

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

R.H., Appellant

and

**U.S. POSTAL SERVICE, EMBACADERO
POSTAL CENTER, San Francisco, CA,
Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 14-415
Issued: November 20, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 17, 2013 appellant filed a timely appeal of an August 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board also has jurisdiction over a nonmerit decision dated December 5, 2013. 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 this case.

ISSUES

The issues are: (1) whether appellant has established that she has more than 18 percent left lower extremity impairment or 8 percent right lower extremity impairment, for which she received schedule awards; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 19, 1999 appellant, then a 44-year-old mail carrier, sustained injury to her right calf when stepping down from a curb while delivering mail.² OWCP accepted the claim for right ankle sprain and right plantaris tendon rupture with consequential left ankle peroneal tenosynovitis.³ It authorized left ankle peroneal tendon repair surgery which occurred on February 11, 2002. On May 7, 2001 appellant accepted a modified job offer.

By decision dated April 27, 2007, OWCP granted appellant a schedule award for six percent impairment to the right and left lower extremities. It noted that she had previously received a schedule award under File No. xxxxxx607 for eight percent left leg impairment and that the current award did not exceed the amount previously awarded.

By decision dated February 8, 2008, an OWCP hearing representative set aside the April 27, 2007 schedule award decision and remanded for further development on the issue of whether appellant was entitled to an additional schedule award for impairment to her lower extremities.

By decision dated March 24, 2008, OWCP granted appellant an additional two percent impairment for her right lower extremity for a total eight percent right lower extremity impairment.

In a separate decision dated March 24, 2008, OWCP granted appellant an additional 10 percent impairment for her left lower extremity for a total 18 percent left lower extremity impairment.

On July 28, 2012 appellant filed a claim for an additional schedule award.

In an October 27, 2012 letter, Dr. Jules P. Steimnitz, an attending Board-certified physiatrist and pain medicine physician, responded to OWCP's August 27, 2012 letter requesting an impairment rating. Using Table 16-2, page 501, he concluded that appellant's left ankle condition was a class 2 or 14 percent lower extremity impairment.

² This was assigned File No. xxxxxx765.

³ Under File No. xxxxxx607, OWCP accepted appellant's occupational disease claim for left ankle sprain and injury date of March 23, 1999. On July 8, 1999 it combined File No. xxxxxx607 with File No. xxxxxx765, with the latter serving as the master file number. On September 23, 2003 OWCP granted appellant a schedule award for an eight percent left lower extremity impairment under File No. xxxxxx607. On September 28, 2009 it combined File Nos. xxxxxx706 and xxxxxx612 with File No. xxxxxx765, with the latter as the master file number. Under File No. xxxxxx706, OWCP accepted that appellant sustained a left medial meniscus tear on January 2, 2008 when her knee locked up and snapped while getting up from her desk. It approved a left medial meniscectomy, which occurred on March 23, 1999. Under File No. xxxxxx612, OWCP accepted a left knee and leg sprain due to a May 10, 2008 traumatic injury. On April 23, 2013 it combined File Nos. xxxxxx966 and xxxxxx732 with File No. xxxxxx765 as the master File No. Under File No. xxxxxx966, appellant filed a traumatic injury claim alleging that on August 12, 1991 she sprained her left ankle while delivering mail. OWCP accepted the claim for a left ankle sprain. Under File No. xxxxxx732, appellant filed a traumatic injury claim alleging that on November 9, 1987 she sustained a swollen right ankle when she slipped and fell while delivering mail. OWCP accepted the claim for a right ankle sprain.

In a June 29, 2013 report, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and second opinion physician, reviewed the statement of accepted facts and medical evidence. On physical examination he noted that appellant was being evaluated for a schedule award under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Using Table 16-2, page 501, Dr. Hanley determined that she was a class 1 for her left ankle based on mild motion deficit and falls. For grade modifiers he assigned a 1 for functional history, 2 for physical examination and clinical studies. Dr. Hanley found that this resulted in a grade E rating or seven percent lower extremity impairment. He considered appellant's left knee injury under Table 16-3, page 509. Dr. Hanley assigned a class 1 based on her partial medial meniscectomy. Applying the grade modifiers, he found a 1 for functional history, clinical studies and physical examination. This resulted in a grade C with a default impairment of two percent. Combining the impairment for appellant's left knee and ankle resulted in a total nine percent left lower extremity impairment. As to her right ankle and knee, Dr. Hanley found that she was a class 0 for both right ankle sprain and right knee arthralgia and, had no ratable impairment of her right ankle or knee.

