



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated March 8, 2010, the Board affirmed November 25, 2008 and March 4, 2009 OWCP decisions determining appellant's pay rate for compensation purposes.<sup>3</sup> The Board further affirmed in part and set aside in part an August 28, 2009 overpayment decision. The Board affirmed fact and amount of overpayment, but remanded the case for OWCP to reconsider waiver of recovery of the overpayment. The facts and the circumstances from the prior decision of the Board are incorporated herein by reference. The facts relevant to the instant appeal are set forth.

On July 18, 2000 appellant, then a 46-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2000 he injured his shoulder and neck in the performance of duty. OWCP accepted the claim, assigned file number xxxxxx970, for right lateral epicondylitis and displacement of a cervical intervertebral disc without myelopathy.

OWCP additionally accepted that appellant sustained a right hand contusion, a crush injury of the right fingers, right carpal tunnel syndrome, a right Boutonniere deformity, and traumatic right hand arthropathy due to a May 8, 2001 employment injury under file number xxxxxx500. It also accepted that he sustained right carpal tunnel syndrome due to a June 5, 2003 employment injury under file number xxxxxx576.<sup>4</sup> In an April 16, 2003 decision, OWCP granted appellant a schedule award for 20 percent permanent impairment of the right hand due to his May 8, 2001 employment injury under file number xxxxxx500.

In a decision dated December 8, 2003, OWCP granted appellant a schedule award for 20 percent permanent impairment of each upper extremity due to cervical radiculopathy under file number xxxxxx970. It subtracted the 20 percent permanent right hand impairment previously compensated from the schedule award.

On February 21, 2008 appellant filed a claim for an increased schedule award under file number xxxxxx970. In a decision dated March 11, 2008, OWCP denied his claim for an additional schedule award.

On March 14, 2008 appellant requested a review of the written record by an OWCP hearing representative in file number xxxxxx970. In a decision dated August 26, 2008, the hearing representative affirmed the March 11, 2008 decision.

On October 14, 2008 appellant requested reconsideration. In a decision dated November 6, 2008, OWCP vacated its March 11, 2008 decision. It found that appellant had an additional 3 percent permanent impairment of each upper extremity due to a sensory deficit of the C5 nerve root which, when combined with the prior award of 20 percent, yielded a total

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<sup>3</sup> Docket Nos. 09-1090 and 09-0226 (issued March 8, 2010).

<sup>4</sup> In a decision dated January 10, 2005, OWCP granted appellant a schedule award for five percent permanent impairment of the right thumb under file number xxxxxx576.

permanent impairment of 22 percent. By decision dated November 7, 2008, OWCP granted him a schedule award for an additional 2 percent permanent impairment of each arm.<sup>5</sup>

On March 17, 2009 OWCP combined file number xxxxxx500 into master file number xxxxxx970.

On December 19, 2011 appellant filed a schedule award claim for an additional impairment to the left upper extremity. By decision dated April 2, 2012, OWCP denied his request for an increased schedule award. Appellant requested reconsideration and, in a decision dated July 2, 2012, OWCP denied his request to reopen his case for further merit review of its April 2, 2012 decision under 5 U.S.C. § 8128(a).

On July 25, 2012 appellant again requested reconsideration. He submitted a July 25, 2012 report from Dr. Jeffrey A. Fried, a Board-certified orthopedic surgeon. Dr. Fried opined that appellant had “23 percent whole person impairment due to cervical radiculitis -- up one percent from 2008 -- due to interference with activities of daily living.”<sup>6</sup>

On September 25, 2012 an OWCP medical adviser noted that the prior awards for the 22 percent impairment of the left upper extremity included the extent of interference with activities of daily living and thus determined that an additional schedule award would duplicate the prior rating.<sup>7</sup>

By decision dated October 9, 2012, OWCP denied modification of its July 2, 2012 decision. It found that Dr. Fried did not properly apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009) in reaching his impairment rating.

