

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board. In the July 27, 2009 decision, the Board affirmed OWCP decisions dated January 29 and August 6, 2008 which found that appellant had an 11 percent impairment of the right lower extremity, for which he received a schedule award. The history of the case as provided in the prior Board decision is incorporated herein by reference.³

By letter dated March 2, 2011, appellant, through counsel, requested reconsideration before OWCP. Counsel stated that the reconsideration request was based on the submission of an August 4, 2010 medical report from Dr. William N. Grant, a Board-certified internist, who found that appellant reached maximum medical improvement on that date and had a 38 percent impairment of the right lower extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a March 31, 2011 decision, OWCP denied appellant's March 2, 2011 request for reconsideration on the grounds that it was not filed and failed to present clear evidence of error. It found that his request was not timely filed within one year of the most recent merit decision in the case. OWCP also found that the evidence submitted failed to establish clear evidence of error.⁴

LEGAL PRECEDENT

A claimant may seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury.⁵ Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award which is not subject to time limitations.⁶ A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.

³ OWCP accepted that on October 16, 2001 appellant, then a 44-year-old letter carrier, sustained a sprain and impingement of the right ankle while in the performance of duty and authorized arthroscopic surgery which was performed on August 8, 2002.

⁴ Following the issuance of OWCP's March 31, 2011 decision, it received new evidence. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c)(1). Appellant may submit this new evidence with a formal, written request for reconsideration to OWCP under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b) (January 2010).

⁶ See *B.K.*, 59 ECAB 228 (2007); *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

ANALYSIS

On July 27, 2009 the Board affirmed OWCP's January 29 and August 6, 2008 decisions which found that appellant had no more than 11 percent impairment of the right lower extremity, for which he received a schedule award. On March 2, 2011 counsel submitted a letter to OWCP entitled request for reconsideration, seeking a schedule award, together with new medical evidence in the form of Dr. Grant's August 8, 2010 report which found that appellant had a 38 percent impairment of the right lower extremity based on the sixth edition of the A.M.A., *Guides*. In a March 31, 2011 decision, OWCP denied reconsideration on the grounds that appellant's request was untimely and did not establish clear evidence of error. The Board finds that his March 2, 2011 letter constituted a request for an increased schedule award.⁷

The distinction between a reconsideration requests and a request for an increased schedule award is that the former would require that OWCP revisit the last merit decision and determine whether that decision should be changed.⁸ A request for an increased schedule award would require that OWCP consider events subsequent to the last schedule award and determine whether subsequent evidence demonstrates that appellant's impairment has worsened. It does not focus on correctness of an old OWCP order but rather on the medical condition of appellant in the time after that order.

Although counsel used the term reconsideration in his March 2, 2011 letter, the request is clearly for a schedule award based on appellant's worsening condition, as reflected in the newly submitted medical evidence. OWCP erroneously treated the March 2, 2011 letter as a request for reconsideration. As appellant made a claim for an increased schedule award, including the submission of current medical evidence regarding his permanent impairment at a date subsequent to his prior request for a schedule award, he is entitled to a merit decision on the medical evidence in connection with this claim. OWCP has not determined his entitlement to a schedule award for such claimed increased impairment of his right lower extremity. For these reasons, the March 31, 2011 OWCP decision will be set aside and the case must be remanded to it for appropriate adjudication.⁹

CONCLUSION

The Board finds that OWCP improperly adjudicated appellant's claim for an increased schedule award as a request for reconsideration.

⁷ *Id.*

⁸ *Thomas Burns*, 53 ECAB 351 (2002); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: December 9, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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