

**United States Department of Labor
Employees' Compensation Appeals Board**

C.C., Appellant)
and) Docket No. 12-1861
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 24, 2013
Akron, OH, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 6, 2012 appellant filed a timely appeal from an August 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). The record also contains a May 23, 2012 OWCP decision denying his application for reconsideration of a January 4, 2011 termination decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a 22 percent right leg permanent impairment; (2) whether OWCP properly found that a \$3,023.61 overpayment of compensation should be recovered by deducting this amount from appellant's schedule award; and (3) whether OWCP properly found that appellant's application for reconsideration of a January 4, 2011 termination decision was untimely and failed to show clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 25, 2010 appellant, then a 53-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right leg injury while working at the mail dock on February 23, 2010. OWCP accepted a closed fracture of the right ankle and a right ankle sprain. Appellant stopped working on May 28, 2010. He underwent right ankle surgery on June 2, 2010. Additional surgery was performed by Dr. Aaron Chokan, a podiatrist, on October 15, 2010 to remove ankle fixation hardware.

The record contains a note from Dr. Chokan indicating that appellant could return to work on October 29, 2010.² Dr. Chokan stated that appellant should limit the amount of walking up and down stairs due to limited range of motion in the right ankle. In a form report dated November 18, 2010, he indicated that appellant could return to work without restriction as of November 15, 2010. By letter dated December 1, 2010, OWCP advised appellant that it proposed to terminate compensation, based on the report from Dr. Chokan. Appellant returned to work on December 5, 2010. The record indicates that he retired from federal employment as of May 10, 2011.

In a letter dated December 1, 2010, OWCP advised appellant that it proposed to terminate his wage-loss compensation. By decision dated January 4, 2011, it terminated compensation for wage loss. OWCP found the medical evidence established that employment-related disability had ceased.

In a letter dated May 24, 2011, OWCP advised appellant of a preliminary determination that an overpayment of \$3,023.61 had occurred. It found that he had returned to work on December 5, 2010 but continued to receive compensation through January 4, 2011. In addition, OWCP made a preliminary determination that appellant was at fault in creating the overpayment.

By decision dated June 28, 2011, OWCP finalized the preliminary determination that an overpayment of \$3,023.61 had occurred. It denied waiver of the overpayment as appellant was at fault in creating the overpayment. Appellant was advised to submit a payment for the amount of the overpayment.

On October 24, 2011 OWCP received an undated letter from appellant, stating that he was requesting a hearing. Appellant did not identify OWCP's decision. He stated that he had a permanent injury, that the employing establishment would not allow him to work with restrictions and that he had filed for disability retirement. By letter dated October 26, 2011, OWCP indicated that it was faxing a copy of appellant's correspondence received on October 24, 2011 to the Branch of Hearings and Review.

On November 7 and 10, 2011 OWCP received additional undated correspondence from appellant, who stated that he had retired because of his leg and there was a conspiracy against him. By letter dated December 7, 2011, it stated that it was unclear what appellant was requesting and advised him to exercise a specific appeal right as provided in the January 4, 2011

² The note contains an October 29, 2010 date as well as a December 2, 2010 date.

decision. Appellant submitted an undated statement on December 20, 2011. He argued that there was abuse of process and unreasonable delay with respect to compensation issues.

On January 30, 2012 appellant submitted a claim for compensation (Form CA-7) and indicated that he was claiming a schedule award. On February 27, 2012 he submitted an undated letter indicating that he was requesting reconsideration. Appellant stated that he had submitted medical evidence, but OWCP claimed he had no restrictions. He requested that his retirement be restored and full compensation be awarded for his injury. The evidence submitted included the notice of proposed termination and the December 2, 2010 note from Dr. Chokan.

By decision dated May 23, 2012, OWCP found that appellant's letter received on February 27, 2012 was a request for reconsideration of the January 4, 2011 termination decision. It found that the reconsideration request was untimely and failed to show clear evidence of error.

In a report dated May 17, 2012, Dr. John Dunne, an osteopath, provided a history and results on examination. He opined that, under Table 16-2 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a 20 percent right leg impairment. Dr. Dunne found that the default impairment for a moderate ankle fracture was 22 percent, but with the net adjustment based on grade modifiers the impairment was 20 percent.

