

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

M.M., Appellant)	
)	
and)	Docket No. 16-0388
)	Issued: April 18, 2016
U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 23, 2015 appellant timely appealed an October 28, 2015 merit decision and a November 25, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has a ratable impairment of the left upper extremity and bilateral lower extremities; and (2) whether OWCP properly denied further merit review pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence with her appeal. The Board is precluded from reviewing any evidence that was not in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, this additional evidence cannot be considered by the Board.

FACTUAL HISTORY

This case has previously been before the Board.³ Appellant, a 59-year-old former sales and service associate, has an employment-related bilateral foot condition and a consequential left shoulder injury. Her bilateral foot condition initially arose on or about May 1, 2004 (xxxxxx163). Appellant sustained a subsequent work-related bilateral foot injury on or about March 30, 2009 (xxxxxx970). Her accepted conditions include bilateral plantar fasciitis, foot-related chronic pain syndrome, and left rotator cuff tear.⁴ Appellant last worked in May 2009, and received a disability retirement effective July 13, 2009.

Appellant has received multiple schedule awards. On June 27, 2008 she received a schedule award for two percent permanent impairment of the left leg due to a hind foot inversion deficit. The award was based on the then-applicable fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2001). By decision dated September 16, 2009, OWCP granted a schedule award for 11 percent permanent impairment of the right lower extremity (RLE) and an additional 12 percent impairment of the left lower extremity (LLE).⁵ The September 2009 award was under the sixth edition of the A.M.A., *Guides* (2009) and included impairment due to both hind foot and ankle range of motion (ROM) deficits. On October 25, 2012 OWCP granted a schedule award for two percent impairment of the left upper extremity due to shoulder impingement syndrome.⁶ It also found that appellant was not entitled to any additional impairment of the lower extremities under the sixth edition of the A.M.A., *Guides*. The October 25, 2012 decision was based on the June 12, 2012 medical report of a Dr. Robyn Roberts.

In February 2013, appellant requested reconsideration of her October 25, 2012 schedule award. OWCP later realized that it had mistakenly relied on June 12, 2012 findings of an occupational therapist, rather than a qualified physician. As a result, it referred appellant for a second opinion examination with Dr. B. Thomas Jeffcoat, a Board-certified orthopedic surgeon.⁷

In a report dated September 26, 2013, Dr. Jeffcoat found one percent bilateral lower extremity impairment and no ratable (zero) impairment of the left upper extremity. In an October 4, 2013 supplemental report, he indicated that appellant had no ratable (zero) lower extremity impairment under Table 16-2, Foot and Ankle Regional Grid (LEI), A.M.A., *Guides* 501 (6th ed. 2009). With respect to her left upper extremity, Dr. Jeffcoat's supplemental report

³ Docket No. 14-1021 (issued July 1, 2015).

⁴ Appellant's left shoulder condition was the result of a January 1, 2010 off-premises fall, which she attributed to left foot discomfort and pain. OWCP doubled her lower extremity occupational disease claims and designated claim number xxxxxx163 as the master file.

⁵ The district medical adviser (DMA) found 14 percent LLE impairment. However, OWCP paid only 12 percent in light of appellant's June 27, 2008 two percent LLE award.

⁶ See A.M.A., *Guides* 402 (6th ed. 2009), Table 15-5, Shoulder Regional Grid. Appellant had undergone left shoulder arthroscopic decompression on March 25, 2011.

⁷ Dr. Jeffcoat had previously examined appellant on July 9, 2009. At that time, he found two percent bilateral lower extremity impairment under A.M.A., *Guides* 501 (6th ed. 2009), Table 16-2, Foot and Ankle Regional Grid (LEI).

indicated that she had no impairment (zero) under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2009).

In an October 11, 2013 report, the DMA concurred with Dr. Jeffcoat's finding of no ratable (zero) impairment of the upper and lower extremities under the sixth edition of the A.M.A., *Guides*.

By decision dated October 16, 2013, OWCP modified its October 25, 2012 schedule award to reflect no ratable (zero) impairment of the left upper extremity and bilateral lower extremities under the sixth edition of the A.M.A., *Guides*. It subsequently denied reconsideration in a February 25, 2014 decision.