On April 26, 2013 appellant requested reconsideration.<sup>8</sup> He submitted an April 17, 2013 report from Dr. Fried again indicating that he had 23 percent whole person impairment as the result of cervical radiculopathy. In a decision dated May 15, 2013, OWCP denied appellant’s

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<sup>5</sup> Appellant, on November 13, 2008, argued that OWCP incorrectly calculated his pay rate in its schedule award decisions. In a decision dated November 25, 2008, OWCP found that it had paid him at an inaccurate rate from October 11, 2002 to September 17, 2003 as it should have based his pay rate on the date of injury. In a March 4, 2009 decision, an OWCP hearing representative affirmed the November 25, 2008 pay rate determination. In a decision dated August 29, 2009, an OWCP hearing representative found that appellant received an overpayment of compensation because he was paid at an incorrect rate. She denied waiver of recovery of the overpayment as he failed to provide adequate documentation. As discussed above, on March 3, 2010 the Board affirmed OWCP’s pay rate determination and fact and amount of overpayment, but remanded the case for it to reconsider waiver. On April 22, 2010 OWCP waived recovery of the overpayment after finding that recovery would defeat the purpose of FECA.

<sup>6</sup> The record contains substantially similar reports from Dr. Fried dated April 23 and June 18, 2012.

<sup>7</sup> On the same date, another OWCP medical adviser also reviewed the medical evidence and advised that the record did not contain a current medical report with a detailed impairment evaluation based on objective findings.

<sup>8</sup> In reports dated September 5, 2012 and January 16, 2013, Dr. Fried again advised that appellant had 23 percent whole person impairment due to cervical radiculopathy.

request for reconsideration as he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review.<sup>9</sup>

In a letter dated August 19, 2013, OWCP informed Dr. Fried that it had previously approved a schedule award for appellant's left upper extremity based on cervical radiculopathy rather than an accepted left arm condition. It requested that he provide an opinion regarding whether there were additional conditions due to work factors or injuries that occurred before August 2004.<sup>10</sup>

On October 18, 2013 appellant requested an additional schedule award. He submitted a July 17, 2013 report from Dr. Fried. Dr. Fried diagnosed cervical disc displacement, right carpal tunnel syndrome, contracture at the proximal interphalangeal (PIP) joint of the right little finger, acquired spondylolisthesis, left elbow bursitis, and right shoulder joint pain. On examination he found reduced range of motion of the shoulders and cervical spine and 4/5 motor strength of the abductors of the left shoulder. Dr. Fried opined that appellant he had 23 percent whole person impairment that had increased from the 2008 award by 1 percent due to difficulties with activities of daily living.

In a decision dated December 3, 2013, OWCP denied appellant's claim for an increased schedule award. It determined that he had not submitted evidence from a physician who properly applied the A.M.A., *Guides* and found an additional impairment rating beyond that previously awarded.

On December 6, 2013 appellant requested a review of the written record.

In a report dated February 27, 2014, Dr. Fried advised that appellant had 23 percent whole person impairment that had increased by 1 percent since 2008 "due to interference with activities of daily living -- left rotator cuff syndrome."

In a decision dated May 15, 2014, an OWCP hearing representative affirmed the December 3, 2013 decision. She found that Dr. Fried's reports were duplicative in nature and not based on the A.M.A., *Guides*.

On October 20, 2014 appellant requested reconsideration of the May 15, 2014 decision. In a decision dated November 20, 2014, OWCP denied his request to reopen his case for further review of the merits under section 8128(a).

In reports dated May 28 and September 22, 2014, Dr. Fried again advised that appellant had 23 percent whole person impairment that had increased by 1 percent due to left rotator cuff syndrome.

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<sup>9</sup> By letter dated May 18, 2013, appellant requested a review of the written record. In a decision dated June 25, 2013, OWCP determined that he was not entitled to a hearing as a matter of right under section 8124 as he had previously received reconsideration. It found that the matter could be equally well addressed through a reconsideration request and the submission of evidence showing an additional impairment.

