

ISSUE

The issue is whether OWCP properly determined the date of maximum medical improvement (MMI) and the period of appellant's schedule award because the April 23, 2013 schedule award was an increased schedule award, not an amended award.

FACTUAL HISTORY

This case has previously been before the Board.³ By decision dated February 7, 2013, the Board found that OWCP had improperly determined on May 1, 2012 that appellant's February 1, 2012 request for an increased schedule award was an untimely request for reconsideration of a February 1, 2011 schedule award. The case was remanded for determination under the proper standard of review.

The findings and facts as set forth in the prior decision are herein incorporated by reference. The relevant facts are set forth below.

On November 20, 2000 OWCP accepted that appellant, then a 37-year-old enumerator, sustained a left ankle sprain on April 28, 2000 when she slipped and fell down the steps of a building.⁴ Appellant missed worked intermittently following the injury until she was placed on the periodic rolls for wage-loss benefits on January 18, 2002.

Appellant continued to treat with Dr. Richard Gasalberti, a specialist in physical medicine and rehabilitation. Dr. Gasalberti submitted progress notes to the record, through the years, regarding appellant's left ankle and right knee conditions.

On June 15, 2007 OWCP referred appellant to Dr. Salvatore R. Lenzo for a second opinion evaluation to determine appellant's disability status. Based upon Dr. Lenzo's August 14, 2007 report, by decision dated September 11, 2007, OWCP expanded the acceptance of appellant's claim to include left ankle sprain, tear of medial meniscus of the right knee, tear of lateral meniscus of the right knee, osteoarthritis of the left lower leg, and joint pain in multiple sites.

On May 11, 2010 appellant requested a schedule award. In support of this request she submitted an April 8, 2010 report from Dr. Arnold Goldman, a Board-certified radiologist. In his report, Dr. Goldman diagnosed internal derangement of the right knee and left ankle. Based upon loss of range of motion, he opined that appellant had a 20 percent permanent impairment of the right knee, and a 15 percent impairment of the left ankle.

Noting that Dr. Goldman's permanent impairment rating was not based on the sixth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) OWCP referred appellant, a statement of accepted facts, and the case record to Dr. P. Leo

³ Docket No. 12-1655 (issued February 7, 2013).

⁴ No formal acceptance decision from 2000 appears in the record, however, the acceptance is noted in a letter to OWCP from the employing establishment dated December 28, 2000.

Varialle, a Board-certified orthopedic surgeon, for a second opinion evaluation on August 10, 2010 under the A.M.A., *Guides*. According to Table 16-2 of the A.M.A. *Guides*, Dr. Varialle calculated an impairment rating of 10 percent for the left ankle.⁵ Using Table 16-3, he calculated an impairment rating of two percent for the right knee.⁶ Dr. Varialle noted the date of MMI as 2004.

On September 2, 2010 an OWCP district medical adviser (DMA) reviewed Dr. Varialle's August 10, 2010 report and agreed with the physician that appellant had 10 percent permanent impairment of the left lower extremity and 2 percent permanent impairment of the right lower extremity. He noted that he could not determine the date of MMI from the medical records and Dr. Varialle did not provide a date other than noting the year as 2004.

In a November 16, 2010 supplemental report, Dr. Varialle stated that a tear of the medial meniscus of the right knee, osteoarthritis, and left ankle osteochondral defect of the talus typically would stabilize without surgery in approximately one year. Thus, he opined that appellant's date of MMI was reached on April 28, 2001, one year after her injury.

On November 29, 2010 the DMA reviewed Dr. Varialle's supplemental report and agreed that the date of MMI was April 28, 2001.

By decision dated February 1, 2011, OWCP granted appellant a schedule award for 2 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity. The date of MMI was noted as April 28, 2001. The award covered a period of 34.56 weeks from March 24 to November 20, 2010.⁷

On February 1, 2012 appellant requested reconsideration of OWCP's February 1, 2011 schedule award decision.

Dr. David Weiss, a Board-certified orthopedic surgeon, submitted a report dated January 17, 2012 wherein he provided a detailed medical history, reviewed appellant's prior diagnostic and medical reports, and stated findings on physical examination. He opined that the April 28, 2000 work-related injury was the competent producing factor for her subjective and objective findings. Using Table 16-3, Table 16-7, and Table 16-8 of the sixth edition of the A.M.A., *Guides*, Dr. Weiss classified the right knee medial collateral ligament injury with moderate laxity in class 2 and calculated a right lower extremity impairment of 18 percent.⁸ He calculated the left osteochondral fracture of the talus within class 1 for a net adjustment of 13

⁵ A.M.A., *Guides*, at 502-08, Table 16-2 (6th ed. 2009).

