

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

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**W.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dallas, TX, Employer**

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**Docket No. 15-1167  
Issued: November 10, 2015**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 28, 2015 appellant filed a timely appeal of a February 9, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 30, 2012, and the filing of this appeal, 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 the claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

**FACTUAL HISTORY**

On February 14, 2008 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left hip and lower back when he slipped and fell

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

in the performance of duty on February 8, 2008. On August 15, 2008 appellant's attending physician, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, diagnosed acute lumbar strain on February 13, 2008. He included the additional conditions of lumbar radiculitis as well as lumbar radiculopathy L5 and S1 on August 15, 2008, based on electrodiagnostic studies.

OWCP accepted appellant's claim for sprain of the lumbar back, thoracic or lumbosacral neuritis or radiculitis and aggravation of brachial neuritis, or radiculitis on September 19, 2008.

In a report dated March 4, 2010, Dr. Shade opined that appellant had reached maximum medical improvement on that date. He reviewed magnetic resonance imaging (MRI) scans which demonstrated a disc bulge and protrusion at L5-S1, electromyogram (EMG) and nerve conduction velocity (NCV) studies which demonstrated lumbar radiculopathy at L5. Dr. Shade diagnosed lumbar radiculitis and lumbar radiculopathy at L5. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> (A.M.A., *Guides*) and found that appellant had seven percent impairment of his "lower extremity" due to a herniated disc at L5-S1 based on Table 17-4.<sup>3</sup> Dr. Shade reviewed the grade modifiers and concluded that functional history had a grade modifier 1, physical examination had a grade modifier 0 and "[c]linical [e]xamination" or clinical studies was grade modifier 4. This resulted in an additional two percent impairment for an impairment rating of nine percent.

Appellant requested a schedule award on April 12, 2010.

An OWCP medical adviser reviewed Dr. Shade's report on May 5, 2011 and stated that Dr. Shade had not utilized the appropriate table in reaching his impairment rating. He noted that Table 17-4 cited by Dr. Shade provided impairment ratings for the spine rather than for scheduled body members.<sup>4</sup> The medical adviser further noted that Dr. Shade found intact motor and sensory function in the lower extremities which would not result in a finding of permanent impairment of these members.

By decision dated May 6, 2011, OWCP denied appellant's claim for a schedule award as the medical evidence did not support a permanent impairment of a scheduled member in accordance with the sixth edition of the A.M.A., *Guides*.

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<sup>2</sup> For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>3</sup> A.M.A., *Guides* 570, Table 17-4, Lumbar Spine Regional Grid: Spine Impairments.

<sup>4</sup> No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations. Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, no claimant is entitled to such an award. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine. *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975). OWCP will address lower extremity impairments originating in the spine through Table 16-11. A.M.A., *Guides* 533, Table 16-11.

Appellant requested reconsideration on March 16, 2012 and submitted an additional report dated September 15, 2011 from Dr. Shade addressing appellant's impairment rating. He stated that appellant had experienced lower back pain radiating into his left leg. Appellant reported difficulty walking as well as going up and down stairs. Dr. Shade reviewed appellant's MRI scans and electrodiagnostic studies. He found that appellant had a normal gait, with bilateral iliolumbar tenderness, and bilateral spinolumbar spasms. Dr. Shade found that appellant's patellar reflexes were diminished bilaterally and his Achilles reflex was absent bilaterally. He reported a normal motor examination on the right with decreased strength in the left lower extremity. Dr. Shade also found sensation deficits in the left lower extremity at L5-S1. He applied the appropriate tables of the A.M.A., *Guides* and found that appellant had 12 percent permanent impairment of his left upper extremity due to sensory and motor cervical impairments at C5, C6, and C7. Dr. Shade further found that appellant had a total left lower extremity rating of 24 percent permanent impairment based on sensory and motor impairments of L4, L5, and S1.

The medical adviser reviewed Dr. Shade's September 15, 2011 report on March 21, 2012. He noted that Dr. Shade had previously described normal sensation and normal motor function in the lower extremities. The medical adviser requested an additional medical examination to determine the findings on physical examination.

