

properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 2009 appellant, then a 29-year-old mail handler, filed an occupational disease claim alleging that the nature of her work resulted in carpal tunnel syndrome in both arms. She first realized her condition was caused or aggravated by her employment on September 8, 2009. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant underwent an authorized left carpal tunnel release on April 23, 2010 and an authorized right carpal tunnel release on May 28, 2010. The November 30, 2009 preoperative electronic diagnostic studies were normal in both upper extremities with no evidence of median nerve entrapment neuropathy at the wrist bilaterally, no evidence of ulnar nerve neuropathy at the elbow bilaterally and no evidence of peripheral polyneuropathy or cervical radiculopathy of both upper extremities. OWCP paid wage-loss benefits and appellant returned to work following her surgeries.

On June 3 and October 30, 2010 appellant filed a schedule award claim. In June 15 and November 9, 2010 letters, OWCP advised her and her physician of the medical information needed to support a schedule award and supplied the necessary worksheets. On November 16, 2010 Dr. Richard M. Gray, a Board-certified orthopedic surgeon, completed the worksheets. He noted that maximum medical improvement was reached on October 23, 2010. Dr. Gary advised that there were no disabling work-related residuals or any preexisting conditions apparent in the same member. He noted that appellant reported intermittent pain and paresthesia. Dr. Gary used Table 15-23, Entrapment/Compression Neuropathy Impairment, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) to rate one percent permanent impairment to the right arm and one percent permanent impairment to the left arm.

On February 15, 2011 an OWCP medical adviser reviewed Dr. Gray's November 16, 2010 worksheet. He noted that Dr. Gray provided no explanation to support his impairment rating. The medical adviser reviewed appellant's November 30, 2009 preoperative electronic diagnostic studies and noted there was no evidence of median nerve entrapment neuropathy at the wrist bilaterally, no evidence of ulnar nerve neuropathy at the elbow bilaterally or any evidence of peripheral polyneuropathy or cervical radiculopathy of either upper extremity. Based on the preoperative evidence appellant failed to meet the criteria for rating entrapment neuropathy impairment. The medical adviser stated that a rating based on a peripheral nerve impairment could not be used as there was no electrodiagnostic evidence of upper extremity peripheral neuropathy. Accordingly, he found no impairment under the A.M.A., *Guides* to either arm.

By decision dated February 22, 2011, OWCP denied appellant's schedule award claim. It accorded determinative weight of medical opinion to the report of the medical adviser.

On May 9, 2011 appellant requested reconsideration. She disagreed with the denial of a schedule award. Appellant contended that her electrodiagnostic studies were not normal and that

she was still having problems with her hands postsurgery. She spoke with Dr. Gray after receiving the denial of her schedule award and he advised that he had used the A.M.A., *Guides*.

Appellant submitted a claim for schedule award benefits dated February 15, 2011 together with an August 12, 2009 electromyogram and nerve conduction velocity study. It reported a mild abnormality which raised the possibility of a very mild bilateral carpal tunnel syndrome (median nerve entrapment at the wrist) affecting only sensory components. She also submitted March 22, 2011 physical therapy reports and a March 22, 2011 medical report from Dr. Gray, who found no evidence of recurrent median neuropathy, but noted some localized neuritis/neuropathy or neurapraxia.

By decision dated June 15, 2011, OWCP denied reconsideration of the merits. It found that appellant did not provide relevant medical evidence or show that OWCP erroneously applied or interpreted a point of law.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA and its implementing regulations 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.³ 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 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 regulations as the appropriate standard for evaluating schedule losses.⁴

The A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For upper extremity impairments, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁵ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.⁶

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

⁴ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁵ *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

⁶ *J.W.*, Docket No. 11-289 (issued September 12, 2011).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and authorized open releases of carpal tunnel syndrome on April 23, 2010 in the left and on May 28, 2010 on the right. Appellant subsequently filed a claim for a schedule award. By decision dated February 22, 2011, OWCP denied her schedule award claim. It relied on its medical adviser's opinion that appellant did not meet the criteria for an impairment rating for either an entrapment neuropathy or a peripheral neuropathy.