On August 13, 2013 the medical adviser reviewed Dr. Hanley's report and concurred with the impairment rating. He noted that appellant's prior impairment ratings under the fifth edition of the A.M.A., *Guides* were higher than the current rating. Therefore, the medical evidence did not warrant an additional schedule award.

By decision dated August 28, 2013, OWCP denied appellant's claim for increased schedule awards. It found that her current impairment rating was less than the rating she received.

On August 30, 2013 appellant requested reconsideration. She submitted an October 3, 2013 report from Dr. Steimnitz, who related that appellant was diagnosed with rheumatoid arthritis following development of increased pain in various joints. On physical examination the ankles revealed no swelling, tenderness on palpitation, intact sensation and motor and slightly antalgic gait. Dr. Steimnitz diagnosed diabetes mellitus, bilateral ankle sprain and new onset rheumatoid arthritis. He advised that appellant had reached maximum medical improvement and a disability retirement examination would be scheduled at a later date.

By decision dated December 5, 2013, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of FECA⁴ and section 10.404 of the implementing federal regulations,⁵ schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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* has been

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).⁷ Under the sixth edition, the evaluator identifies the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁸ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted the conditions of right ankle sprain, right plantaris tendon rupture, left ankle peroneal tenosynovitis, left ankle sprain and left knee meniscal tear. Appellant received schedule awards totaling an 18 percent left lower extremity impairment and an 8 percent right lower extremity impairment. The Board finds that she has not established that she has greater impairment of her left or right lower extremities.

On October 27, 2012 Dr. Steimnitz, an attending Board-certified physiatrist and pain medicine physician, concluded that appellant had a 14 percent left lower extremity impairment using Table 16-2, page 501 with a class 2.

In a June 29, 2013 report, Dr. Hanley, a second opinion Board-certified orthopedic surgeon, concluded that appellant had no (zero percent) impairment of her right ankle and right knee as she was at class 0. He determined that she had nine percent impairment for her left ankle and left knee conditions. Dr. Hanley noted that, under Table 16-2, page 501, appellant's mild motion deficits and falls resulted in a default class C. He explained that the grade modifiers of 1 for functional history, 2 for physical examination and clinical studies resulted in a grade E rating or seven percent impairment for the left ankle.

⁶ *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁷ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, ICF: A Contemporary Model of Disablement.

⁸ *Id.* at 383-419.

⁹ *Id.* at 411.

¹⁰ See *C.K.*, Docket No. 09-2371 (issued August 18, 2010); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010). *Frantz Ghassan*, 57 ECAB 349 (2006).

Next Dr. Hanley considered appellant's left knee injury under Table 16-3, page 509. He assigned a class 1 based on her partial medial meniscectomy. Applying the grade modifiers, Dr. Hanley found a 1 for functional history, clinical studies and physical examination, which resulted in a grade C with a default impairment of two percent. Combining the impairment for appellant's left knee and ankle resulted in a total nine percent left lower extremity impairment.

On August 13, 2013 an OWCP medical adviser reviewed the medical evidence and concurred with the impairment rating of Dr. Hanley. OWCP properly found that appellant was not entitled to additional schedule awards. The medical evidence does not establish greater impairment than that previously awarded. Under the sixth edition of the A.M.A., *Guides*, appellant's lower extremity impairment had not increased. Her treating physician, Dr. Steimnitz found a 14 percent left lower extremity impairment. Dr. Hanley and the medical adviser concluded that appellant had nine percent impairment of the left leg. None of the physicians rated impairment for her right lower extremity. Appellant did not submit medical evidence showing that she has additional impairment of her lower extremities. She has not shown that she has more than an 18 percent left lower extremity impairment or an 8 percent right lower extremity impairment.

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,¹¹ OWCP's regulations provide that 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.¹² 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.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁴

¹¹ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹² 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹³ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ANALYSIS -- ISSUE 2

On August 28, 2013 OWCP denied appellant's request for an additional schedule award for her bilateral extremity impairments. Appellant requested reconsideration of this decision on August 30, 2013. The issue presented is whether she met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not contend that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument.

Appellant submitted an October 3, 2013 report from Dr. Steimnitz, who provided physical findings for her ankle, diagnoses of bilateral ankle sprain, diabetes mellitus and rheumatoid arthritis. Dr. Steimnitz stated that she had reached maximum medical improvement, but provided no permanent impairment rating. His October 3, 2013 report is not relevant to the issue of whether appellant has greater impairment to her right or left lower extremities.¹⁵

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has no more than 18 percent left lower extremity impairment and 8 percent right lower extremity impairment, for which she received schedule awards. The Board further finds that OWCP properly denied her request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁵ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 5 and August 28, 2013 are affirmed.

Issued: November 20, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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