

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

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C.S., Appellant )

and )

**DEPARTMENT OF THE NAVY, MARINE  
CORPS LOGISTICS BASE, Barstow, CA,  
Employer** )

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**Docket No. 13-787  
Issued: August 5, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 8, 2013<sup>1</sup> appellant filed a timely appeal from an August 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming a schedule award and a September 6, 2012 nonmerit decision denying a request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 established that he sustained more than a 19 percent impairment of the right arm, for which he received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error.

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<sup>1</sup> Appellant's request for appeal was postmarked on February 8, 2013.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that OWCP erred in finding 19 percent impairment of the right arm. He argues that Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, did not adequately describe his pain, sensory deficits, weakness and neurologic signs. Appellant also asserts that OWCP erred by failing to accept his claim for lumbar radiculopathy, lumbar spondylolisthesis, L5-S1 disc degeneration and an L4-5 disc herniation.

### **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated June 10, 2011,<sup>3</sup> the Board affirmed OWCP's January 29, 2010 decision denying appellant's request for reconsideration. The Board found that the evidence he submitted in support of his request was irrelevant or duplicative. The facts of the case as set forth in the Board's prior decision are incorporated by reference. The facts relevant to the present appeal are set forth.

OWCP accepted that on June 16, 2007 appellant sustained a lumbosacral sprain and right shoulder impingement syndrome. Appellant submitted reports through February 2008 diagnosing lumbar degenerative disc disease with right-sided radiculopathy. By decision dated April 9, 2008, OWCP denied authorization of a proposed lumbar fusion as the medical evidence did not establish the causal relationship between the requested surgery and the accepted lumbosacral sprain. Appellant underwent an anterior L5-S1 lumbar fusion on May 14, 2008. He retired on June 3, 2008. OWCP affirmed denial of the lumbar fusion by decision dated November 18, 2008.

By decision dated October 7, 2009, OWCP denied appellant's claim for right hand and arm conditions as causal relationship was not established. Appellant requested reconsideration on October 25, 2009. He submitted physical therapy notes and a duplicate copy of a report previously of record. OWCP denied reconsideration by decision dated January 29, 2010 finding that the evidence was duplicative or irrelevant. It subsequently accepted impingement syndrome of the right shoulder.

In a January 20, 2010 report, Dr. Mary Ann Shannon, an attending Board-certified orthopedic surgeon, diagnosed adhesive capsulitis of the right shoulder. She obtained a January 25, 2010 magnetic resonance imaging (MRI) scan of the right shoulder, which demonstrated postoperative changes consistent with an anterior supraspinatus rotator cuff repair and fixation of the long head biceps tendon and mild degenerative changes of the acromioclavicular joint. On February 1, 2010 Dr. Shannon recommended closed manipulation to attempt to increase appellant's range of right shoulder motion. She performed closed manipulation with injection on February 26, 2010. Dr. Shannon submitted follow-up notes diagnosing adhesive capsulitis of the right shoulder with improved range of motion.

In a May 13, 2010 report, Dr. Fred C. Redfern, an attending physician Board-certified in sports medicine,<sup>4</sup> opined that appellant's right shoulder was permanent and stationary. He

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<sup>3</sup> Docket No. 10-1988 (issued June 10, 2011).

<sup>4</sup> The record indicates that Dr. Redfern was a physician consulting to Dr. Shannon.

diagnosed probable symptomatic cervical nerve root irritation with neural foraminal narrowing and a disc osteophyte complex.<sup>5</sup>

On June 2, 2010 Dr. Shannon found that appellant's right shoulder condition was permanent and stationary. She opined that his symptoms were due in part to residual adhesive capsulitis and in part to cervical arthritis and radiculopathy.

On January 12, 2011 appellant claimed a schedule award.

On March 22, 2011 OWCP obtained a second opinion examination by Dr. Swartz, a Board-certified orthopedic surgeon, who reviewed the medical record and statement of accepted facts. On examination, Dr. Swartz noted restricted cervical and lumbar motion in all planes, give-way weakness with strength testing in the right shoulder and glove anesthesia in the right arm. He listed the following ranges of motion for the right shoulder: 70 degrees flexion; 30 degrees abduction; 0 degrees adduction; 80 degrees internal rotation; 90 degrees external rotation, 20 degrees extension. Dr. Swartz diagnosed status post right shoulder arthroscopy, closed manipulation and injection. Referring to Chapter 15 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), he opined that appellant had a 9 percent impairment of the right upper extremity for flexion limited to 70 degrees, a 2 percent impairment for extension at 20 degrees, a 6 percent impairment for abduction at 30 degrees and a 10 percent impairment for adduction at 0 degrees. Dr. Swartz added these percentages to total 27 percent impairment of the right arm. He noted a grade modifier of 3 according to Table 15-35<sup>6</sup> and a grade modifier of 2 according to Table 15-36,<sup>7</sup> which he found would not alter the 27 percent impairment rating.

