

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

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A.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Oakland, CA, Employer )

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**Docket No. 13-1810  
Issued: January 6, 2014**

*Appearances:*  
*James Wright*, for the appellant  
*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 July 30, 2013 appellant, through her representative, filed a timely appeal from a February 4, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. The last merit decision of record was OWCP's November 7, 2011 schedule award decision. Because more than 180 days elapsed from the most recent merit decision to the filing of this appeal and, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On November 8, 1991 appellant, then a 28-year-old mail clerk, filed an occupational disease claim (Form CA-2) alleging that she developed injuries as a result of her federal employment duties. OWCP accepted the claim for right shoulder tendinitis, bilateral carpal tunnel syndrome (CTS), left wrist tendinitis and left first dorsal compartment tenosynovitis.

By decision dated May 11, 1998, OWCP issued a schedule award for 10 percent permanent impairment of the right arm. The February 12, 1998 report of the district medical adviser (DMA) noted that appellant's 10 percent right upper extremity impairment was due to entrapment neuropathy of the median nerve at the wrist.

On September 19, 2011 appellant filed a new claim for a schedule award (Form CA-7).

In a May 4, 2011 report, Dr. Ellen Pichey, a DMA, found that appellant had five percent impairment of the right and left arms due to her bilateral CTS, noting the date of maximum medical improvement as March 16, 2009. In a November 7, 2011 note, Dr. Pichey reported that the 5 percent impairment of the right arm was not an additional impairment to the previous 10 percent award. Because the original 10 percent award was based on CTS for the upper right extremity, there was no additional impairment.

By decision dated November 7, 2011, OWCP granted appellant a schedule award for five percent permanent impairment of the left arm. It found that she was not entitled to an increased schedule award for the right arm as she had already received a schedule award for 10 percent impairment.

Appellant submitted reports dated July 29, 2011 through November 30, 2012 from Dr. Mathias A. Masem, Board-certified in orthopedic surgery, who addressed treatment of her upper extremities and course of therapy. She also submitted an October 7, 2011 magnetic resonance imaging scan of the right shoulder and a July 20, 2009 report from Dr. Binh Luu.

On November 5, 2012 appellant requested reconsideration of the November 7, 2011 OWCP decision. OWCP noted the appeal as having been received on November 8, 2012.

In a December 19, 2012 report, Dr. Pichey reviewed Dr. Masem's March 20, 2012 report. She determined that the total impairment of the right arm equaled 12 percent, 5 percent for right CTS and 7 percent for a right shoulder rotator cuff tear/tendon rupture. Dr. Pichey concluded that appellant had an additional seven percent impairment of the right arm.

By decision dated February 4, 2013, OWCP denied appellant's reconsideration request as untimely filed and failing to establish clear evidence of error.

## LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.<sup>3</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>4</sup>

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.<sup>5</sup>

## ANALYSIS

The Board finds that OWCP erroneously adjudicated appellant's request for an additional schedule award as a request for reconsideration under the clear evidence of error standard.

On November 8, 2012 appellant requested reconsideration of the November 7, 2011 OWCP schedule award decision. She submitted new evidence relating to her medical diagnosis and schedule award claim. In a March 20, 2013 report, Dr. Masem, appellant's treating physician, provided additional findings. On December 19, 2012 Dr. Pichey reviewed Dr. Masem's report and rated impairment of 12 percent: 5 percent for right CTS and 7 percent for a right shoulder rotator cuff tear/tendon rupture. She advised that appellant had an additional seven percent.

In its February 4, 2013 decision, OWCP denied appellant's November 8, 2012 request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error.

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<sup>3</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

<sup>4</sup> *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

<sup>5</sup> *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).

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 or increased impairment.<sup>6</sup> Dr. Pichey provided an impairment rating for right shoulder rotator cuff tear/tendon rupture in addition to the prior five percent rating for CTS.

As in *Paul R. Reedy*, the February 4, 2013 decision treated appellant's claim as a request for reconsideration. The Board finds, however, that she was not seeking reconsideration of the previous schedule award determination, but submitted new evidence pertaining to additional impairment of the upper right extremity.<sup>7</sup> OWCP's procedure manual states that, if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award.<sup>8</sup>

The Board finds that OWCP erroneously adjudicated appellant's claim for an additional schedule award as a request for reconsideration. It failed to issue an appropriate decision regarding her claim for an increased schedule award.<sup>9</sup> On remand, OWCP should review the medical evidence and issue an appropriate decision.

### **CONCLUSION**

The Board finds that OWCP improperly adjudicated appellant's schedule award claim as a request for reconsideration.

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<sup>6</sup> *Id.*

<sup>7</sup> *J.F.*, Docket No. 13-112 (issued November 6, 2013).

<sup>8</sup> The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (October 2011).

<sup>9</sup> *E.T.*, Docket No. 13-1691 (issued September 25, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2013 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

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