⁶ *Id.* at 509-11, Table 16-3.

⁷ The Board notes that because appellant was receiving wage-loss compensation after her April 28, 2001 injury, the period of her schedule award began on March 24, 2010.

⁸ A.M.A., *Guides* 510-19.

percent impairment of the left lower extremity.⁹ Dr. Weiss noted the date of MMI as January 17, 2012.

By letter dated March 23, 2012, appellant argued that her schedule award should be increased based on greater impairment which was established by the additional medical evidence submitted.

By decision dated May 1, 2012, OWCP denied appellant's claim finding that the evidence submitted was not sufficient to warrant modification of the February 1, 2011 decision. It noted that its decision was based on whether it committed clear evidence of error when rendering its previous decision.

On August 1, 2012 appellant requested an appeal before the Board. The appeal was docketed as 12-1655.¹⁰ She argued that Dr. Weiss' January 17, 2012 medical report was new evidence which provided an impairment rating and date of MMI, but was not reviewed or considered by OWCP.

In a February 7, 2013 decision, the Board set aside the May 1, 2012 OWCP decision finding that it failed to properly conduct a merit review of appellant's claim and incorrectly determined that she filed an untimely reconsideration request. The case was remanded to OWCP to review the newly submitted evidence and properly consider her request under the standard of review applicable to timely requests for reconsideration.

On remand, OWCP referred the case file, statement of accepted facts, and Dr. Weiss' January 17, 2012 report to a DMA for review and a determination on appellant's permanent partial impairment of the right and left lower extremity and date of MMI.

In an April 8, 2013 report, the DMA reviewed Dr. Weiss' January 17, 2012 report and agreed with the physician that appellant had 18 percent permanent impairment for the right lower extremity and 13 percent permanent impairment of the left lower extremity. He found that she was entitled to 18 percent impairment of the right lower extremity after applying the net adjustment formula for a class 2 right knee medial collateral ligament injury.¹¹ Applying the net adjustment formula to the left osteochondral fracture of the talus, the DMA calculated 13 percent permanent impairment of the left lower extremity.¹² He also agreed with Dr. Weiss' January 17, 2012 date of MMI. The DMA explained that January 17, 2012 was the appropriate date of MMI based on the medical documentation and objective evidence considered in order to determine a schedule award.

By decision dated April 23, 2013, OWCP granted appellant a schedule award for an additional 16 percent impairment of the right lower extremity, or a total impairment of 18

⁹ *Id.* at 503-19, Tables 16-2, 16-7, and 16-8.

¹⁰ *Supra* note 3.

¹¹ A.M.A., *Guides*, Table 16-3.

¹² *Id.* at 503, Table 16-2.

percent. It further granted her a schedule award for an additional 3 percent impairment of the left lower extremity, or a total impairment of 13 percent. The date of MMI was noted as January 17, 2012. The award covered a period of 54.72 weeks from January 17, 2012 to February 3, 2013.

On January 30, 2014 appellant requested reconsideration of OWCP's April 23, 2013 decision. She did not contest the percentage of impairment awarded. Rather, appellant argued that the April 23, 2013 award was an amended schedule award and the period of the award should have started on November 21, 2010, the day following the end of the previously issued February 1, 2011 award. She argued that, because OWP previously paid 10 percent left lower extremity and 2 percent right lower extremity impairment was deducted from her April 23, 2013 schedule award, the award was an amended schedule award, and should have begun on November 21, 2010. In support of her argument, appellant cited Chapter 2.808.9(a) of FECA procedure manual which stated, "If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same, and the revised award will begin on the day following the end of the award issued previously."¹³ She also submitted the February 1, 2011 schedule award decision, the April 23, 2013 schedule award decision, citations to FECA procedure manual, a January 20, 2012 medical report from Dr. Weiss, and a September 23, 2013 letter from Dr. Weiss.