In a May 14, 2011 report, Dr. Arthur S. Harris, an OWCP medical adviser, reviewed Dr. Swartz' report. He concurred with the rating with the exception of the 10 percent impairment for adduction at 0 degrees. The medical adviser noted that according to the A.M.A., *Guides*, adduction of 0 degrees was a two percent impairment. He therefore reduced the 27 percent impairment rating by the 8 percent difference between 10 and 2 percent, to total 19 percent.

By decision dated September 12, 2011, OWCP granted issued appellant a schedule award for a 19 percent impairment of the right upper extremity. The period of the award ran from May 13, 2010 to July 1, 2011.

In a May 19, 2012 letter, appellant requested reconsideration of the September 12, 2011 schedule award. He submitted copies of surgical reports and chart notes previously considered. In a March 20, 2012 report, Dr. Grace Galik, an attending Board-certified internist, noted

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<sup>5</sup> Appellant underwent a May 5, 2010 functional capacity evaluation but could not complete testing due to pain symptoms. The evaluator noted that the testing should be considered unreliable.

<sup>6</sup> Table 15-35, page 477 of the sixth edition of the A.M.A., *Guides* is entitled "Range of Motion Grade Modifiers."

<sup>7</sup> Table 15-36, page 477 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Grade Adjustment: Range of Motion."

appellant's complaint of paresthesias through the right side of his body, left hand and left foot. On examination, she found positive Tinel's and Phalen's signs in the left hand and left foot. Dr. Galik diagnosed paresthesias of unknown etiology, possibly reflex sympathetic dystrophy syndrome. She recommended diagnostic studies. Dr. Galik did not specifically address permanent impairment.

In a June 5, 2012 letter, appellant requested reconsideration of OWCP's November 18, 2008 decision denying authorization for a lumbar fusion. He asserted that he was asymptomatic after a 1995 laminectomy until the July 26, 2007 injury. Appellant contended that he sustained herniated L4-5 and L5-S1 discs, lumbar radiculopathy, reflex sympathetic dystrophy syndrome and permanent nerve damage. He submitted copies of medical evidence previously of record, June and July 2007 chart notes and a copy of Dr. Galik's March 20, 2012 report.

By decision dated August 14, 2012, OWCP affirmed the September 12, 2011 schedule award. It noted that, with the exception of the Dr. Galik's medical report, the evidence submitted in support of the reconsideration request was duplicative of that previously of record and considered. While Dr. Galik's March 20, 2012 report was new, it did not address the issue of permanent impairment. The rating of the medical adviser continued to carry the weight of the medical evidence.

By decision dated September 6, 2012, OWCP denied reconsideration on the grounds that appellant's request was not timely filed and failed to present clear evidence of error. It found that his June 5, 2012 letter and the accompanying medical evidence were insufficient to raise a substantial question regarding the correctness of OWCP's November 18, 2008 decision or any procedural error by OWCP in denying the lumbar fusion authorization.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>8</sup> provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>9</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>10</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability

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<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

and Health (ICF).<sup>11</sup> Under the sixth edition, 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).<sup>12</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

### **ANALYSIS -- ISSUE 1**

Appellant claimed a schedule award for right shoulder impairment related to accepted impingement syndrome. He submitted a May 13, 2010 report from Dr. Redfern, a physician Board-certified in sports medicine, and a June 2, 2010 report from Dr. Shannon, an attending Board-certified orthopedic surgeon, diagnosing adhesive capsulitis of the right shoulder at maximum medical improvement. Neither physician offered an impairment rating.

OWCP obtained a second opinion impairment rating on March 22, 2011 from Dr. Swartz, a Board-certified orthopedic surgeon. Based on a thorough clinical examination, a review of the medical record and statement of accepted facts, Dr. Swartz referred to the A.M.A., *Guides* to rate a 29 percent impairment of the right arm. He measured loss of range of motion as follows: 9 percent for flexion at 70 degrees; 2 percent for extension at 20 degrees; 6 percent for abduction at 30 degrees; 10 percent for adduction at 0 degrees. Dr. Swartz explained that grade modifiers for range of motion would not alter the final rating. On May 14, 2011 Dr. Harris, a medical adviser, reviewed the report. He concurred in the range-of-motion ratings except for the 10 percent rating for loss of adduction, which was 2 percent. Dr. Harris totaled the measurement at 19 percent impairment. Based on Dr. Swartz' opinion as reviewed by the medical adviser, OWCP granted appellant a schedule award on September 12, 2011 for a 19 percent impairment of the right arm.

