

FACTUAL HISTORY

On April 1, 2006 appellant, then a 47-year-old mail handler, filed a recurrence (Form CA-2a) under claim File No. xxxxxx688, alleging that her carpal tunnel syndrome had recurred as a result of pushing heavy mail equipment in the performance of her duties as a mail handler. She submitted a report from Dr. S. Vic Glogovac, a Board-certified orthopedic surgeon, dated May 1, 2006 and two reports from Dr. Ahmed H. Jafri, a Board-certified neurologist and neurophysiologist.

By letter dated September 7, 2006, OWCP requested that appellant file a new claim on the basis that Dr. Glogovac's report described an injury to the bilateral pronator teres muscles caused by a new work factor, that of lifting trays.

On September 12, 2006 appellant filed an occupational disease claim (Form CA-2) alleging that her carpal tunnel syndrome had progressed as a result of an incident on March 31, 2006. She submitted evidence from Drs. Glogovac and Jafri.

By decision dated December 14, 2006, OWCP accepted appellant's claim for bilateral median nerve entrapment in the proximal forearm (bilateral pronator teres syndrome).

On October 14, 2008 appellant filed a Form CA-7 claim for a schedule award under her accepted claim for bilateral pronator teres syndrome. She had previously received two schedule awards for the same member under different claims. On October 17, 2000 appellant received a schedule award for 14 percent impairment of her left arm, under her claim for a left shoulder condition. On June 3, 2003 she received a schedule award for three percent impairment of her right upper extremity and four percent left upper extremity impairment, under her claim for carpal tunnel syndrome.

By letter dated October 21, 2008, OWCP requested additional medical evidence from appellant as the evidence of record did not support a date of maximum medical improvement; a detailed description of the permanent impairment or a final rating of permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By letter dated October 24, 2008, Dr. Glogovac stated that he did not perform impairment ratings. He recommended sending appellant to another physician to rate her current permanent impairment. Appellant also submitted physical therapy records dated March 5, 2007 through August 6, 2008.

On February 24, 2009 OWCP scheduled an appointment with Dr. Richard T. Katz, Board-certified in physical medicine and rehabilitation. It requested a second opinion assessment of appellant's impairment for a schedule award.

In a report dated March 18, 2009, Dr. Katz stated that appellant's sensory and motor examinations were unreliable. Appellant's pain complaints were both unreliable and largely somatizing. Dr. Katz noted that she demonstrated a wide variation in effort for one test and that the results were inconsistent for another. He recommended a zero percent impairment rating.

Dr. Katz stated that appellant's date of maximum medical improvement was August 6, 2008, when she returned to light-duty work.

On March 26, 2009 Dr. Donald D. Zimmerman, an OWCP medical adviser, reviewed Dr. Katz's report. He concurred that due to the inconsistencies noted on physical examination, appellant had no impairment to either arm.

By decision dated March 31, 2009, OWCP denied appellant's schedule award claim. It found that the medical evidence of record failed to demonstrate a measureable impairment to her right and left upper extremities.

On April 13, 2009 appellant requested reconsideration of the March 31, 2009 decision. She submitted physician's orders for physical therapy dated February 26 to July 25, 2008.

By decision dated June 11, 2009, OWCP denied appellant's request for reconsideration. It found that the evidence provided in support of her request was not sufficient to review the case on its merits and immaterial to the issue of whether she sustained permanent impairment of her upper extremities.

By letter dated February 26, 2010, appellant's representative again requested reconsideration. He submitted a letter dated February 8, 2010, from Dr. Frank Niesen, who rated appellant's permanent impairment of the upper right extremity at 30 percent, basing his evaluation on a "points" system under the sixth edition of the A.M.A., *Guides* Table 15-23, page 449. On April 14, 2010 Dr. Zimmerman evaluated Dr. Niesen's report. He found that it did not conform to the A.M.A., *Guides*. Dr. Zimmerman noted that Table 15-23 rated neuropathy impairment in conjunction with Table 15-21. Further, there was no basis to rate such impairment by a point system.

By decision dated May 4, 2010, OWCP reviewed the merits of appellant's claim and denied her schedule award claim. Dr. Niesen's report was not sufficient to establish permanent impairment of the upper extremities due to her accepted condition of pronator teres syndrome.

By letter dated July 13, 2010, counsel requested reconsideration and submitted a report dated June 24, 2010 from Dr. Naseem A. Shekhani, Board-certified in physical medicine and rehabilitation, who stated that appellant had reached maximum medical improvement, but did not provide a date. Dr. Shekhani rated appellant's impairment as follows: (1) 20 percent of the right and left upper extremities at the wrist level and forearm; (2) 10 percent of the left lower extremity at the level of left ankle and foot; and (3) 5 percent of the left and right upper extremities at the level of the shoulders.