By letter dated September 23, 2013, received by OWCP on February 6, 2014, Dr. Weiss reported that appellant brought to his attention that the new accepted percentages which were calculated in his updated January 20, 2012 report were not used to calculate her impairment from March 24 through November 20, 2010. He submitted an attached report for review of the impairment percentages.

A report dated January 20, 2012 from Dr. Weiss was newly submitted in support of appellant's claim. The original report was dated January 17, 2012 with an "updated" date of January 20, 2012. In the updated January 20, 2012 report, Dr. Weiss placed appellant in class 2 primary right knee joint arthritis with a default value of 20 percent. He found no applicable grade modifier for clinical studies and assigned a grade modifier 3 for functional history and grade modifier 2 for physical examination.¹⁴ Applying the Net Adjustment Formula, Dr. Weiss subtracted 2, the numerical value of the class, from the numerical value of the grade modifier for each applicable component (functional history and physical examination) and then added those values, resulting in a net adjustment of 1 ((3-2) + (2-2)). Application of the Net Adjustment Formula meant that movement was warranted one place to the right of class 2 default value grade C to grade D yielding a 22 percent impairment of the right lower extremity. Dr. Weiss did not modify his 13 percent left lower extremity impairment rating, nor did he modify the date of MMI as January 17, 2012. He concluded that appellant's final combined right lower extremity impairment amounted to 32 percent.

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(a) (February 2013).

¹⁴ A.M.A., *Guides* 517, Table 16-7.

By decision dated August 28, 2014, OWCP denied modification of the April 23, 2013 schedule award decision. As appellant did not contest the percentage of permanent impairment in her January 30, 2014 request for reconsideration, OWCP did not review the impairment calculation Dr. Weiss provided in his updated January 20, 2012 report. OWCP found that it correctly paid her schedule award based on the January 17, 2012 date of MMI. It noted that the April 23, 2013 decision was not an amended schedule award, but rather was an increased schedule award based on Dr. Weiss' January 17, 2012 report and the DMA's April 8, 2013 report.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.¹⁵ 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 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.¹⁶

ANALYSIS

OWCP has accepted that appellant sustained injury on April 28, 2000 which caused left ankle sprain, tear of the medial meniscus of the right knee, tear of the lateral meniscus of the right knee, osteoarthritis of the left lower leg, and multiple site joint pain. By decision dated February 1, 2011, it granted her a schedule award claim for 2 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity. The date of MMI was noted as April 28, 2001 and the award covered a period of 34.56 weeks from March 24 to November 20, 2010. The schedule award was based on Dr. Varialle's August 10, 2010 evaluation, impairment rating, and date of MMI which was confirmed by an OWCP DMA.

Later appellant submitted a new report from Dr. Weiss and OWCP, by decision dated April 23, 2013, granted an additional schedule award of 16 percent of the right lower extremity and an additional 3 percent impairment of the left lower extremity.

On January 30, 2014 appellant requested reconsideration of OWCP's April 23, 2013 decision. She did not contest the percentage of impairment awarded, but argued that, as the April 23, 2013 award was an amended schedule award, the period of the award should have started on November 21, 2010, the day following the end of the previously issued schedule award and not on January 17, 2012.

¹⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

¹⁶ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

By decision dated August 28, 2014, OWCP denied modification of its April 23, 2013 schedule award decision finding that it correctly paid appellant's schedule award based on the January 17, 2012 date of MMI. It noted that the April 23, 2013 decision was not an amended schedule award and rather was an award for an increased schedule award based on Dr. Weiss' January 17, 2012 report and the April 8, 2013 DMA report.

The Board finds that OWCP properly determined that appellant's April 23, 2013 schedule award was an increased schedule award and not an amended award of the previously issued February 1, 2011 award.

The February 1, 2011 schedule award was based on Dr. Varialle's August 10, 2010 evaluation and impairment rating which was confirmed by an OWCP DMA. On January 26, 2012 appellant requested reconsideration and submitted a new evaluation and impairment rating from Dr. Weiss dated January 17, 2012 to establish an increased schedule award. There was no allegation that the previous schedule award was incorrect.

