

ISSUES

The issues are: (1) whether appellant has established entitlement to a schedule award; and (2) whether OWCP properly denied his request for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On December 22, 2009 appellant, then a 46-year-old medical support assistant, filed a traumatic injury claim alleging that on December 10, 2009 he sustained a work injury when he was returning to his workstation in rainy weather and the car in front of him stopped causing him to slam on brakes and hydroplane. OWCP accepted the claim for lumbar strain, cervical strain, lumbar intervertebral disc, cervical intervertebral disc and headache. Appellant stopped work December 10, 2009 and did not return.³ He was placed on the periodic compensation rolls effective January 25, 2010.

In a May 14, 2010 report, Dr. Kerry H. Haskins, an internist, noted the history of injury, set forth examination findings and provided impressions of: cervical strain, trapezial strain, thoracic and lumbar strain, cervical disc bulge, cervical disc herniations and lumbar radiculopathy. He opined that appellant reached maximum medical improvement. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Haskins opined that appellant had diagnostic-related estimate cervical, class 1, 3 percent impairment rating and diagnostic-related estimate lumbar, class 2, 12 percent impairment rating for a total 15 percent impairment rating.

Appellant continued to undergo multiple testing. In a March 16, 2011 report, Dr. Angelo M. Alves, a Board-certified neurologist, stated that appellant was totally and permanently disabled as a result of the December 10, 2009 work-related accident. He opined that, as a consequence of the low back injury, appellant developed a “cauda equina type of syndrome” with urinary incontinence and saddle anesthesia. Dr. Alves noted that, while appellant saw a neurosurgeon who recommended surgery, appellant decided against surgery. He listed an impression of chronic and acute low back pain syndrome with lumbar radiculopathy, cauda equine syndrome with urinary incontinence and saddle anesthesia and hypoesthesia, chronic cervical pain syndrome with frequent acute flare-ups and cervical radiculopathy, headaches, post-traumatic headaches and bilateral thoracic outlet syndrome. Dr. Alves indicated that appellant reached maximum medical improvement from his work-related injuries and opined that he should be given 10 percent for the cervical injury with the headaches and 75 percent impairment rating for the lower back condition with the “cauda equine syndrome.” In a March 24, 2011 report, he stated that, before appellant developed urinary incontinence, he was considered temporarily disabled, but the status changed to permanent disability when the urinary incontinence developed. Dr. Alves continued to report on appellant’s condition and opined that he was permanently and totally disabled from all work.

In a May 4, 2011 medical report, Dr. William Dinenberg, a Board-certified orthopedic surgeon and second opinion examiner, noted the history of injury and his review of the medical

³ Appellant was placed on temporary total disability from December 10 to 31, 2009.

record. He provided an impression of degenerative disc disease of the lumbar and cervical spine and herniated nucleus pulposus of the lumbar spine with right-sided radiculopathy. Dr. Dinenberg opined that appellant was totally disabled from all work due to the residuals of the accepted condition of aggravation of displacement of the lumbar intervertebral disc without myelopathy and he remained significantly symptomatic and had worsened from his preinjury condition.

On June 14, 2011 appellant requested a schedule award. In a June 28, 2011 letter, OWCP advised him of the type of medical evidence needed to establish a schedule award. It specifically noted that a schedule award was not payable for any part of the back, if appellant believed that he had an impairment to an extremity (an arm or leg) as a result of his back and/or neck injury, then he could claim a schedule award for that extremity and provide all the necessary supporting medical evidence.

In an August 2, 2011 report, Dr. Alves stated that appellant's impairment rating and disability status remained the same. He noted that appellant's problems with the lower extremities have worsened in terms of pain.

By decision dated August 10, 2011, OWCP denied appellant's request for a schedule award, finding that the medical evidence did not provide an impairment rating to support entitlement to a schedule award.