On June 12, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Zvi Kalisky, a Board-certified physiatrist. Appellant underwent NCV studies and an EMG on August 1, 2012 which were normal with no evidence of diffuse or entrapment peripheral neuropathy or radiculopathy in either the upper or lower extremities. Dr. Kalisky reported on August 13, 2012 following an examination that deep tendon reflexes were symmetric and motor examination was intact. He reported hypoesthesia in the anterior and lateral right thigh on sensory examination. Dr. Kalisky reviewed appellant's August 1, 2012 electrodiagnostic studies and diagnosed status post cervical sprain/strain with nonverifiable radicular symptoms in the upper extremities with no objective findings of radiculopathy. He also diagnosed status post lumbar sprain/strain with chronic pain and nonverifiable radicular symptoms in the right thigh with no objective findings of radiculopathy. Dr. Kalisky found that appellant had reached maximum medical improvement and applied the A.M.A., *Guides* to his findings on physical examination. He found that appellant had no ratable impairment in either the upper or lower extremities due to the lack of objective physical or electrodiagnostic findings of radiculopathy.

By decision dated August 30, 2012, OWCP reviewed the merits of appellant's claim and denied modification of the May 6, 2011 decision denying a schedule award.

Appellant requested reconsideration on January 22, 2015. He submitted a note dated January 11, 2015 and alleged that Dr. Kalisky had been fired or removed by OWCP as a referee physician due to false medical examinations he had performed on behalf of the employing establishment. Appellant submitted additional NCV and EMG results dated June 30, 2014 which were interpreted as demonstrating bilateral median neuropathy at the wrist or carpal tunnel syndrome moderate on the right and mild on the left as well as evidence of chronic right C5-6 radiculopathy. He also submitted a September 18, 2013 cervical MRI scan.

In an October 2, 2012 report, Dr. Shade again provided findings on examination and noted his symptoms of pain in the lower back that radiated down into the left leg as well as pain,

numbness, tingling sensation, night pain, and cramps, in addition to pain in his arm. He diagnosed brachial neuritis, lumbar sprain, and lumbar neuritis. Dr. Shade applied the tables of the sixth edition of the A.M.A., *Guides* and concluded that appellant had 12 percent permanent impairment of the left upper extremity and 24 percent permanent impairment of the left lower extremity entitling him to schedule awards. He noted that the latter impairment demonstrated an increase from the nine percent permanent impairment from his prior rating.

By decision dated February 9, 2015, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that the request for reconsideration was not timely received within one year of the August 30, 2012 merit decision. It further found that the evidence and argument submitted did not establish clear evidence of error.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>5</sup> and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards 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*.<sup>7</sup>

To the extent that a claimant asserts that a schedule award decision was erroneous based on his or her medical condition at that time, this would properly be considered a request for reconsideration.<sup>8</sup> A claimant may, however, seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury. 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.<sup>9</sup> A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Supra* note 2 at Chapter 2.808.5a (February 2013); *see also* Chapter 3.700, Exhibit 1 (January 2010).

<sup>8</sup> *See J.K.*, Docket No. 14-1082 (issued November 24, 2014).

<sup>9</sup> *B.K.*, 59 ECAB 228 (2007).

<sup>10</sup> *R.P.*, Docket No. 10-1123 (issued January 25, 2011).

## ANALYSIS

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

Appellant requested reconsideration on January 22, 2015 and submitted new evidence regarding his claim for a schedule award, including additional electrodiagnostic studies dated June 30, 2014 and an October 2, 2012 report from Dr. Shade. Dr. Shade provided findings on examination and described appellant's symptoms of pain in the lower back that radiated down into the left leg as well as pain, numbness, tingling sensation, night pain, and cramps, in addition to pain in his arm. He diagnosed brachial neuritis, lumbar sprain, and lumbar neuritis. Dr. Shade then applied the tables of the sixth edition of the A.M.A., *Guides* and concluded that appellant had 12 percent permanent impairment of the left upper extremity and 24 percent permanent impairment of the left lower extremity entitling him to schedule awards. He noted that this was an increased impairment from that which had previously been awarded.

In its February 9, 2015 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.<sup>11</sup>

In the present case, appellant submitted a new medical report from Dr. Shade dated October 2, 2012 after OWCP's August 30, 2012 schedule award decision. This report addressed the pertinent issue of this case, *i.e.*, whether he was entitled to schedule award compensation for extremity impairment, and it contained an impairment rating that referenced the A.M.A., *Guides*. It is evident from the record that appellant 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.<sup>12</sup>

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.<sup>13</sup> 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.

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<sup>11</sup> See *A.C.*, Docket No. 13-1810 (issued January 6, 2014); *supra* note 2 at Chapter 2.1602.3(b) (October 2011).

<sup>12</sup> See *B.K.*, 59 ECAB 228, 229-30 (2007); *supra* note 2 at Chapter 2.808.9.b (February 2013).

<sup>13</sup> *K.D.*, Docket No. 15-0524 (issued August 3, 2015).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 9, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision of the Board.

Issued: November 10, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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