When this case was last on appeal, the Board set aside OWCP's October 16, 2013 schedule award decision, and remanded the matter for further medical development. The Board found that OWCP's reliance on Dr. Jeffcoat's second opinion evaluation was misplaced given a number of noted deficiencies, including the doctor's failure to adequately explain how he arrived at his upper and lower extremity impairment ratings.⁸ The Board's July 1, 2015 decision is incorporated herein by reference.⁹

On remand, OWCP referred appellant for another second opinion examination. Dr. Daniel P. Dare, a Board-certified orthopedic surgeon and OWCP-referral physician, provided results on examination in an October 1, 2015 report. He reviewed appellant's prior medical records regarding her accepted conditions and the August 5, 2013 statement of accepted facts (SOAF), which included information regarding her prior schedule awards, her date-of-injury job duties, and various surgeries she had undergone with respect to her accepted conditions.¹⁰ As to the shoulder, Dr. Dare found the examination "entirely unremarkable." Appellant had full range of motion, normal strength, and there was no instability. Additionally, Dr. Dare noted that there was no evidence of impingement or tendinitis. He stated: "In essence, this was a normal examination." With respect to appellant's feet, Dr. Dare noted that on inspection she had calluses on the heel, which was indicative of ambulation on the heel. He also noted incisions from her prior plantar fasciotomy, and commented that whenever he came close to touching her skin, she would jump "implying ... pain even at the very lightest touch." Dr. Dare further noted that when appellant ambulated, she made a point of walking on her toes. Appellant advised him that she walked this way because she could not bear weight on her heel, but Dr. Dare noted that when she thought she was unobserved, she did put weight on her heel.

Dr. Dare's lower extremity diagnoses included history of chronic plantar fasciitis with multiple extracorporeal shock treatments and subsequent plantar fasciotomy, and

⁸ The Board explained that once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that resolves the relevant issues in the case. *Richard F. Williams*, 55 ECAB 343, 346 (2004).

⁹ *Supra* note 3.

¹⁰ The record also included evidence regarding appellant's cervical and lumbar degenerative disc disease; conditions that have not been accepted under the current claims. In his October 5, 2015 report, Dr. Dare questioned why this evidence was included given that the August 5, 2013 SOAF made no mention of any accepted spine condition.

well-documented chronic pain behavior. With respect to appellant's left upper extremity, he diagnosed impingement with partial rotator cuff tear, which was "totally resolved following arthroscopic surgery...." Dr. Dare believed that appellant had reached maximum medical improvement. He found "no problems whatsoever with her left shoulder," and therefore zero impairment of the left upper extremity. Regarding appellant's lower extremities, Dr. Dare noted that there were no true objective findings. He further noted that she exhibited a lot of pain behavior and possibly secondary gain behavior. In conclusion, Dr. Dare indicated that he could not assign appellant any disability whatsoever to either lower extremity.

On October 27, 2015 the DMA, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon, concurred with Dr. Dare's findings. The DMA indicated that Dr. Dare's October 5, 2015 second opinion evaluation was "thorough and objective." He further noted that Dr. Dare reviewed a large medical record, obtained a history, and examined appellant. The DMA explained that there were no findings that provided a basis for an additional impairment of the right or LLE or of the left upper extremity. Consequently, he found zero percent impairment of the RLE, LLE, and left upper extremity.

In an October 28, 2015 decision, OWCP found that appellant had zero percent impairment of the left upper extremity and zero percent impairment of the bilateral lower extremities. The decision also noted that the current medical evidence demonstrated that she had zero percent impairment of the right arm.¹¹

Appellant timely requested reconsideration. She submitted the appeal request form that accompanied the October 28, 2015 merit decision. Appellant also submitted a six-page handwritten letter dated November 3, 2015. In her letter, she expressed disagreement with Dr. Dare's impairment rating. Lastly, appellant submitted a copy of OWCP's October 4, 2010 notification that her bilateral lower extremity claim (xxxxxxx970) had been expanded to include chronic pain syndrome.

In a November 25, 2015 decision, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹² FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for

¹¹ The current claims have not been accepted for an injury involving the right upper extremity.

