

FACTUAL HISTORY

In mid-1993, appellant, then a 46-year-old immigration inspector, filed a claim alleging that he sustained foot problems due to his duties which required extensive walking and standing.² OWCP accepted his claim for bilateral plantar fasciitis, bilateral Achilles tendinitis and bilateral calcaneal spurs.

In a February 5, 1998 decision, OWCP reduced appellant's compensation based on its determination that his wage-earning capacity was represented by the constructed position of paralegal assistant.

By decision dated May 14, 2003, OWCP granted appellant a schedule award for right leg permanent impairment of 47 percent and a left leg permanent impairment of 50 percent.

Appellant alleged that his injury-related condition had changed such that he was no longer able to meet the physical requirements of the paralegal assistant job which served as the basis for OWCP's February 5, 1998 wage-earning capacity determination. In August 30, 2012 and January 11, 2013 decisions, OWCP denied modification of its February 5, 1998 wage-earning capacity determination.

On January 29, 2013 appellant filed a Form CA-7 claiming additional schedule award compensation.

In a July 24, 2012 report, Dr. Rommel Bugho, an attending Board-certified rehabilitation medicine physician, provided a history of appellant's foot conditions and described his current complaints. He noted that x-rays showed bilateral calcaneal spurs and loose bodies near the calcaneal area of the left foot. Appellant had an antalgic gait and moderate motor power in the right lower extremity with intermittent swelling and aggravation of pain. Dr. Bugho noted additional surgery might be indicated for the right foot. He did not provide an opinion regarding the percentage impairment of either lower extremity in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). Appellant also submitted reports of Dr. Bugho dated July 24 and September 13, 2012, but the reports did not address any impairment.

In an April 1, 2013 report, Dr. Morris Baumgarten, an attending Board-certified orthopedic surgeon, described appellant's current complaints. He indicated that appellant wished to have foot surgery. He did not provide any impairment assessment of appellant's extremities.

In an April 29, 2013 decision, OWCP denied appellant's claim for an additional schedule award. It found that he did not submit sufficient medical evidence to establish more than a 47 percent permanent impairment of his right leg and a 50 percent permanent impairment of his left leg.

² Appellant initially filed a traumatic injury claim, but he later changed it to an occupational disease claim.

In May 2013, appellant requested reconsideration of his schedule award claim. He submitted an April 22, 2013 report of Dr. Baumgarten. The report did not provide an impairment rating under the standards of the A.M.A., *Guides*.

In May 2013, appellant requested reconsideration of OWCP's January 11, 2003 wage-earning capacity decision. He alleged that his injury-related condition had changed such that he was no longer able to meet the physical requirements of the paralegal assistant job which served as the basis for OWCP's February 5, 1998 wage-earning capacity determination. Appellant submitted April 1 and 22, 2013 reports from Dr. Baumgarten, who diagnosed bilateral insertional Achilles tendinitis and bilateral Haglund deformities. Dr. Baumgarten stated that his bilateral foot condition had worsened.

In a July 25, 2013 decision, OWCP denied appellant's request for further review of the merits of its wage-earning capacity determination pursuant to 5 U.S.C. § 8128(a).

Appellant requested a review of the written record by an OWCP hearing representative with respect to his schedule award claim. In a July 29, 2013 decision, an OWCP hearing representative affirmed the April 29, 2013 decision, finding that the additional evidence submitted by appellant did not establish greater impairment than previously awarded.

In October 2013, appellant requested reconsideration of his schedule award claim. He submitted an August 20, 2013 report from Dr. Baumgarten, who indicated that he was not familiar with the sixth edition of the A.M.A., *Guides*. Dr. Baumgarten did not provide any impairment rating.

In November 2013, appellant again requested reconsideration of OWCP's wage-earning capacity decision. He submitted an August 20, 2013 report in which Dr. Baumgarten diagnosed bilateral insertional Achilles tendinitis and bilateral Haglund deformities. Dr. Baumgarten reiterated that his bilateral foot condition had worsened.

In a December 2, 2013 decision, OWCP denied modification of the April 29, 2013 schedule award decision.

