United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
and	)	**Docket No. 14-1735**
	)	**Issued: December 24, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Roanoke, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2014 appellant timely appealed the March 14, 2014 merit decision and the April 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has a ratable impairment of the left upper extremity and/or right lower extremity; and (2) whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193 (2006).

[2] The record on appeal contains evidence received after OWCP issued its April 10, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2014).

FACTUAL HISTORY

Appellant, a 67-year-old retired mail processing clerk, sustained injuries to his head, chest, left arm, and right lower extremity as a result of a July 29, 2009 employment-related motor vehicle accident (MVA). His accepted conditions include multiple left rib closed fractures (ICD-9 807.09) and left traumatic pneumothorax (ICD-9 860.0).[3] Appellant also sustained an open fracture of the left radius/ulna (ICD-9 813.93) and a right ankle closed fracture of the medial malleolus (ICD-9 824.0). Accepted head injuries include traumatic subarachnoid hemorrhage without open intracranial wound (ICD-9 852.00) and complicated open wound of the scalp (ICD-9 873.1). Appellant underwent surgery to repair his left arm and right leg fractures.

OWCP paid wage-loss compensation for temporary total disability through February 18, 2010. Appellant subsequently returned to work in a part-time, limited-duty capacity and received compensation for four hours of lost wages per day until he retired in December 2010.

On July 10, 2012 appellant filed a claim for a schedule award (Form CA-7).

On July 19, 2012 OWCP advised appellant that the then-current record did not support his claim for a schedule award. It further advised him to provide an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).

OWCP subsequently received July 25, 2012 treatment notes and an attending physician's report (Form CA-20) from Dr. Thomas E. Shuler.[4] The July 25, 2012 treatment notes report that appellant had an active summer playing golf and walking. Appellant was experiencing some ankle pain and swelling, and had done nothing in terms of edema control, bracing, or wrapping. He rated his pain about 4 out of 10. On physical examination, Dr. Shuler noted 1+ lymphedema of the lower extremity. He also noted that all of appellant's surgical wounds were well healed. Dr. Shuler indicated that appellant had good range of motion, but he also noted some impingement in range and some anterolateral pain in dorsiflexion eversion and inversion. He stated that appellant definitely needed to improve his strength, noting that he was about 3+/5 in eversion.

Recent right ankle x-rays showed that all hardware was intact and in good position. Dr. Shuler noted the onset of a little osteoarthritis, which was to be expected. He further commented that considering the high-grade injury appellant sustained, overall he looked quite good on x-ray.

According to the treatment notes, Dr. Shuler reviewed the July 25, 2012 ankle x-rays with appellant and explained the findings. He also discussed soft tissue management and the importance of wrapping appellant's ankle. Furthermore, Dr. Shuler advised appellant of the

[3] Appellant's medical records also referenced a left clavicle fracture. However, OWCP has not accepted this particular condition.

[4] Dr. Shuler is a Board-certified orthopedic surgeon.

importance of low impact activity, such as riding a golf cart instead of walking a lot of sloped and uneven surfaces. Additionally, he recommended strength building exercises for appellant's ankle. Dr. Shuler advised appellant to return on an as-needed basis.

In his July 25, 2012 CA-20, Dr. Shuler diagnosed right ankle fracture, left wrist fracture with tendon involvement, and clavicle fracture. He indicated that appellant was able to perform light work as of February 22, 2010. Dr. Shuler also noted that appellant reached maximum medical improvement (MMI).

OWCP later received Dr. Shuler's January 16, 2013 treatment records, which included repeat x-rays of the right ankle, left wrist, and left forearm. Appellant reported that his ankle ached frequently. He also noted that his pain worsened with walking a half mile or greater. Appellant wore a brace when planning to walk a distance. Clinical examination of the right lower extremity showed 1+ lymphedema. Appellant's scars were noted to be pale and flat, and his skin was warm, dry, and intact. Dr. Shuler detected a pulse at the dorsalis pedis artery. He also noted that sensation was intact to light touch. Appellant's range of motion was "good." Dr. Shuler reported dorsiflexion to neutral. Strength on dorsiflexion and plantar flexion was 4/5, and eversion strength was 3+/5. Dr. Shuler also noted that appellant was tender to palpation at the medial malleolus over distal hardware.[5] Appellant reached MMI and reportedly had no desire to have his hardware removed. With respect to appellant's right upper extremity, Dr. Shuler reported that he could make a full fist. He also noted "[pronation] full [supination] 10 degrees limitation." The January 16, 2013 treatment notes also indicate that appellant's wrist and forearm x-rays showed good healing.

On January 30, 2014 OWCP contacted Dr. Shuler directly and asked him to submit an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* (2008). It sent copies of the January 30, 2014 correspondence to both appellant and his then-counsel and advised that it was appellant's responsibility to ensure that Dr. Shuler provide the requested information within 30 days. However, no additional evidence was received within the allotted time.

In a March 14, 2014 decision, OWCP denied appellant's claim for a schedule award.

