

FACTUAL HISTORY

On February 15, 2014 appellant, then a 39-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on February 14, 2011 as a result of bench pressing in the performance of duty. OWCP accepted the claim for pectoralis tear and right shoulder infraspinatus tear. It authorized right shoulder pectoral tendon repair surgery, which appellant underwent on March 3, 2011.

On October 30, 2012 appellant, through counsel, filed a claim for a schedule award.

On January 14, 2013 an OWCP medical adviser reviewed the record and found that appellant had reached maximum medical improvement on December 3, 2012 but that he had no ratable impairment of the right upper extremity.

In a January 15, 2013 letter, OWCP notified appellant of the deficiencies of his schedule award claim and afforded him 30 days to submit additional evidence.

Appellant submitted a report dated February 1, 2013 from Dr. George Caldwell, Jr., a Board-certified orthopedic surgeon, who reiterated that appellant had received a zero impairment rating and indicated that he used the Florida Impairment Rating, not the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), to determine impairment ratings.

By decision dated February 22, 2013, OWCP denied appellant's schedule award claim as the medical evidence failed to establish a ratable impairment of a scheduled member.

On November 11, 2014 appellant, through counsel, requested reconsideration. Counsel submitted reports dated September 16 and October 27, 2014 from Dr. Robin Simon, a Board-certified orthopedic surgeon, who diagnosed right shoulder infraspinatus tendon tear and right shoulder impingement syndrome. Dr. Simon opined that appellant had reached maximum medical improvement and had six percent permanent impairment of the right upper extremity under Table 15-34, page 475, of the sixth edition of the A.M.A., *Guides*.

By decision dated November 26, 2014, OWCP denied appellant's request for reconsideration on the basis that it was untimely filed and failed to present clear evidence of error.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ 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

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

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.⁴ The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

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.⁶

ANALYSIS

The Board finds that this case is not in posture for decision.

On November 11, 2014 appellant requested reconsideration of OWCP's February 22, 2013 schedule award decision. He submitted new evidence relating to his medical diagnosis and schedule award claim. In reports dated September 16 and October 27, 2014, Dr. Simon diagnosed right shoulder infraspinatus tendon tear and right shoulder impingement syndrome and opined that appellant had six percent permanent impairment of the right upper extremity under Table 15-34, page 475, of the sixth edition of the A.M.A., *Guides*.

In its November 26, 2014 decision, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to present clear evidence of error. Its procedures state 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.⁷

⁴ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379, 385 (2006).

⁵ *Supra* note 3; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

⁶ See *B.K.*, 59 ECAB 228, 229-30 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.b (February 2013). See also *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); *Leonard E. Redway*, 28 ECAB 242, 246-47 (1977) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration).

⁷ See *A.C.*, Docket No. 13-1810 (issued January 6, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (October 2011).

In the present case, appellant submitted two new medical reports dated September 16 and October 27, 2014 from Dr. Simon, after OWCP's February 22, 2013 schedule award decision. These reports addressed the pertinent issue of this case, *i.e.*, whether he was entitled to schedule award compensation for right upper extremity impairment, as it contained an impairment rating that referenced the A.M.A., *Guides*. It is evident from the record that he was not seeking reconsideration of the February 22, 2013 OWCP decision, but was seeking a schedule award based on new medical evidence. The Board has held that, 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 increased schedule award and OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.⁸

The Board finds that OWCP improperly adjudicated appellant's request for an additional schedule award as a request for reconsideration under the clear evidence of error standard. The case will be remanded for further development on the issue of whether appellant has a permanent impairment of his right upper extremity entitling him to a schedule award. After this development is carried out, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁸ See *supra* note 6. See also *R.L.*, Docket No. 09-1948 (issued June 29, 2010).

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 3, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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