In a December 10, 2013 decision, OWCP denied appellant's request for further review of the merits of its wage-earning capacity determination pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations⁴ 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral plantar fasciitis, bilateral Achilles tendinitis and bilateral calcaneal spurs. It granted him schedule awards for 47 percent permanent impairment of the right leg and 50 percent impairment of the left. On January 29, 2013 appellant filed a Form CA-7 claiming additional schedule award compensation. OWCP subsequently denied the claim for additional impairment in July 29 and December 2, 2013 merit decisions.

The Board finds that appellant did not submit sufficient medical evidence to establish more than a 47 percent permanent impairment of his right leg or a 50 percent permanent impairment of his left leg. Appellant did submit reports of Dr. Bugho and Dr. Baumgarten. However, the reports did not provide any impairment rating under the standards of the sixth edition of the A.M.A., *Guides*.⁷ Consequently, the medical evidence does not support an award for any greater permanent impairment than that for which he previously received. Therefore, OWCP appropriately denied appellant's claim for increased schedule award compensation.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without

⁵ *Id.*

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *See supra* note 7.

⁸ Under section 8128 of FECA, "[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).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ *Id.* at § 10.607(a).

reopening the case for review on the merits.¹¹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹² and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁴

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁵ The burden of proof is on the party attempting to show modification.¹⁶ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁷

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of OWCP's wage-earning capacity determinations. In May 2013, he requested reconsideration of OWCP's January 11, 2003 wage-earning capacity decision. Appellant alleged that his injury-related condition had changed such that he was no longer able to meet the physical requirements of the paralegal assistant job which served as the basis for OWCP's February 5, 1998 wage-earning capacity determination. He submitted April 1 and 22, 2013 reports from Dr. Baumgarten who diagnosed bilateral insertional Achilles tendinitis and bilateral Haglund deformities. Dr. Baumgarten found that his bilateral foot condition had worsened. In November 2013, appellant requested reconsideration of OWCP's wage-earning capacity decision and submitted an August 20, 2013 report in which Dr. Baumgarten repeatedly diagnosed bilateral insertional Achilles tendinitis and bilateral Haglund deformities and reiterated that his bilateral foot condition had worsened.

OWCP considered appellant's May and November 2013 letters to be requests for reconsideration of its prior wage-earning capacity determinations under 5 U.S.C. § 8128(a). Although OWCP found that appellant's requests were timely, it further found that he had not submitted sufficient new and relevant evidence or legal argument to require reopening his claim for merit review. The Board notes that appellant asserted that his injury-related condition had worsened since the February 5, 1998 wage-earning capacity determination was made.

¹¹ *Id.* at § 10.608(b).

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹³ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁴ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁶ *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁷ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

Appellant's May and November 2013 letters constituted requests for modification of OWCP's wage-earning capacity determination. Further he submitted medical evidence in support of the requests.¹⁸ Therefore, OWCP improperly adjudicated appellant's letters as requests for reconsideration.¹⁹

Appellant requested modification of OWCP's 1998 wage-earning capacity determination. The specific requirements of OWCP's regulations for requesting reconsideration do not apply in this case and he is entitled to a merit review on the wage-earning capacity issue.²⁰ The case will be remanded for OWCP to adjudicate appellant's requests for modification of the February 5, 1998 wage-earning capacity determination and to issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish more than a 47 percent permanent impairment of his right leg and more than a 50 percent permanent impairment of his left leg, for which he received schedule awards. The Board further finds that appellant requested modification of OWCP's wage-earning capacity determination and is entitled to a merit review of the wage-earning capacity issue. The case will be remanded to OWCP for all necessary development and issuance of an appropriate decision.

¹⁸ See 5 U.S.C. § 8128(a).

¹⁹ *D.E.*, Docket No. 12-8 (issued June 7, 2012); *F.B.*, Docket No. 10-99 (issued June 21, 2010); *M.J.*, Docket No. 08-2280 (issued July 7, 2009).

²⁰ See 20 C.F.R. § 10.606; *D.E.*, *supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the December 2 and July 29, 2013 decisions of the Office of Workers' Compensation Programs are affirmed. The December 10 and July 25, 2013 decisions of OWCP are set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: July 21, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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