<sup>10</sup> The employing establishment placed appellant on administrative leave in August 2004 and removed him from employment in December 2004 due to misconduct.

In a report dated December 18, 2014, Dr. Fried noted that appellant “sustained a rotator cuff injury and using the [A.M.A., *Guides*] [appellant] has an additional one [percent] upper body impairment due to loss of motion, which was never awarded.” He also diagnosed spondylolisthesis causally related to appellant’s June 28, 2000 work injury.

On January 14, 2015 appellant requested reconsideration.

On February 13, 2015 an OWCP medical adviser reviewed Dr. Fried’s report. He noted that OWCP had not accepted that appellant sustained a rotator cuff injury and that he was consequently not entitled to a schedule award for loss of motion as a result of that condition.<sup>11</sup> The medical adviser further noted that OWCP had not accepted spondylolisthesis at L4-5.

By decision dated April 20, 2015, OWCP denied modification of its May 15, 2014 decision.

On April 20, 2015 appellant requested reconsideration and on May 8, 2015 he requested a review of the written record. By letter dated May 14, 2015, OWCP advised him that it would not take further action on the reconsideration request given his request for a review of the written record.

In a decision dated May 19, 2015, OWCP found that appellant was not entitled to a review of the written record as a matter of right as he had previously received reconsideration. Exercising its discretion, it denied his request for a review of the written record after finding that the matter could be equally well addressed through the reconsideration process.

On appeal appellant contends that he is entitled to 23 percent whole person impairment.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA,<sup>12</sup> and its implementing federal regulations,<sup>13</sup> 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>14</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>15</sup>

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<sup>11</sup> The medical adviser referred to an impairment of the right rather than left upper extremity; however, this appears to be a typographical error.

<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404.

<sup>14</sup> *Id.* at § 10.404(a).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The sixth edition requires identifying the impairment class for the diagnosed condition Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>16</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, he or she has the burden of proof to establish a greater impairment causally related to the employment injury.<sup>17</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained right lateral epicondylitis and a displaced cervical intervertebral disc without myelopathy from a June 28, 2000 employment injury, and assigned file number xxxxxx970. It further accepted that he sustained a crush injury of the right fingers, a right hand contusion, right carpal tunnel syndrome, a right Boutonniere deformity, and arthropathy of the right hand under file number xxxxxx500 and right carpal tunnel syndrome under file number xxxxxx576.

In a decision dated April 16, 2003, OWCP granted appellant a schedule award for a 20 percent permanent impairment of the right hand. By decision dated December 8, 2003, it issued him a schedule award for 20 percent permanent impairment of each upper extremity due to cervical radiculopathy after subtracting the previous award for 20 percent permanent right hand impairment. On November 7, 2008 OWCP granted appellant a schedule award for an additional two percent impairment of each arm due to sensory loss from a cervical nerve root.

Appellant subsequently requested an increased schedule award and submitted numerous reports from Dr. Fried from 2012 to 2013, which OWCP denied in merit decisions dated April 2 and October 9, 2012.

On October 18, 2013 appellant again requested an increased schedule award. In support of his request, he submitted a July 17, 2013 report from Dr. Fried. Dr. Fried opined that appellant had a whole person impairment of 23 percent as a result of cervical radiculitis. FECA, however, does not provide for impairment of the whole person, and thus his opinion is insufficient to show that appellant is entitled to an additional schedule award.<sup>18</sup>

In a report dated February 27, 2014, Dr. Fried opined that appellant had an additional one percent whole person impairment as a result of left rotator cuff syndrome. He submitted similar reports on May 28 and September 22, 2014. OWCP, however, has not accepted that appellant sustained a left upper extremity impairment under either file number xxxxxx970 or xxxxxx500. A schedule award must arise from a condition related to an employment injury.<sup>19</sup> Additionally,

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<sup>16</sup> A.M.A., *Guides* 494-531.