Appellant requested reconsideration on May 19, 2012. He submitted medical evidence previously of record and a March 20, 2012 report from Dr. Galik, an attending Board-certified internist. The Board notes that the physician did not address the issue of permanent impairment. OWCP denied reconsideration by August 14, 2012 decision, finding that the evidence submitted did not demonstrate a greater percentage of permanent impairment of the right arm than the 19 percent awarded.

The Board finds that the report of Dr. Harris, the medical adviser, is entitled to the weight of the medical evidence. Dr. Harris relied on the findings of Dr. Swartz and properly applied the appropriate portions of the A.M.A., *Guides* to the clinical measurement. The Board notes that none of appellant's other physicians provided an impairment rating. Therefore, appellant had not established that he sustained more than a 19 percent impairment of the right arm.

Appellant may request a schedule award or increased schedule award regarding the right upper extremity, based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

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<sup>11</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

<sup>12</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008), pp. 494-531.

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA<sup>13</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>14</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>15</sup> Through regulations, it has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>16</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>17</sup>

In those cases where requests for reconsideration are not timely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>18</sup> Its regulations state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>19</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which decided by OWCP.<sup>20</sup> The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.<sup>21</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>22</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>23</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error by OWCP.<sup>24</sup> The Board must make an

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<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>15</sup> *Thankamma Mathews, id.*; see also *Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>16</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>17</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews, supra* note 14; *Jesus D. Sanchez, supra* note 15.

<sup>18</sup> *Thankamma Mathews, supra* note 14.

<sup>19</sup> 20 C.F.R. § 10.607(b).

<sup>20</sup> *Thankamma Mathews, supra* note 14.

<sup>21</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>22</sup> *Jesus D. Sanchez, supra* note 15.

<sup>23</sup> *Leona N. Travis, supra* note 21.

<sup>24</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>25</sup>

### **ANALYSIS -- ISSUE 2**

In its September 6, 2012 decision, OWCP properly determined that appellant failed to file a timely application for review. It rendered its most recent merit decision on November 18, 2008 denying authorization for a lumbar fusion. Appellant's request for reconsideration was dated June 5, 2012 and received June 8, 2012, more than one year after November 18, 2008. Accordingly, his request for reconsideration was not timely filed.

Appellant contended that he sustained lumbar disc herniations and radiculopathy due to the accepted July 26, 2007 lumbar strain. The Board finds that his letter does not raise a substantial question as to whether OWCP's November 18, 2008 decision was in error or shift the weight of the medical evidence in his favor. Therefore, it is insufficient to establish clear evidence of error. The medical evidence submitted in support of appellant's request for reconsideration did not address causal relationship, the critical issue at the time of the November 8, 2008 merit decision. The reports are irrelevant and do not establish clear evidence of error.<sup>26</sup>

Appellant has not otherwise provided any argument or evidence of sufficient probative value to shift the weight of the evidence in his favor and raise a substantial question as to the correctness of OWCP's November 18, 2008 decision. Consequently, OWCP properly denied his reconsideration request as his request does not establish clear evidence of error.

On appeal, appellant contends that OWCP erred in transcribing Dr. Swartz' impairment rating, he rated a 27 percent impairment of the right upper extremity. He argues that Dr. Swartz did not adequately describe his pain, sensory deficits, weakness and neurologic signs. As noted Dr. Swartz listed an incorrect percentage of impairment for loss of adduction. The medical adviser corrected this percentage. Appellant also asserts that OWCP erred by failing to accept lumbar radiculopathy, lumbar spondylolisthesis, L5-S1 disc degeneration and an L4-5 disc herniation. However, the Board does not have jurisdiction over the merits of the lumbar injury claim on the present appeal.

### **CONCLUSION**

The Board finds that appellant has 19 percent impairment of his right arm. The Board also finds that OWCP did not abuse its discretion in denying his request for reconsideration.

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<sup>25</sup> *Gregory Griffin, supra* note 16.

<sup>26</sup> *Leona N. Travis, supra* note 21.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 6 and August 14, 2012 are affirmed.

Issued: August 5, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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