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 the time of the original award, 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.¹⁷

OWCP procedures clearly explain that if it is determined after payment of a schedule award that the award was erroneous and the claimant was entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same, and the revised award will begin on the day following the end of the award issued previously. If, on the other hand, the claimant sustains increased impairment at a later date which is due to work-related factors, an additional award will be payable if supported by the medical evidence. In this case, the original award is undisturbed and the new award has its own date of MMI, percent of impairment, and period of award. This may occur if the claimant sustains additional impairment due to the original work factors with no intervening or additional exposure to those same work factors.¹⁸

In this instance, appellant submitted a new January 17, 2012 evaluation and impairment rating from Dr. Weiss who determined that she was entitled to 18 percent permanent impairment for the right lower extremity and 13 percent permanent impairment of the left lower extremity based on a new January 17, 2012 date of MMI. On April 8, 2013 an OWCP DMA confirmed

¹⁷ *R.L.*, Docket No. 09-1948 (issued June 29, 2010); *B.K.*, 59 ECAB 228, 229-30 (2007); *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); see *Leonard E. Redway*, 28 ECAB 242, 246-47 (1977).

¹⁸ *Supra* note 13.

Dr. Weiss' findings. Appellant did not assert that the original February 11, 2011 schedule award was erroneous based on her medical condition on February 11, 2011.¹⁹ Rather, she submitted medical evidence in support of an increased impairment on a later date based on Dr. Weiss' January 17, 2012 evaluation. Appellant did not establish entitlement to an amended award as she did not establish that she was entitled to a greater percentage of loss as of February 1, 2011, the date of the initial schedule award.²⁰

Regarding the date of MMI for the increased schedule award, OWCP procedures explain that schedule awards begin on the date of MMI, unless circumstances show a later date should be used.²¹ The MMI date is determined solely on the basis of the medical evidence; however, a subsequent date may be chosen to start the award if the MMI date falls within a period of compensable disability such that converting disability payments into a schedule award would be disadvantageous to the claimant.²²

Based on the evidence of record, there is no indication that OWCP incorrectly utilized January 17, 2012 as the date of MMI for the increased schedule award. It further correctly determined that the date of the award started on January 17, 2012.²³ Dr. Weiss and the DMA both agreed that the date of MMI for the increased impairment was January 17, 2012 based on the date of evaluation.²⁴ As appellant submitted support for an increased impairment at a later date, the original February 1, 2011 award was undisturbed and the new award had its own date of MMI, percent of impairment, and period of award.

On appeal, appellant alleges that, because OWCP determined that the April 23, 2013 schedule award was an increased award and not an amended award, it erroneously deducted the previously awarded 2 percent permanent impairment of the right lower extremity and 10 percent permanent impairment of the left lower extremity issued in the February 1, 2011 decision.

OWCP procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.²⁵ Appellant previously received an award for 2 percent impairment to her right lower extremity, and an award for 10 percent impairment to the left lower extremity, these amounts were properly subtracted from the current determination.²⁶

¹⁹ See *M.M.*, Docket No. 14-192 (issued May 22, 2014).

²⁰ *Supra* note 13.

²¹ *Supra* note 13, at Chapter 2.808.7(b).

²² See *Franklin L. Armfield*, 28 ECAB 445 (1977).

²³ *L.M.*, Docket No. 09-690 (issued December 29, 2009).

²⁴ The Board is reluctant to find a retroactive date of MMI absent persuasive proof. *E.L.*, Docket No. 13-943 (issued November 8, 2013).

²⁵ *Supra* at note 13, Chapter 2.808.7.a(1).

²⁶ See *G.B.*, Docket NO. 15-0445 (issued May 4, 2015).

On appeal before the Board, appellant also argues that Dr. Weiss' January 20, 2012 report establishes that she is entitled to a greater impairment of the right lower extremity. The Board notes that when requesting reconsideration of OWCP's April 23, 2013 decision, appellant did not contest the percentage of impairment. Rather, she argued that the period of her award should begin on November 21, 2010. As appellant did not contest the percentage of the award, OWCP did not address this issue in its August 28, 2014 decision, and this issue is not before the Board on this appeal.²⁷

Appellant may request an 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.

CONCLUSION

The Board finds that OWCP properly determined that appellant's April 23, 2013 schedule award was an increased schedule award and not an amended award of the previously issued February 1, 2011 award. The Board further finds that she reached MMI on January 17, 2012 and the period of the award properly started on that date.

²⁷ *T.B.*, Docket No. 15-0001 (issued July 1, 2015).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 28, 2014 is affirmed.

Issued: October 19, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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