By report dated July 18, 2012, an OWCP medical adviser opined that the right leg impairment was 22 percent. The medical adviser found that there was no adjustment from the 22 percent default value based on the appropriate grade modifiers. The date of maximum medical improvement was December 5, 2010.

In a decision dated August 14, 2012, OWCP issued a schedule award for a 22 percent right leg impairment. The period of the award was 63.36 weeks from January 5, 2011. OWCP found that the lump-sum payment of \$45,331.08 would be reduced by \$3,023.61 to recover the declared overpayment.

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 all claimants.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ See *Ronald R. Kraynak*, 53 ECAB 130 (2001); *August M. Buffa*, 12 ECAB 324 (1961).

appropriate standard for evaluating the permanent impairment.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

With respect to an ankle impairment, the A.M.A., *Guides* provides a regional grid at Table 16-2. The class of impairment (CDX) is determined based on specific diagnosis and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History (GMFH) Table 16-6, Physical Examination (GMPE) Table 16-7 and Clinical Studies (GMCS) Table 16-8. The adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

ANALYSIS -- ISSUE 1

In the present case, appellant's physician, Dr. Dunne, identified Table 16-2 and the diagnosis of ankle fracture. For a class (CDX) 2 moderate impairment, the grade C impairment is 22 percent.⁹ In applying the adjustment formula, Dr. Dunne assigned a grade modifier 2 for functional history and clinical studies, with a grade modifier 1 for physical examination. As noted above, the adjustment formula would then result in a -1 adjustment ((2-2) + (1-2) + (2-2)) or a grade B impairment, which is 20 percent under Table 16-2.¹⁰

An OWCP medical adviser found a higher impairment of 22 percent was appropriate. As the medical adviser noted, if the diagnosis class includes physical examination findings, it is not used as a grade modifier.¹¹ Therefore, application of the adjustment formula would be (2-2) + (2-2), resulting in no adjustment from the grade C impairment of 22 percent.

The Board finds that the weight of the probative medical evidence establishes that OWCP properly found that appellant had a 22 percent right leg impairment. The number of weeks of compensation is determined by 5 U.S.C. § 8107. Complete loss of use of the leg is 288 weeks of compensation and therefore appellant is entitled to 22 percent of 288 or 63.36 weeks. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.¹² In this case, the medical adviser found that the date of maximum medical improvement was December 5, 2010, when appellant returned to full duty. OWCP began the schedule award on January 5, 2011, when his wage-loss compensation ceased. A claimant may not concurrently receive compensation under

⁶ *Supra* note 4.

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ The net adjustment is up to +2 (grade E) or -2 (grade A).

⁹ A.M.A., *Guides* 503, Table 16-2.

¹⁰ *Id.*

¹¹ A.M.A., *Guides* 500.

¹² *Albert Valverde*, 36 ECAB 233, 237 (1984).

a schedule award and wage loss for disability.¹³ OWCP properly issued a schedule award for 63.36 weeks commencing January 5, 2011.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.¹⁴

LEGAL PRECEDENT -- ISSUE 2

With respect to recovery of overpayments, OWCP's procedures provide: "If a sufficiently large lump-sum payment of compensation is due to the debtor for a single period of past entitlement or for a schedule award, the debt should be recovered in full by a single deduction from compensation owed."¹⁵

ANALYSIS -- ISSUE 2

In the present case, OWCP found an overpayment of \$3,023.61 occurred because appellant returned to work on December 5, 2010 and continued to receive wage-loss compensation. It found that he was not entitled to waiver of the overpayment as he was at fault in creating the overpayment. The Board does not have jurisdiction over the June 28, 2011 overpayment decision.¹⁶ The issue on the current appeal is the determination by OWCP, in the August 14, 2012 decision, to recover the overpayment by deducting \$3,023.61 from the schedule award.

OWCP had requested that appellant submit a payment for the amount of the overpayment of June 28, 2011 and continued to request payment. Appellant was entitled to a large lump-sum payment of \$45,331.08 pursuant to the schedule award. As noted above, OWCP may deduct in full the amount of an overpayment if the claimant is owed a sufficiently large lump-sum payment.¹⁷ There is no evidence that the deduction of \$3,023.61 from a lump-sum payment of \$45,331.08 would cause financial hardship.¹⁸ The Board finds that OWCP properly determined

¹³ *James A. Earle*, 51 ECAB 567 (2000).