On August 20, 2010 Dr. Zimmerman evaluated Dr. Shekhani's June 24, 2010 report. He found that it did not conform to the A.M.A., *Guides*, sixth edition, as Dr. Shekhani did not utilize the correct tables to rate entrapment neuropathy.

By decision dated September 17, 2010, OWCP reviewed the merits of appellant's claim, and denied a schedule award. Dr. Shekhani's June 24, 2010 report was not sufficient to establish impairment of the upper extremities due to her accepted condition of pronator teres syndrome.

By letter dated March 7, 2011, counsel requested reconsideration and submitted a report dated January 13, 2011 from Dr. Shekhani. He stated that the total impairment to both upper extremities was six percent. Dr. Shekhani made reference to a *QuickDASH* worksheet, which was not included in the file. On July 24, 2011 Dr. Zimmerman found that Dr. Shekhani again did not conform with the A.M.A., *Guides*.

By decision dated July 27, 2011, OWCP denied appellant's schedule award claim. Dr. Shekhani's January 13, 2011 report was found not sufficient to establish permanent impairment of the upper extremities due to her accepted condition of pronator teres syndrome.

On September 26, 2011 appellant, through counsel, again requested reconsideration, but did not submit any evidence or raise substantive legal questions.

By decision dated November 2, 2011, OWCP denied appellant's request for reconsideration on the grounds that she had not submitted new relevant evidence or raised substantive legal questions.

By letter dated November 14, 2012, counsel again requested reconsideration. In a report dated July 15, 2012, Dr. Peters diagnosed appellant with bilateral chronic hand and arm pain as well as bilateral chronic carpal tunnel syndrome. He stated that maximum medical improvement was reached on August 6, 2008 and that her condition was related to an injury sustained in the course of her federal employment on March 31, 2006. Dr. Peters rated appellant's impairment at five percent for both the left and right upper extremities under Table 15-23, of the sixth edition of the A.M.A., *Guides*. He also opined that her current hand/wrist/arm symptoms were the result of chronic carpal tunnel syndrome at the wrist, for which she had already been rated. Dr. Peters noted that proximal median nerve entrapment was rare and that appellant's more proximal current symptoms were related to distal entrapment.

By letter dated November 28, 2012, OWCP requested that plaintiff submit another reconsideration request that clearly identified the decision date and issues upon which reconsideration was being requested.

On January 21, 2013 appellant requested reconsideration of the July 27, 2011 decision denying a schedule award.

By decision dated February 25, 2013, OWCP denied appellant's request for reconsideration on the grounds that it was untimely and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

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.⁴ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of an existing schedule award. When a claimant is asserting that an original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. However, even if the term “reconsideration” is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an additional schedule award. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment. OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.⁶

ANALYSIS

The Board finds that this case is not in posture for decision because OWCP erroneously adjudicated appellant’s request for reconsideration under the clear evidence of error standard.

By letter dated November 14, 2012, counsel requested reconsideration and submitted new evidence relating to appellant’s medical diagnosis and her schedule award claim. On July 15, 2012 Dr. Peters diagnosed bilateral chronic hand and arm pain and bilateral chronic carpal tunnel syndrome. He stated that maximum medical improvement was reached on August 6, 2008 and that appellant’s condition was related to an injury sustained in the course of her federal employment on March 31, 2006. Dr. Peters rated five percent impairment for both the left and right arms. He also opined that appellant’s current hand/wrist/arm symptoms were the result of chronic carpal tunnel syndrome at the wrist. Dr. Peters advised that proximal median nerve entrapment is rare and that her more proximal current symptoms were related to distal entrapment.

The Board notes that appellant submitted new evidence from Dr. Peters addressing impairment as of July 15, 2012. The Board has held that a claimant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing the progression of an employment-related condition resulting in permanent impairment

⁴ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁵ 20 C.F.R. § 10.404; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

⁶ *R.L.*, Docket No. 09-1948 (issued June 29, 2010); *B.K.*, 59 ECAB 228, 229-30 (2007); *Candace A. Karkoff*, 56 ECAB 622, 625 (2005); *Linda T. Brown*, 51 ECAB 115, 115-16 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994); see *Leonard E. Redway*, 28 ECAB 242, 246-47 (1977).

or increased impairment.⁷ Dr. Peters addressed the issue of appellant's permanent impairment of the upper extremities relating to her March 31, 2006 injury and her accepted condition of carpal tunnel syndrome. The Board finds that OWCP erroneously issued a denial of appellant's request for reconsideration under the clear evidence of error standard. On remand, OWCP should consolidate appellant's schedule award claims under case File Nos. xxxxxx688 and xxxxxx355, review and develop the medical evidence and issue an appropriate decision regarding her claim for a schedule award.

CONCLUSION

OWCP improperly adjudicated appellant's schedule award claim as an untimely request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 25, 2013 is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: September 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁷ *Id.*