

FACTUAL HISTORY

On October 25, 2012 appellant, then a 62-year-old senior mail processor, filed a claim for a recurrence of disability causally related to a July 29, 2002 employment injury, commencing on July 19, 2012.³ He alleged that on July 19, 2012 he assisted a coworker with lifting and putting away rubber floor mats which caused inflammation in his lower back and resulted in severe back pain. OWCP accepted appellant's claim for a new traumatic injury for sprain of the lumbar region of the back.⁴ It paid compensation benefits.

In a November 7, 2013 report, Dr. Craig Underset, a general practitioner and appellant's treating physician, noted that appellant had a history of overuse and manual labor as well as chronic pain associated with his July 19, 2012 workers' compensation injury. He noted the following positive findings: positive muscle spasms and guarding in his thoracic and lumbar regions, bilateral hip spasm and pain, decreased range of motion in his lower back and S1 JTS bilaterally; and positive orthopedic tests for soft tissue trauma. Dr. Underset noted that appellant had not worked since August 1, 2013 because of his chronic pain exacerbations and no light duty available at his job. He anticipated that appellant would be able to return to work with restrictions on December 1, 2013.

On November 17, 2013 appellant filed a claim for a schedule award.

By letter dated November 22, 2013, OWCP asked Dr. Underset to submit a medical opinion detailing the date of maximum medical improvement, the diagnosis upon which the impairment is based, a detailed description of any permanent impairment, and a final rating of permanent impairment pursuant to the applicable criteria of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009). Dr. Underset did not submit a timely response.

By decision dated November 25, 2013, OWCP accepted appellant's claim for a recurrence of disability effective August 8, 2013. At that time it expanded the acceptance of appellant's claim to include herniated nucleus pulposus L2-S1 and authorized payment for appropriate periods of disability.

In a decision dated December 30, 2013, OWCP denied appellant's claim for a schedule award.

On May 13, 2014 appellant requested reconsideration. In support thereof, he submitted a May 5, 2014 report wherein Dr. Vidyadhar S. Chitale, a Board-certified neurosurgeon, interpreted appellant's May 5, 2014 magnetic resonance imaging (MRI) scan as showing, *inter alia*: lumbar disc herniation at L1-2 level with central herniation and thecal sac compression; right foraminal disc herniation causing significant stenosis at L4-5; bilateral facet effusions and

³ In File No. xxxxxx765, OWCP accepted that on July 29, 2002 appellant experienced lumbosacral disc syndrome and radiculitis in the performance of duty.

⁴ After OWCP accepted appellant's claim, it received an October 25, 2012 traumatic injury claim for the same incident.

bilateral neuroforaminal stenosis at L3-4 level; bilateral facet effusions at L2-3 with mild neuroforaminal stenosis; disc spondylotic ridging at T1-12 and T12-L1; and conus eads at L1 level. Dr. Chitale also noted multilevel disc degeneration.

Other evidence submitted by appellant since the December 30, 2013 decision includes work capacity evaluations of February 19 and March 27, 2014 by Dr. Underset wherein he indicated that appellant was limited to four hours per workday of sitting, walking, standing, reaching, and twisting. Dr. Underset also limited appellant to bending, stooping, pushing, pulling, lifting, squatting, kneeling, and climbing to four hours and 10 pounds. Appellant also submitted a February 28, 2014 impairment rating report, by Dr. Underset, concluding that appellant had an impairment rating of eight percent of the whole person based on the fifth edition of the A.M.A., *Guides* (2001). In reaching this conclusion, the report described flexion, side bending, gait and strength and discussed neurological findings for reflexes and sensation. The report concluded that appellant fell under diagnosis-related estimates lumbosacral category II at page 384 of the fifth edition of the A.M.A., *Guides*.

By decision dated May 27, 2014, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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 stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁷ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for a sprain of the lumbar region of the back and herniated nucleus pulposus L2-S1. Appellant filed a claim for a schedule award. To be entitled to a schedule award, he must establish that he is at maximum medical improvement and sustained a permanent impairment of a scheduled member of the body due to an employment injury.⁹

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404.

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *R.E.*, Docket No. 14-713 (issued June 26, 2014).

The Board finds that appellant failed to submit sufficient medical evidence to establish that he is at maximum medical improvement or the extent of any permanent impairment. Appellant submitted a November 7, 2013 report by Dr. Underset. However, Dr. Underset did not provide an impairment rating, discuss whether the accepted condition caused permanent impairment, or state an opinion as to whether appellant was at maximum medical improvement.¹⁰ Moreover, he indicated that appellant was anticipated to return to work with restrictions on December 1, 2013, which would indicate that appellant was not at maximum medical improvement as of the date of Dr. Underset's November 7, 2013 report. As Dr. Underset did not support that the accepted condition caused any permanent impairment, his report is insufficient to establish that appellant has any permanent impairment due to the accepted condition.

Without probative medical opinion evidence from a physician addressing how appellant's impairment correlated to the appropriate edition of the A.M.A., *Guides* and explaining the causal relationship between these findings and his permanent impairment, appellant did not meet his burden of proof to establish entitlement to a schedule award.

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 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.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

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she need only submit relevant, pertinent evidence not previously considered by OWCP. When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether

¹⁰ A schedule award is not payable unless it is determined by probative medical evidence that the employee is at maximum medical improvement. *See D.R.*, 57 ECAB 720 (2006).

¹¹ 5 U.S.C. §§ 8101-8193. 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).

¹² 20 C.F.R. § 10.606(b)(3).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim for a schedule award as he failed to submit sufficient evidence with regard to permanent impairment. The Board finds that OWCP properly declined to reopen appellant's case for further merit review. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He also did not advance a relevant legal argument not previously considered by OWCP.

Although appellant submitted work capacity evaluations by Dr. Underset and the MRI scan report by Dr. Chitale, they do not address the issue of permanent impairment. The Board has found that submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.¹⁵ Appellant also submitted a February 28, 2014 impairment rating report, by Dr. Underset, concluding that appellant had eight percent whole person impairment based on the fifth edition of the A.M.A., *Guides*. However, effective May 1, 2009, schedule awards are determined in accordance with the second printing of the sixth edition of the A.M.A., *Guides*.¹⁶ Therefore, as Dr. Underset did not apply the correct edition of the A.M.A., *Guides*, his report does not constitute pertinent new and relevant evidence and is thus insufficient to require OWCP to conduct a merit review.

Because appellant has failed to meet any of the criteria enumerated under section 10.606(b)(3) of OWCP's regulations, he was not entitled to further merit review of the claim.

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award. The Board further finds that OWCP properly denied merit review under 5 U.S.C. § 8128(a).

¹⁵ *S.L.*, Docket No. 14-81 (issued May 1, 2014).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 27, 2014 and December 30, 2013 are affirmed.

Issued: August 18, 2015
Washington, D.C.

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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