

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

A.C., Appellant)

and)

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**)

**Docket No. 13-1408
Issued: November 15, 2013**

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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 28, 2013 appellant filed a timely appeal from a February 14, 2013 merit decision of the Office of Workers' Compensation Programs' (OWCP) denying his schedule award claim and a March 14, 2013 nonmerit decision denying his request for reconsideration. 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.

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award due to his accepted employment injury; and (2) whether OWCP properly denied his request to reopen his case for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 21, 2012 appellant, then a 56-year-old electrician, filed an occupational disease claim alleging that he sustained a right side hernia due to factors of his federal employment. OWCP accepted the claim for a right inguinal hernia and on May 9, 2012 he underwent surgical repair. On October 6, 2012 appellant underwent surgical repair of a recurrent right inguinal hernia. He returned to work with restrictions on November 27, 2012.

On February 13, 2013 appellant filed a claim for a schedule award. By decision dated February 14, 2013, OWCP denied his schedule award claim. It found that appellant had not submitted any medical evidence supporting an impairment of a scheduled member or function. OWCP informed him that FECA did not provide a schedule award for a hernia.²

On February 20, 2013 appellant requested reconsideration. In a decision dated March 14, 2013, OWCP denied his request for reconsideration as he had not submitted any evidence or raised an argument sufficient to warrant reopening his case for further merit review under section 8128.³

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ 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 for all claimants, OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Appellant has the burden under FECA to establish that he sustained a permanent impairment of a scheduled member or function as a result of his employment injury entitling him to a schedule award.⁸ A schedule award is not payable for a member, function or organ of the body not specified under FECA or in the implementing regulations. As neither FECA nor the

² OWCP noted that he had received a schedule award for his left leg under another file number and advised that if he was claiming an additional award for the left leg he should pursue the claim under the other file number.

³ 5 U.S.C. § 8128(a).

⁴ *Id.* at § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See Veronica Williams*, 56 ECAB 367 (2005); *Annette M. Dent*, 44 ECAB 403 (1993).

regulations provide for the payment of a schedule award for a hernia, a claimant is not entitled to such an award.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right inguinal hernia causally related to factors of his federal employment. Appellant underwent hernia repairs on May 9 and October 6, 2012. On February 13, 2013 he filed a claim for a schedule award. Appellant did not, however, submit an impairment evaluation or other medical evidence showing that he has a permanent impairment. As discussed, appellant has the burden of proof to submit medical evidence supporting that he has a permanent impairment of a scheduled member or function of the body.¹⁰ As appellant did not submit such evidence, OWCP properly denied his request for a schedule award.

On appeal, appellant argues that his hernia results in reduced strength and pain and limits his daily activities. He maintains that he should receive a whole body impairment rating due to his hernia. As noted, however, no schedule award is payable for any member, function or organ of the body not listed in section 8107 of FECA or its implementing regulations. A hernia is not listed in either section 8107 or the implementing regulations, which added organs to the original list in section 8107.¹¹ The terms of FECA are specific as to the method and amount of payment of compensation. Neither, OWCP nor the Board has the authority to enlarge the terms of FECA or to make an award of benefits under terms other than those specified in the statute.¹² Consequently, a schedule award cannot be granted for any permanent impairment based on appellant's hernia condition because a hernia is not a scheduled member under FECA or the regulations. Further, FECA does not provide for impairment of the whole person.¹³

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁴ OWCP's regulations provide that 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 relevant and pertinent new evidence not previously

⁹ *K.H.*, Docket No. 09-275 (issued August 14, 2009); *George E. Williams*, 44 ECAB 530 (1993).

¹⁰ *See D.H.*, 58 ECAB 358 (2007); *Annette M. Dent*, *supra* note 8.

¹¹ 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404.

¹² *Danny E. Haley*, 56 ECAB 393 (2005).

¹³ *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁴ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[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."

considered by OWCP.¹⁵ 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.¹⁶ 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.¹⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ While the 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.²⁰

ANALYSIS -- ISSUE 2

On February 20, 2013 appellant indicated by checkmark that he desired reconsideration before OWCP. He did not, however, submit any evidence or raise any argument in support of his request for reconsideration. Appellant did not identify a specific point of law or show that it was erroneously applied or interpreted. He did not advance a new and relevant legal argument. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not established that he is entitled to a schedule award due to his accepted employment injury. The Board further finds that OWCP properly denied his request to reopen his case for further merit review under section 8128.

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ *Id.* at § 10.607(a).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁹ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 14 and February 14, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 15, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board