¹⁴ The Board notes that the record contains a November 27, 2012 hearing representative's decision with respect to the August 14, 2012 schedule award. It is well established that the Board and OWCP may not have concurrent jurisdiction and OWCP decisions that change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8(b) (June 2009).

¹⁶ The Board's jurisdiction is limited to OWCP's final decisions issued within 180 days of the filing of the appeal. 20 C.F.R. § 501.3(e). As appellant filed the appeal on September 6, 2012, the Board does not have jurisdiction over the June 28, 2011 overpayment decision.

¹⁷ See also H.K. Docket No. 12-571 (issued August 17, 2012).

¹⁸ According to OWCP regulations, OWCP should attempt to minimize financial hardship when recovering an overpayment from future compensation. 20 C.F.R. § 10.441.

that the overpayment could be recovered by deduction of the overpayment amount from the large lump-sum schedule award.

LEGAL PRECEDENT -- ISSUE 3

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.¹⁹ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”²⁰

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.²¹ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.²² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.²³ As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.²⁴

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.²⁵ Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error.²⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁷ The Board makes an independent

¹⁹ 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. § 10.605.

²¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²² Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

²³ 5 U.S.C. §§ 8101-8193.

²⁴ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

²⁵ *Annie L. Billingsley*, 50 ECAB 210 (1998).

²⁶ *Jimmy L. Day*, 48 ECAB 652 (1997).

²⁷ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.²⁸

ANALYSIS -- ISSUE 3

Appellant submitted an undated application for reconsideration that was received by OWCP on February 27, 2012. The Board notes that he had submitted statements on October 24, November 7, 10 and December 20, 2011. But none of this correspondence can be considered an application for reconsideration of the January 4, 2011 termination decision. While no special form is required, a reconsideration request must be in writing, identify the decision and specific issue(s) for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not previously considered.²⁹ Appellant referred to a hearing in the October 24, 2011 letter and it appeared his request was referred to OWCP's Branch of Hearings and Review.³⁰ OWCP advised appellant by letter dated December 7, 2011 to follow available appeal rights and provide clarification. The December 20, 2011 correspondence does not identify the January 4, 2011 decision and discuss the termination issue.

It was not until the letter received on February 27, 2012 that appellant indicated that he was requesting reconsideration and discussed a termination of wage-loss issue. The timeliness of an application for reconsideration, for a decision prior to August 29, 2011 is determined by the date it is mailed by OWCP.³¹ Appellant did not date his letter nor is there any evidence that it was mailed within one year of the January 4, 2011 decision.³² The Board finds that OWCP properly found the application for reconsideration to be untimely.

As an untimely reconsideration request, appellant must establish clear evidence of error. His request does not provide clear evidence of error with respect to the termination of compensation on January 4, 2011. Appellant referred to the submission of evidence that he did have restrictions. To the extent he is referring to the brief note from Dr. Chokan dated December 2, 2010, this is not sufficient to establish clear evidence of error. The note provides no detail, briefly notes a restriction against excessive walking up and down stairs and does not discuss his assertion on November 18, 2010 that appellant could return to work without restrictions on November 15, 2010.

The Board finds that appellant has not established clear evidence of error in this case. OWCP properly declined to review the merits of the January 4, 2011 termination decision.

²⁸ *Thankamma Mathews*, 44 ECAB 765 (1993).

²⁹ *Vincente P. Taimanglo*, 45 ECAB 504 (1994).

³⁰ The record does not contain a final decision with respect to a hearing request. Appellant may seek a decision with respect to an October 24, 2011 hearing request on return of the case record.

³¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

³² See *B.K.*, Docket No. 10-768 (issued November 19, 2010) (undated reconsideration request received after the one year time period was untimely); *H.B.*, Docket No. 09-874 (issued December 1, 2009) (undated reconsideration request received after one year time period and evidence submitted as to mailing did not establish timeliness).

CONCLUSION

The Board finds that appellant did not establish more than a 22 percent permanent impairment to his right leg. The Board further finds that OWCP properly determined that a \$3,023.61 overpayment of compensation could be recovered by deducting the full amount from his lump-sum schedule award. The Board further finds that OWCP properly found that appellant's application for reconsideration was untimely and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 14 and May 23, 2012 are affirmed.

Issued: April 24, 2013
Washington, DC

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

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

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