<sup>17</sup> *Edward W. Spohr*, 54 ECAB 806 (2003).

<sup>18</sup> *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>19</sup> *Veronica Williams*, 56 ECAB 367 (2005).

as discussed, schedule awards are not paid for whole person impairments.<sup>20</sup> Dr. Fried further did not explain the protocols that he used in making the impairment determination; consequently, his opinion is insufficient to establish permanent impairment.<sup>21</sup>

On December 18, 2014 Dr. Fried noted appellant's history of a June 28, 2000 employment injury. He related that, pursuant to the A.M.A., *Guides*, he had an additional upper extremity impairment of one percent due to loss of motion. Dr. Fried did not specify which side of the body had increased impairment or reference the tables and provisions of the A.M.A., *Guides*. A physician must support his impairment rating by specifically referencing the tables or other provisions of the A.M.A., *Guides* and explaining the application of the provisions.<sup>22</sup> Dr. Fried's report does not conform to the A.M.A., *Guides*; thus, it is of diminished probative value.<sup>23</sup>

On appeal appellant argues that he is entitled to 23 percent whole person impairment. As noted, however, FECA does not provide for payment of a schedule award for impairment of the whole person.<sup>24</sup>

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**

Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>25</sup> OWCP regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>26</sup>

Additionally, the Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and OWCP must exercise this discretionary authority in

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<sup>20</sup> *Id.*

<sup>21</sup> See *Carl J. Cleary*, 57 ECAB 563 (2006) (an opinion which is not based upon the standards adopted by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of permanent impairment).

<sup>22</sup> See *E.L.*, Docket No. 13-0894 (issued July 8, 2013); *Mary L. Henninger*, 52 ECAB 408 (2001).

<sup>23</sup> See *Mary L. Henninger*, *id.*

<sup>24</sup> See *F.J.*, Docket No. 15-0610 (issued May 8, 2015); *Gordon G. McNeill*, 42 ECAB 140 (1990).

<sup>25</sup> 5 U.S.C. § 8124(b)(1).

<sup>26</sup> 20 C.F.R. § 10.616(a).

deciding whether to grant a hearing.<sup>27</sup> OWCP's procedures, which require it to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of FECA and Board precedent.<sup>28</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

In decisions dated December 3, 2013 and May 15, 2014, OWCP denied appellant's claim for an increased schedule award. On October 20, 2014 appellant requested reconsideration, which OWCP denied in a nonmerit decision dated November 20, 2014. He again requested reconsideration on January 15, 2015. By decision dated April 20, 2014, OWCP denied modification of the May 15, 2014 decision. On May 8, 2015 appellant requested a review of the written record. As he had previously requested reconsideration, he was not entitled to a review of the written record as a matter of right under section 8124(b)(1).<sup>29</sup>

In its May 19, 2015 decision, OWCP exercised its discretion and determined that appellant's request for a review of the written record could be equally well addressed by a request for reconsideration and the submission of evidence showing that he has a greater impairment than that previously awarded. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logical and probable deductions from established facts.<sup>30</sup> The Board finds that there is no evidence that OWCP abused its discretion in denying appellant's request for a review of the written record.

### **CONCLUSION**

The Board finds that appellant has not established that he has more than 22 percent permanent impairment of each upper extremity. The Board further finds that OWCP properly denied his request for a review of the written record as he had previously requested reconsideration.

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<sup>27</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>28</sup> *Teresa M. Valle*, 57 ECAB 542 (2006); *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>29</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a); *see also T.S.*, Docket No. 15-1119 (issued August 10, 2015).

<sup>30</sup> *See L.L.*, Docket No. 12-0309 (issued August 7, 2012); *Samuel R. Johnson*, 51 ECAB 612 (2000).



**ORDER**

**IT IS HEREBY ORDERED THAT** the May 19 and April 20, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 22, 2015  
Washington, DC

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