

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

C.O., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Washington, DC, Employer)

**Docket No. 13-1680
Issued: October 24, 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
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 29, 2013 appellant filed a timely appeal from a January 2, 2013 decision of the Office of Workers' Compensation Programs (OWCP) and an April 26, 2013 nonmerit 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 established that she sustained a permanent impairment warranting a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 27, 1999 appellant, then a 41-year-old clerk, filed a traumatic injury claim alleging that on July 27, 1999 she sustained pain in her right shoulder and arm as a result of

¹ 5 U.S.C. § 8101 *et seq.*

pulling down flat mail and putting it in the cage. She stopped work and received wage-loss compensation. OWCP accepted her claim for right shoulder sprain with cervical and thoracic sprains and later expanded it to include dislocations of the cervical and thoracic levels.

On November 11, 2003 appellant returned to limited duty. She continued to receive wage-loss compensation for partial disability.

On October 21, 2005 appellant underwent authorized cervical and right shoulder surgeries and stopped work. She was placed on the periodic rolls. Appellant continued to receive medical treatment for her accepted conditions.

On October 15, 2012 appellant requested a schedule award.

In a letter dated December 21, 2012, OWCP requested that appellant submit a medical report that included a date of maximum medical improvement and a final rating of her permanent impairment with medical rationale for calculation of the impairment according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2008).

In a December 14, 2012 report, Dr. Atlener Artis-Trower, a Board-certified family practitioner, provided an accurate history of appellant's July 27, 1999 injury and reviewed her records. He noted that in 2005 she underwent a right shoulder arthroscopy and that her physician stated that appellant had sustained permanent injuries, which would prevent her from resuming the repetitive stress activities of her prior occupation. Dr. Artis-Trower reported that appellant continued to experience severe pain and spasms of her right shoulder and neck and was unable to return to work. He concluded that her disability was permanent in nature.

In a decision dated January 2, 2013, OWCP denied appellant's claim for a schedule award finding that the medical evidence failed to establish that she sustained a permanent impairment to her right upper extremity as a result of her accepted work-related injuries.

On January 17, 2013 appellant requested reconsideration. In a handwritten statement, she noted that her physician did not use the medical guideline book.

In a January 23, 2013 report, Dr. Dexter W. Love, a Board-certified orthopedic surgeon, noted appellant's complaints of cervical and right shoulder pain since a July 27, 1999 work-related injury and reviewed her history. Examination of the right shoulder revealed active forward elevation to 100 degrees and passive elevation to 120 degrees. Hawkins's impingement test was positive and the acromioclavicular joint was exquisitely tender. Examination of the cervical spine demonstrated some mild line and right paraspinal tenderness and full range of motion. Spurling's test was negative. Dr. Love diagnosed right cervical and shoulder girdle pain. He reported that it was difficult to determine the etiology of the pain and recommended new magnetic resonance imaging (MRI) scan tests of the right shoulder and cervical spine.

In a February 6, 2013 MRI scan of appellant's cervical spine, Dr. Joel Bowers, a Board-certified diagnostic radiologist, observed moderate spondylotic changes at C5-6 and milder spondylotic changes elsewhere in the cervical spine, especially at C6-7. He diagnosed mild, predominantly right-sided disc osteophyte complex at C5-6 and mild-to-moderate,

predominantly right-sided disc osteophyte complex at C6-7 with impingement on the right lateral recess and right neural foramen at both levels.

In a February 6, 2013 MRI scan of appellant's right shoulder, Dr. Bowers noted that the examination was limited due to appellant's inability to fully cooperate with resultant motion degradation. He observed supraspinatus tendinosis with a small, partial tear but no full thickness tear.

In a March 11, 2013 report, Dr. Levi Pearson, III, a Board-certified anesthesiologist, related appellant's complaints of chronic neck pain which radiated into her right upper extremity as a result of a July 29, 1999 employment injury. He observed limited range of motion at the cervical spine and right upper extremity secondary to pain. Dr. Pearson noted that an MRI scan revealed disc osteophyte complex at C5-6 and C6-7. He diagnosed cervical disc osteophyte complexes at C5-6 and C6-7 resulting in cervical radicular pain involving the right upper extremity.