On October 6, 2011 appellant requested reconsideration. Medical records from Dr. Alves dated September 25 and November 1, 2011 were received. In his September 25, 2011 report, Dr. Alves opined that appellant's erectile dysfunction and urinary incontinence are part of his neurological disabilities and should be considered workers' compensation related. In both reports, he continued to opine that appellant was at a standstill regarding his medical neurological conditions and that he was considered totally and permanently disabled for any type of employment. The medical reports did not provide an impairment finding.

In a November 17, 2011 decision, OWCP denied appellant's request for reconsideration finding that insufficient evidence was submitted to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA and its implementing regulations⁴ 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. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁵ 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

⁴ 20 C.F.R. § 10.404; 5 U.S.C. § 8107.

⁵ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

regulations as the appropriate standard for evaluating schedule losses.⁶ As May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.⁸ 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 award 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.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant had work-related lumbar sprain, neck sprain, displacement of lumbar intervertebral disc without myelopathy, displacement of cervical intervertebral disc without myelopathy and headache. Appellant requested a schedule award. On June 28, 2011 OWCP informed him of the evidence necessary to support a schedule award. By decision dated August 10, 2011 it denied appellant's claim for a scheduled award on the grounds that the medical evidence did not provide an impairment rating to support entitlement to a schedule award.

In a May 14, 2010 report, Dr. Haskins opined that appellant had 3 percent impairment of the cervical spine and 12 percent impairment for the lumbar spine, for a total 15 percent impairment rating. However, this was not sufficient to establish entitlement to a schedule award under FECA as FECA and OWCP regulations do not provide for payment of a schedule award for the permanent loss of use of the back or spine.¹⁰ Dr. Haskins did not attempt to explain how appellant had any impairment of a scheduled body member pursuant to the A.M.A., *Guides*. Thus, his report is of no probative value to support an impairment rating.

In a March 16, 2011 report, Dr. Alves indicated that appellant reached maximum medical improvement from his work-related injuries and opined that he should be given 10 percent for the cervical injury with the headaches and 75 percent impairment rating for the lower back

⁶ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

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

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000). However, a schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition. *Denise D. Cason*, 48 ECAB 530, 531 (1997); *Gordon McNeil*, 42 ECAB 140 (1990).

condition with the “cauda equine syndrome.” However, this was not sufficient to establish entitlement to a schedule award under FECA as FECA and OWCP regulations do not provide for payment of a schedule award for the permanent loss of use of the back or spine.¹¹ Dr. Alves did not specifically address whether appellant’s accepted conditions caused impairment in either his legs or arms or provide detailed examination findings from which impairment to the extremities could be calculated. His other reports do provide an impairment finding of a scheduled body member pursuant to the A.M.A., *Guides*. Thus, Dr. Alves’ reports are insufficient to establish entitlement to a schedule award. No other medical evidence of record provides an impairment rating in conformance with the A.M.A., *Guides*, which rates impairment of a scheduled body member under FECA and OWCP regulations.

On appeal, appellant contends that OWCP erred in denying his schedule award claim as Dr. Alves’ March 16, 2011 report is sufficient to establish an impairment rating. However, for the reasons set forth above, Dr. Alves’ March 16, 2011 report is insufficient to establish entitlement to a 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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP’s regulations provide that the evidence or argument submitted by 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 considered by OWCP.¹² Section 10.608(b) of OWCP’s regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹³ The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴

ANALYSIS -- ISSUE 2

On October 6, 2011 appellant requested reconsideration of OWCP’s August 10, 2011 decision, which denied his schedule award claim. His request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. He is

¹¹ *Id.*

¹² 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

¹³ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

not 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).

Appellant also did not submit relevant and pertinent new evidence not previously considered by OWCP. The medical reports from Dr. Alves dated September 25 and November 1, 2011 while new do not provide an impairment rating or otherwise address permanent impairment of a scheduled body member pursuant to the A.M.A., *Guides*. The submission of evidence that does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁵

The evidence submitted by appellant did not show that OWCP erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by OWCP. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.¹⁶

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award. The Board also finds that OWCP properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ See *D. Wayne Avila*, 57 ECAB 642 (2006).

¹⁶ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the November 17 and August 10, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 20, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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