

FACTUAL HISTORY

On August 3, 2004 appellant, a 44-year-old city letter carrier, filed a claim alleging that his left knee condition was a result of delivering mail while carrying a satchel, especially while descending stairs and pushing a gurney up and down ramps. OWCP accepted his claim for aggravation of chondromalacia, left knee.

On October 5, 2007 appellant received a schedule award for a 37 percent impairment of his left lower extremity. On August 23, 2010 OWCP issued a schedule award for a 22 percent additional impairment (59 percent total). It explained that appellant had a poor result from his total knee replacement with a default impairment value of 67 percent, but that a grade 2 functional history, grade 3 physical examination and grade 4 clinical study adjusted the default value two grades lower to 59 percent.

Appellant requested reconsideration on November 10, 2010. He argued that OWCP's medical adviser erroneously applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) by failing to follow the special net adjustment formula for class 4 impairments described on pages 521 and 522. Appellant explained that, for a class 4 impairment, +1 is added to each of the nonkey factors and if the nonkey factors were grade 2, grade 3 and grade 4, the default value should not have dropped two grades to 59 percent.² He asked for a reconsideration and correction of the calculation of his additional schedule award.

In a nonmerit decision dated February 9, 2011, OWCP denied appellant's request for reconsideration. It found that the calculation of impairment was a medical determination and that appellant's interpretation of the A.M.A., *Guides* was not a valid legal argument and irrelevant to the medical issue as he was not a qualified physician trained in calculating impairment levels.

On appeal, appellant argues that his request for reconsideration did not attempt to substitute his medical judgment for that of the physicians who calculated his impairment. He simply questioned how the A.M.A., *Guides* were applied to his claim.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.³ The employee shall exercise this right through a request to the district OWCP.⁴

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth

² See A.M.A., *Guides* 511 (Table 16-3, total knee replacement).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605.

arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

Appellant timely submitted his November 10, 2010 request for reconsideration within one year of OWCP's August 23, 2010 schedule award decision. The question, therefore, is whether his request met at least one of the three criteria for obtaining a merit review of his schedule award.

Appellant advanced a legal argument, namely, that OWCP based his additional schedule award on an improper application of the A.M.A., *Guides*. OWCP found his argument irrelevant because he was not a qualified physician to address medical issues.

Impairment evaluation requires medical knowledge; therefore, mostly doctors who are qualified in allopathic or osteopathic medicine or chiropractic medicine use the A.M.A., *Guides* to evaluate permanent impairment. It must be emphasized, however, that even though the A.M.A., *Guides* is mainly for medical doctors and others permitted to do impairment evaluation, nonphysician evaluators may analyze an impairment evaluation to determine if it was performed in accordance with the A.M.A., *Guides*.⁸ Indeed, as appellant points out on appeal, OWCP procedures permit the claims examiner to review OWCP's medical adviser's findings and, if he or she believes that the impairment has not been correctly described or that the percentage is not reasonable, obtain a new or supplemental report.⁹ OWCP's hearing representative and the Board frequently determine whether a physician performed the impairment evaluation in accordance with the A.M.A., *Guides*.

Appellant questioned OWCP's medical adviser's application of the A.M.A., *Guides*. He noted that the medical adviser followed the standard net adjustment formula to lower the default

⁵ *Id.* at § 10.606.

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608.

⁸ A.M.A., *Guides* (6th ed. 2009).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.d(2) (January 2010).

impairment value two grades from 67 to 59 percent. Appellant argued error because he had a class 4 impairment, which required a special net adjustment formula. As the A.M.A., *Guides* explains:

“If the key factor is class 4, and both nonkey factors were grade modifier 4, the differences would summate to zero, and placement in a grade above the default value C in class 4 would not be possible. In order to correct this deficiency, if the key factor is class 4, automatically add +1 to the value of each nonkey factor. For example, if the key factor is class 4, and the first nonkey factor was grade 3, the second was grade 4, the differences are -1 and zero. Adding +1 to each of these yields zero and +1; this summates to +1. Consequently, ... the final impairment is class 4 grade D.”¹⁰

The Board finds that appellant’s November 10, 2010 request for reconsideration before OWCP advanced a relevant legal argument not previously considered. Appellant is, therefore, entitled to a merit review of his schedule award. The Board will set aside OWCP’s February 9, 2011 decision denying reconsideration and remand the case for a merit review of his schedule award claim under the A.M.A., *Guides* and an appropriate final decision.

CONCLUSION

The Board finds that OWCP abused its discretion by denying appellant’s November 10, 2010 request for reconsideration.

¹⁰ A.M.A., *Guides* 522; *see id.* at 525 (lower extremity example 16-6).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: December 23, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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