reconsideration request, appellant asserted that OWCP should have used the fifth, rather than the sixth edition of the A.M.A., *Guides* to rate permanent impairment. For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>9</sup> For decisions issued after May 1, 2009, the sixth edition is used.<sup>10</sup> The Board finds that appellant's argument does not rise to the level of relevant new argument. OWCP has no discretion to adjudicate decisions issued after May 1, 2009 under any edition of the A.M.A., *Guides* other than the sixth edition.<sup>11</sup>

Appellant did not offer, discuss, or address any specific point of contention with the OWCP medical adviser's application of the A.M.A., *Guides*. He merely indicated that he preferred the rating of his physician and that OWCP should rely on the fifth edition of the A.M.A., *Guides*. This does not raise any new or relevant argument. Appellant did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not

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<sup>6</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2007). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* C.F.R. § 501.3(e) (2008); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

<sup>10</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>11</sup> *Id.* In the case *Harry D. Butler*,<sup>11</sup> the Board addressed OWCP's use of the A.M.A., *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has adopted the subsequent editions of the A.M.A., *Guides* and stated the specific date when use of each edition should be made applicable to claims under FECA. The fact that the sixth edition revises the evaluation methods used in previous editions does not establish an abuse of discretion. As noted in FECA Bulletin No. 09-03, the American Medical Association periodically revises the A.M.A., *Guides* to incorporate current scientific clinical knowledge and judgment and to establish standardized methodologies for calculating permanent impairment.

entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>12</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), on reconsideration appellant submitted a print-out from OWCP's website noting the effective date of application of the sixth edition of the A.M.A., *Guides*. The Board has held that such publications are of general application and not determinative regarding specific aspects of an employee's claim.<sup>13</sup> Appellant also submitted a brief report from Dr. Faggard who advised that he had used the fifth edition to evaluate appellant's permanent impairment. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup> As noted above, the sixth edition of the A.M.A., *Guides* is to be used for all decisions issued after May 1, 2009.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.<sup>15</sup>

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.

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>12</sup> 20 C.F.R. § 10.606(b)(2).

<sup>13</sup> See generally *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>14</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>15</sup> *Supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 19, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board