In his November 16, 2010 report, Dr. Gray noted appellant's reports of intermittent pain and paresthesia. He opined under Table 15-23, Entrapment/Compression Neuropathy Impairment, of the A.M.A., *Guides* that she had one percent permanent impairment to the right upper extremity and one percent permanent impairment to the left upper extremity. However, no explanation was provided for Dr. Gray's impairment rating. He did not explain how the rating process for Table 15-23⁸ was followed or otherwise provide a description of how he calculated impairment. Thus, Dr. Gray's report is of limited probative value to obtain an impairment rating.⁹

OWCP's medical adviser determined that appellant had no ratable impairment in either arm based on entrapment/compression neuropathy or peripheral neuropathy. In making this determination, he relied upon Dr. Gray's clinical findings and appellant's preoperative electrodiagnostic studies of November 30, 2009, which were reported as normal in both upper extremities with no evidence of median nerve entrapment neuropathy at the wrist bilaterally; no evidence of ulnar nerve neuropathy at the elbow bilaterally; and no evidence of peripheral polyneuropathy or cervical radiculopathy of both upper extremities. Page 448 of the A.M.A., *Guides* states that whether or not the nerve conduction tests show a recovery to normal after surgical or nonsurgical treatment does not influence the impairment rating. The preoperative electrodiagnostic test should be used in the impairment rating unless postoperative studies were done for a clinical indication of failure to improve with surgery and the postoperative study is clearly worse than the preoperative electrodiagnostic study. Thus, the medical adviser properly relied upon the November 30, 2009 electronic diagnostic studies in determining an impairment rating to the upper extremities. He noted that, as the November 30, 2009 electronic diagnostic studies were normal in both of appellant's upper extremities, appellant did not meet the criteria for rating as an entrapment neuropathy. Page 448 of the A.M.A., *Guides* state that if test findings are grade modifier zero (i.e., electrodiagnostic testing is normal or does not meet

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

⁸ A.M.A., *Guides* 448-49 (6th ed. 2009).

⁹ See *I.F.*, Docket No. 08-2321 (issued May 21, 2009) (an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of diminished probative value in determining the extent of permanent impairment).

standards), Table 15-23 should not be used. Thus the medical adviser properly determined that an impairment based on Table 15-23 was not applicable in this case. Furthermore, as there was no electrodiagnostic or other appropriate evidence of an upper extremity peripheral neuropathy,¹⁰ an impairment rating based on a peripheral neuropathy also was not applicable in this case.

There are no other medical reports to support an impairment based on the A.M.A., *Guides*. The medical adviser provided extensive rationale, based on the complete medical record and statement of accepted facts, explaining how, under the A.M.A., *Guides*, appellant had no ratable impairment of either arm due to her accepted condition. The Board finds that OWCP's medical adviser correctly applied the appropriate tables and grading schemes of the A.M.A., *Guides* to Dr. Gray's clinical findings, resulting in no impairment to either arm. Therefore, OWCP properly relied on OWCP medical adviser's calculation in denying appellant's claim for a schedule award. The February 22, 2011 decision is proper under the law and facts of this case.

On appeal, appellant generally disagrees with OWCP's finding that she is not entitled to a schedule award. However, as explained, the medical evidence does not support entitlement to an 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) of FECA,¹¹ 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 considered by OWCP.¹² To be entitled to a merit review of OWCP's 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.¹³ 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.¹⁴

¹⁰ See A.M.A., *Guides* 423-25 regarding the process of clinical assessment and grading of deficits in assessing peripheral nerve impairment.

¹¹ Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹² 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹³ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ANALYSIS -- ISSUE 2

In her May 9, 2011 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. While appellant contended that Dr. Gray used the A.M.A., *Guides* in determining her impairment, this assertion has no reasonable color of validity.¹⁵ A physician's impairment rating must be properly calculated under the A.M.A., *Guides* to be considered valid. The Board notes that the underlying issue in this case is medical in nature and appellant's contentions that she should receive a schedule award do not show that OWCP erroneously applied or interpreted a point of law and do not advance a point of law or fact not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

To support her request for reconsideration, appellant submitted a February 15, 2011 claim for schedule award benefits. She previously filed a schedule award claim which OWCP denied on February 22, 2011. Thus the filing of a new schedule award claim is duplicative of appellant's previous filing. The submission of evidence which repeats or duplicates evidence already of record and considered by OWCP does not constitute a basis for reopening a case. It is insufficient to warrant further merit review.¹⁶

The additional evidence appellant submitted, while new, is not relevant to the issue of schedule award benefits. The August 12, 2009 diagnostic testing and Dr. Gray's March 22, 2011 medical report fail to address the issue of permanent impairment to appellant's bilateral upper extremities. Thus, such evidence is not considered relevant and competent medical evidence to the issue at hand. OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of her claim as she did not present evidence or argument satisfying any of the three regulatory criteria, under section 10.606(b)(2), for obtaining a merit review.

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award based on her accepted conditions. The Board further finds that the OWCP properly denied her request for reconsideration.

¹⁵ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity. *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁶ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

ORDER

IT IS HEREBY ORDERED THAT the June 15 and February 22, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 1, 2012
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