¹² For total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) and for a 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. *Id.* at § 8107(c)(2).

evaluating schedule losses.¹³ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁴

ANALYSIS -- ISSUE 1

In its July 1, 2015 decision, the Board remanded the case for further medical development regarding the existence and extent of any left upper extremity and bilateral lower extremity impairment due to appellant's accepted bilateral foot condition and left shoulder condition. On remand, OWCP referred her for a second opinion evaluation with Dr. Dare, who found zero percent permanent impairment of her left upper extremity and zero percent permanent impairment of the bilateral lower extremities. In an October 27, 2015 report, the DMA concurred with Dr. Dare's October 5, 2015 findings. Based on the latest medical evidence, OWCP issued an October 28, 2015 merit decision finding that appellant had zero percent upper or lower extremity impairment under the A.M.A., *Guides* (6th ed. 2009). The decision effectively nullified appellant's prior schedule awards dated September 16, 2009 and October 25, 2012.

The Board finds that Dr. Dare's October 5, 2015 report established that appellant has no ratable impairment of the left upper extremity and bilateral lower extremities. He indicated that her accepted left shoulder injury had "totally resolved following arthroscopic surgery..." According to Dr. Dare, appellant's bilateral shoulder examination was "entirely unremarkable." She had full range of motion, normal strength, no instability, and no evidence of impingement or tendinitis. Dr. Dare characterized it as a "normal examination." Accordingly, he found zero percent impairment of the left upper extremity.

With respect to appellant's lower extremities, Dr. Dare indicated that there were no true objective findings. He also noted that she exhibited a lot of pain behavior and possibly secondary gain behavior. In light of these factors, Dr. Dare did not assign any impairment to either lower extremity. As previously noted, the DMA concurred with his October 5, 2015 findings. Since the case was last before the Board, appellant has not submitted any additional medical evidence indicating that she currently has a ratable impairment under the A.M.A., *Guides* (6th ed. 2009). Accordingly, the Board affirms OWCP's October 28, 2015 decision with respect to her left upper extremity and bilateral lower extremities.

Appellant may request a schedule award or increase 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 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a

¹³ 20 C.F.R. § 10.404.

¹⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); see also Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

matter of right.¹⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁶ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁷ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁹

ANALYSIS -- ISSUE 2

OWCP received appellant's November 3, 2015 request for reconsideration on November 9, 2015. Appellant submitted the appeal request form that accompanied the October 28, 2015 merit decision, as well as a six-page handwritten letter. She expressed her disagreement with Dr. Dare's October 5, 2015 opinion. Appellant noted problems with her neck, left shoulder, lower back, and both legs and feet. She also claimed that Dr. Dare hurt her back during the October 5, 2015 examination. Lastly, appellant noted that she had undergone cervical fusion and she believed that her neck condition should have been rated because it was related to her left arm complaints.²⁰

The Board notes that appellant's cervical condition has not been accepted under the current claims, and Dr. Dare's October 5, 2015 upper extremity examination was "entirely unremarkable." The Board finds that appellant's November 3, 2015 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. Accordingly, she is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).²¹

¹⁵ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.607.

¹⁷ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁸ 20 C.F.R. § 10.606(b)(3).

¹⁹ *Id.* at §§ 10.607(b), 10.608(b).

²⁰ On October 5, 2009 appellant underwent C5-6 anterior cervical discectomy with interbody fusion.

²¹ 20 C.F.R. § 10.606(b)(3)(i) and (ii).

Appellant also failed to submit any “relevant and pertinent new evidence not previously consider by OWCP “with her November 3, 2015 request for reconsideration. She did not submit any new medical evidence on reconsideration. All appellant submitted was a copy of OWCP’s October 4, 2010 notification that her claim (xxxxxx970) had been expanded to include foot-related chronic pain syndrome. Because she did not provide any “relevant and pertinent new evidence,” she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).²² Accordingly, OWCP properly declined to reopen appellant’s case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant failed to establish a ratable impairment of the left upper extremity and bilateral lower extremities. The Board further finds that OWCP properly denied her November 3, 2015 request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 25 and October 28, 2015 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: April 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees’ Compensation Appeals Board

²² *Id.* at § 10.606(b)(3)(iii).