By decision dated April 26, 2013, OWCP denied appellant's request for reconsideration finding that the evidence submitted was not sufficient to warrant further merit review under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing federal regulations³ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁶ Neither FECA nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or the

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.*

⁵ FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

body as a whole.⁷ However, a claimant may be entitled to a schedule award where the employment-related back condition affects the upper and/or lower extremities.⁸

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right shoulder sprain with cervical and thoracic sprains and dislocations of the cervical and thoracic levels as a result of a July 27, 1999 employment injury. On October 15, 2012 appellant requested a schedule award. The Board finds that the medical evidence of record does not establish that she sustained permanent impairment to her right upper extremity.

In a December 14, 2012 report, Dr. Artis-Trower provided an accurate history of appellant's July 27, 1999 injury and reviewed her records. He reported that appellant continued to experience severe pain and spasms of her right shoulder and neck and was unable to return to work. Dr. Artis-Trower stated that appellant's disability was permanent in nature. The Board notes that he did not provide any impairment rating based on the sixth edition of the A.M.A., *Guides*. Accordingly, the Board finds that Dr. Artis-Trower's opinion lacks probative value and is insufficient to establish appellant's schedule award claim.

On appeal, appellant alleges that she was never allowed to submit evidence according to the A.M.A., *Guides* because the claims examiner used the evidence she submitted to have her diagnosis changed. The Board notes, however, that she had sufficient time from the date she submitted her reconsideration request on January 17, 2013 until OWCP issued its decision on April 26, 2013 to submit medical evidence in accordance with the sixth edition of the A.M.A., *Guides*. Appellant did not submit any such medical evidence to establish that she sustained a permanent impairment to a specified member, organ or function of the body listed in FECA or its implementing regulations. The Board finds that she is not entitled to a schedule award as a result of her accepted cervical and right upper extremity conditions.

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.

⁷ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a(3) (January 2010).

⁹ See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁰ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district Office.¹¹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹²

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.¹³ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁴ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS -- ISSUE 2

By decision dated January 2, 2013, OWCP denied appellant's schedule award claim finding that she did not submit sufficient evidence to establish that she sustained a permanent impairment as a result of her work-related injury. On January 17, 2013 appellant requested reconsideration of her claim and submitted various new medical reports regarding her accepted cervical and right shoulder conditions. In a decision dated April 26, 2013, OWCP denied her request for reconsideration.

The Board notes that the underlying issue in this case was whether appellant met her burden of proof to submit medical evidence demonstrating that she has a ratable impairment as a result of her accepted conditions. In its April 26, 2013 decision denying her reconsideration request, OWCP stated that the medical reports appellant submitted were irrelevant because they

¹⁰ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹² 20 C.F.R. § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁵ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

did not provide any physical findings related to her current physical impairment. Although OWCP mentions the reports by Drs. Love, Bowers and Pearson, the decision fails to mention that these reports contained physical examination findings. Both Drs. Love and Pearson conducted an examination and found limited range of motion of appellant's right shoulder. Dr. Love noted that Hawkin's impingement test was positive. Examination of the cervical spine revealed right paraspinal tenderness and negative Spurling's test. In addition, Dr. Bowers' MRI scan reports demonstrated right-sided disc osteophyte complex at C5-6 and C6-7 and a small, partial tear in appellant's right shoulder. The Board finds that these examination findings are new and relevant to determining whether appellant sustained a permanent impairment warranting a schedule award.¹⁶ Because these reports are new and relevant, OWCP should have reviewed her claim on the merits.¹⁷ To be entitled to a merit review, it is not necessary that appellant establish her schedule award, but only to submit new and relevant evidence probative to the schedule award issue.¹⁸

The Board also finds that upon remand, OWCP should refer the case record to OWCP's medical adviser for review.¹⁹ The Board sets aside OWCP's April 26, 2013 decision denying reconsideration and will remand the case for a merit review on her schedule award claim.

CONCLUSION

The Board finds that as of January 2, 2013 appellant had not established any ratable impairment related to her accepted cervical and right shoulder conditions. The Board also finds that OWCP improperly denied appellant's request for further merit review pursuant to 5 U.S.C. § 8128(a).

¹⁶ See Fed. R. Evid. 401 (relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

¹⁷ See 20 C.F.R. § 10.606(b)(3)(iii). See also *T.Y.*, Docket No. 10-1857 (issued October 15, 2010).

¹⁸ See *F.P.*, Docket No. 13-363 (issued August 15, 2013).

¹⁹ See *T.T.*, Docket No. 13-258 (issued April 17, 2013); see also Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.808(d) (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed, but OWCP's April 26, 2013 decision is set aside and the case remanded for further action consistent with this decision.

Issued: October 24, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board