On March 31, 2014 appellant requested reconsideration. Along with the request, he submitted operative reports dated July 29 and 31, 2009. Appellant also submitted an August 6, 2009 hospital discharge summary, as well as Dr. Shuler's July 25, 2012 and January 16, 2013 treatment records. Additionally, he provided a March 24, 2014 report from Dr. Shuler, who found 7 percent impairment of the left upper extremity (LUE) and 27 percent impairment of the right lower extremity (RLE) based on the fifth edition of the A.M.A., *Guides* (2001). With respect to appellant's left forearm, Dr. Shuler noted that there was some mild limitation of range of motion. He also indicated that appellant's x-rays showed good healing. As to appellant's right lower extremity, Dr. Shuler found stage 2 lymphedema. He reported moderate swelling that was incompletely controlled with elastic supports. Dr. Shuler additionally noted that appellant still had some weakness, with reported ankle strength of 3+ to 4 out of 5. Appellant's 7

[5] The January 16, 2013 treatment records included additional remarks regarding right ankle x-ray findings and assessment/plan that were consistent with Dr. Shuler's July 25, 2012 treatment notes.

percent LUE rating was based on scarring and restriction of motion and the 27 percent RLE rating was based on stage 2 lymphedema (15 percent) and weakness (12 percent).

By decision dated April 10, 2014, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[6] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[8]

ANALYSIS -- ISSUE 1

At the time OWCP issued its March 14, 2014 schedule award decision, the record did not include an impairment rating regarding appellant's upper and lower extremities. Prior to denying his claim, OWCP twice advised appellant of the need to submit an impairment rating under the A.M.A., *Guides* (6th ed. 2008). Dr. Shuler's July 25, 2012 attending physician's report (CA-20) and treatment notes did not specifically address impairment. Similarly, his January 16, 2013 treatment notes failed to address the extent of any upper or lower extremity impairment. These records did not include a sufficiently detailed description of impairment such that one could visualize the character and degree of appellant's disability.[9] Dr. Shuler provided minimal examination findings regarding appellant's left wrist/hand. While his notes regarding appellant's right ankle condition included mention of pain, swelling, and weakness, he otherwise provided scant information to allow one to quantify the extent of any impairment.

On January 30, 2014 OWCP contacted Dr. Shuler directly and asked that he submit an impairment rating in accordance with the sixth edition of the A.M.A., *Guides* (2008). No additional evidence was received within the 30-day allotment. Consequently, OWCP denied appellant's claim on March 14, 2014. Based on the record at the time, the Board finds that appellant failed to establish entitlement to a schedule award.

---

[6] For total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1). For a 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. *Id.* at § 8107(c)(2).

[7] 20 C.F.R. § 10.404.

[8] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

[9] *See id.* at Chapter 2.808.5b(2) (February 2013).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[10] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[11] One such limitation is that the application for reconsideration must be sent within one year of the date of the merit decision for which review is sought.[12] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[13] When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[14]

ANALYSIS -- ISSUE 2

The March 31, 2014 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Appellant also did not advance any relevant legal arguments not previously considered by OWCP. He merely noted that he was previously unaware that Dr. Shuler had not submitted an impairment rating. The Board finds that appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(2).[15]

Appellant also failed to submit any relevant and pertinent new evidence with his March 31, 2014 request for reconsideration. Most of the evidence he provided on reconsideration was previously submitted, such as Dr. Shuler's July 25, 2012 and January 16, 2013 treatment notes. Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.[16] The only new evidence was Dr. Shuler's March 24, 2014 impairment rating. After briefly summarizing appellant's treatment through January 16, 2013, Dr. Shuler concluded that he had 7 percent LUE impairment and 27 percent RLE impairment. Although the rating was noted to have been based on application of the A.M.A., *Guides* (5th ed. 2001), he omitted any reference to specific chapters, sections, Tables, and/or Figures upon which he relied in determining the extent of appellant's upper and lower extremity impairments. Moreover, Dr. Shuler's reported reliance on the fifth

---

[10] This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.607.

[12] *Id.* at § 10.607(a).

[13] *Id.* at § 10.606(b)(2).

[14] *Id*. at §§ 10.607(b), 10.608(b).

[15] *Id.* at § 10.606(b)(2)(i) and (ii).

[16] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

edition of the A.M.A., *Guides* (2001) was contrary to OWCP's repeated instructions regarding use of the sixth edition of the A.M.A., *Guides* (2008).

According to Dr. Shuler, the upper extremity impairment was due to limited motion and scarring and the lower extremity rating was based on swelling and weakness. He appears to have relied on his January 16, 2013 examination findings. While ostensibly new, Dr. Shuler's March 24, 2014 impairment rating was largely based on prior evidence OWCP already deemed insufficient to support appellant's claim for a schedule award. Moreover, his mere reference to an outdated and inapplicable edition of the A.M.A., *Guides* does not make this latest report "relevant and pertinent." Because appellant did not provide any new medical evidence that might arguably impact the prior decision, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).[17] Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant failed to establish entitlement to a schedule award. The Board also finds that OWCP properly denied further merit review with respect to his March 31, 2014 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 10 and March 14, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 24, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[17] 20 C.F.R. § 10.606(b)(2)(iii).