

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a five percent permanent impairment of her left leg for which she received a schedule award; and (2) whether OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

OWCP accepted that on December 22, 2007 appellant, then a 44-year-old letter carrier, sustained a left ankle sprain due to a fall at work. She filed a claim for a schedule award due to this injury.

In an October 5, 2009 decision, OWCP granted appellant a schedule award for a five percent permanent impairment of her left leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

OWCP referred appellant for additional evaluation to Dr. Michael S. Smith, a Board-certified orthopedic surgeon. In a June 1, 2011 report, Dr. Smith reported findings of his examination, including the findings of ankle motion testing. Appellant had some tenderness over the left talar fibular ligament and motion testing of the left ankle showed 26 degrees dorsiflexion, 30 degrees of plantar flexion, 24 degrees of eversion and 22 degrees of inversion. Dr. Smith noted that she had 5/5 strength and no frank sensory loss in the left leg and stated:

“Looking back at the range of [zero] to [two] percent under the path report findings and radiographic findings with no range of motion deficits on page 501, we find [two] percent impairment for the left ankle. No impairment is being recommended on the knee, hip or back as they are not accepted conditions at this time. Given the fact that [appellant] has previously been awarded [five] percent impairment for the left ankle no additional impairment is recommended based on her current findings despite her complains of pain.”

On June 16, 2011 an OWCP medical adviser reviewed Dr. Smith's report and concluded that the report did not demonstrate a permanent, measurable, scheduled impairment greater than that already paid. He applied the diagnosis-based standards of Table 16-2 of the sixth edition of the A.M.A., *Guides*, noting that appellant's diagnosis (left ankle sprain) fell under the default value of one percent which was raised to two percent after the relevant grade modifiers were applied.²

In a June 22, 2011 decision, OWCP denied appellant's claim on the grounds that she had not shown that she has more than a five percent permanent impairment of her left leg, for which she received a schedule award. It indicated that the medical evidence of record did not show that she was entitled to additional schedule award compensation.

² See A.M.A., *Guides* 501, Table 16-2.

Appellant submitted a July 8, 2011 report of Dr. John Hughes, an attending osteopath. In this report, Dr. Hughes stated that he had examined her on that date. He indicated that he measured appellant's left ankle motion and concluded that she had "a 10 percent permanent impairment to that ankle" under Table 16-2 on page 501 of the sixth edition of the A.M.A., *Guides*. Dr. Hughes stated, "It is easy to see that the impairment here is 1 to 13 percent. Again, there can be modifiers but I did not think [appellant] had any obvious modifiers as far as the disability was concerned. I did ascribe a disability of 10 percent to the left lower extremity as a result of her injury." He stated that, since appellant already received a schedule award for a five percent impairment of her left leg, she would be entitled to a schedule for an additional five percent impairment of her left leg.

On August 2, 2011, the medical adviser determined that Dr. Hughes did not adequately explain the basis for his belief that appellant had a 10 percent impairment of her left leg. He stated, "In his letter of explanation dated July 8, 2011 he recommends 10 percent [partial permanent impairment] for the [left lower extremity] based on the foot and ankle grid on page 501. The medical adviser apparently was referring to ankle sprain with the presence of moderate motion loss. He does not describe that motion loss in his letter dated July 8, 2011 and describes ankle motion as being adequate in his original evaluation [dated March 18, 2011]." The medical adviser then cited the range of motion findings Dr. Smith provided on June 1, 2011 and stated that Dr. Hughes' report was "not probative" and both his and Dr. Smith's findings on left ankle motion were "adequate."

In an August 9, 2011 decision, OWCP affirmed its June 22, 2011 decision noting that the medical evidence submitted by appellant was not sufficient to establish her claim for increased schedule award compensation.

On August 15, 2011 appellant requested reconsideration of her claim. She submitted a statement in which she indicated that her left ankle injury caused her a great deal of pain and problems with her foot, knee, hip and back. Appellant suggested that she had right leg problems which were related to her accepted left ankle injury. She indicated that one of her attending physicians had produced new medical evidence.

In an August 24, 2011 decision, OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ 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. 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that on December 22, 2007 appellant sustained a left ankle sprain due to a fall at work. In an October 5, 2009 decision, it granted her a schedule award for a five percent permanent impairment of her left leg under the standards of the sixth edition of the A.M.A., *Guides*. Appellant claimed entitlement to additional schedule award compensation but OWCP denied her claim for increased compensation.

The Board finds that appellant did not meet her burden of proof to show that she has more than a five percent permanent impairment of her left leg, for which she received a schedule award. None of the medical evidence of record contains a rationalized opinion showing that she has more than a five percent impairment of her left leg under the relevant standards of the A.M.A., *Guides*.

In a June 1, 2011 report, Dr. Smith, a Board-certified orthopedic surgeon serving as an OWCP referral physician, provided an opinion that appellant had a two percent impairment of her left leg. The medical adviser properly noted that this report did not show that she was entitled to increased schedule award compensation.

Appellant submitted a July 8, 2011 report of Dr. Hughes, an attending osteopath. In this report, Dr. Hughes stated that he had examined her on that date. He indicated that he measured appellant's left ankle motion and concluded that she had "a 10 percent permanent impairment to that ankle" under Table 16-2 on page 501 of the sixth edition of the A.M.A., *Guides*. The medical adviser reviewed this report and properly noted that Dr. Hughes did not adequately explain how this impairment rating was warranted by the findings of record, particularly recent measurements of her left ankle motion (both by Dr. Hughes and Dr. Smith), which showed extensive left ankle motion.

For these reasons, OWCP properly denied appellant's claim for increased schedule award compensation. 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,⁷ OWCP's regulations provide that the evidence or argument submitted by a claimant must:

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ Under section 8128 of FECA, "[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." 5 U.S.C. § 8128(a).

(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.⁸ 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.⁹ 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.¹⁰ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹² While a 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.¹³

ANALYSIS -- ISSUE 2

OWCP issued a decision on August 9, 2011 denying appellant's claim for increased schedule award compensation. Appellant requested reconsideration of this decision on August 15, 2011. She submitted a statement in which she indicated that her left ankle injury caused her a great deal of pain and problems with her foot, knee, hip and back. Appellant suggested that she had right leg problems which were related to her accepted left ankle injury. She indicated that one of her attending physicians had produced new medical evidence.

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. In the statement she submitted in connection with her reconsideration request, she suggested that the severity of her medical condition showed that she is entitled to additional schedule award compensation. But the underlying issue in this case is a medical issue which must be addressed by relevant medical evidence.¹⁴ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any 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

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁴ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a five percent permanent impairment of her left leg, for which she received a schedule award. The Board finds that OWCP properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 24 and 9, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ On appeal, appellant submitted additional evidence. However, the Board may not consider new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).