

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

D.W., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Rosemont, IL, Employer**

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**Docket No. 13-1387
Issued: January 6, 2014**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013 appellant filed a timely appeal from a March 4, 2013 merit decision of the Office of Workers' Compensation Programs' (OWCP) and a March 26, 2013 nonmerit decision that denied his reconsideration request. 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 the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 2, 2008 appellant, then a 62-year-old supervisory customs and border protection officer, injured his left elbow and neck while participating in firearm qualification at work. OWCP accepted the claim for aggravation of cervical spondylosis and left and right ulnar neuropathy. Appellant received wage-loss benefits.²

Appellant came under the treatment of Dr. Martin G. Luken, a Board-certified orthopedic, from August 25, 2008 to November 28, 2011. His left arm and neck symptoms were exacerbated by firearms practice at work. Dr. Luken diagnosed cervical spondylosis and ulnar neuropathy. He noted a history that appellant underwent left ulnar transposition on April 28, 2003. Dr. Luken noted numbness of the fourth and fifth fingers of the right hand with left arm pain interfering with his work. On June 22, 2010 he performed an authorized right ulnar nerve decompression, neurolysis and transposition of the cubital tunnel and diagnosed right cubital tunnel syndrome. Dr. Luken noted that appellant progressed well postsurgery, but developed neck pain radiating into his left arm and painful numbness of all fingers in both hands. An August 11, 2010 magnetic resonance imaging (MRI) scan of the cervical spine revealed an old fusion, degenerative disease at C7-T1, T1-2, T2-3, severe facet joint degenerative changes with neuroforaminal impingement at multiple levels. On March 2, 2012 appellant underwent an electromyogram (EMG), which revealed severe chronic left ulnar neuropathy, severe chronic bilateral median neuropathies to the wrist, axonal sensory neuropathy of both upper extremities and right-sided chronic severe C7 radiculopathy. A July 13, 2012 MRI scan of the left arm revealed multiple erosions versus subchondral cysts of the wrist, possible gout or rheumatoid arthritis and perforation of the triangular fibrocartilage. A July 27, 2012 x-ray of the right hand and wrist revealed possible gout.

On October 9, 2012 appellant filed a claim for a schedule award.

On October 16, 2012 OWCP requested that appellant submit a detailed report from his treating physician which provided an impairment evaluation pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It also requested an opinion as to whether he had reached maximum medical improvement.

In a September 28, 2012 report, Dr. Luken noted no change in appellant's clinical findings from the prior 10 months. He related that diagnostic testing of the left elbow revealed joint erosion, gout or rheumatoid arthritis. Dr. Luken noted an EMG study in March 2012 revealed chronic left ulnar neuropathy, bilateral median neuropathies localized to the wrist and severe C7 radiculopathy. He opined that appellant had reached maximum medical improvement with regard to his work-related injuries. In an occupational health clinical patient status form

² The record indicates that appellant has filed other claims: on October 13, 1982 he sustained a contusion of the wrist and hand, claim number xxxxx008; on October 13, 1983 he sustained a wound on the finger, claim number xxxxx715; on August 15, 1987 he sustained a back fracture and intervertebral disorder of the back in claim number xxxxx715; on August 27, 1998 he sustained a right tear of the ligaments around the knee, claim number xxxxx640; and on February 10, 2000 he sustained a neck, thoracic and left arm injury in claim number xxxxx922. These other claims are not presently before the Board.

³ A.M.A., *Guides* (6th ed. 2008).

dated September 28, 2012, Dr. Luken diagnosed cervical spondylosis, entrapment neuropathies and noted that appellant reached maximum medical improvement and his restrictions were permanent. Additional copies of diagnostic testing reports were also submitted.

In a decision dated March 4, 2013, OWCP denied appellant's claim for a schedule award. It found that the medical evidence did not establish any permanent impairment.

In an appeal request form dated March 12, 2013, appellant requested reconsideration. He submitted a copy of the March 4, 2013 decision.

In a March 26, 2013 decision, OWCP denied appellant's request for reconsideration. It found that the evidence was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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. The A.M.A., *Guides*⁶ has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

Before the A.M.A., *Guides* can be utilized, a description of impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁸

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for aggravation of cervical spondylosis and bilateral ulnar neuropathy. He claimed a schedule award for permanent impairment. To be entitled to a schedule award appellant must establish that he sustained permanent impairment of a schedule

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ A.M.A., *Guides* (6th ed. 2008).

⁷ See *supra* note 5.

⁸ Vanessa Young, 55 ECAB 575 (2004).

member of the body due to an employment injury.⁹ On October 16, 2012 OWCP requested that he submit a medical opinion from his treating physician addressing permanent impairment under the A.M.A., *Guides*.

The Board found that appellant failed to submit sufficient medical evidence to establish permanent impairment due to his accepted condition. The September 28, 2012 report from Dr. Luken found no change in appellant's clinical findings. He noted the diagnoses and stated that appellant had reached maximum medical improvement; however, he offered no opinion on whether appellant sustained any permanent impairment of the arms due to the accepted injuries. Dr. Luken also did not address the A.M.A., *Guides*. As noted, the evaluation made by the attending physician must include a description of the impairment that is in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. Dr. Luken did not address any impairment; thus, his reports are insufficient to establish that appellant has permanent impairment.¹⁰

On appeal, appellant asserts that Dr. Luken provided a detailed outline of his permanent disabilities and noted that he reached maximum medical improvement. As noted, however, Dr. Luken did not provide impairment rating under the A.M.A., *Guides*.

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.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹¹ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or
- “(2) Advances a relevant legal argument not previously considered by OWCP; or

⁹ *Id.* at 56 ECAB 367 (2005) (a schedule award can be paid only for a condition related to an employment injury; the claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment).

¹⁰ *Lela M. Shaw*, 51 ECAB 372 (2000) (where the Board found that a physician's opinion which does not explicitly define impairment in terms of the A.M.A., *Guides*, i.e., whether it be based on findings of pain, loss of range of motion or loss of strength, is insufficient to establish that appellant sustained any permanent impairment due to her accepted employment injury).

¹¹ 5 U.S.C. § 8128(a).

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹²

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹³

ANALYSIS -- ISSUE 2

OWCP’s most recent merit decision dated March 4, 2013 denied appellant’s claim for a schedule award on the grounds that he failed to provide sufficient medical evidence to establish that he sustained permanent impairment to a scheduled member due to his accepted work injury. It denied his reconsideration request without a merit review and he appealed this decision to the Board.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

The Board notes that the underlying issue in this case is whether appellant’s sustained permanent impairment to a scheduled member due to his accepted work injury is in accordance with the A.M.A., *Guides*. That is a medical issue which must be addressed by relevant medical evidence.¹⁴ However, appellant did not submit any new and relevant medical evidence in support of his claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant failed to establish that he is entitled to a schedule award. The Board further finds that OWCP properly denied his request for reconsideration dated March 12, 2013.

¹² 20 C.F.R. § 10.606(b)(2).

¹³ *Id.* at 20 C.F.R. § 10.608(b).

¹⁴ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 26 and 4, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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