



## **FACTUAL HISTORY**

On June 20, 2011 appellant, then a 62-year-old budget technician, filed an occupational disease claim (Form CA-2) alleging that she developed a right knee injury as a result of her federal employment duties which consisted of walking, rising from her desk, and using stairs occasionally at work. Appellant did not work from July 17 to 30, 2011 and received wage-loss compensation.

By decision dated December 7, 2012, OWCP accepted the claim for temporary aggravation of right knee osteoarthritis and temporary aggravation of right lateral meniscus derangement.

On February 25, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a May 13, 2013 medical report, Dr. H. Daniel Maghen, a Board-certified orthopedic surgeon, diagnosed osteoarthritis of the right knee and acute right knee tear of the lateral meniscus. He recommended total knee arthroplasty.

In a May 13, 2013 report, Dr. John Carmel Norton, Board-certified in occupational medicine, diagnosed osteoarthritis of the left knee, derangement of left lateral meniscus, acquired left genu valgum, left chondromalacia patella, osteoarthritis of the right knee, and derangement of lateral meniscus. He provided appellant permanent modified work restrictions and reported that she had reached maximum medical improvement as of May 13, 2013.

On May 13, 2013 appellant was provided full-time modified work with restrictions.

OWCP referred appellant, a statement of accepted facts (SOAF),<sup>2</sup> and the case record to Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon, for a second opinion evaluation on February 21, 2014 to determine whether appellant was entitled to a schedule award for a permanent impairment causally related to her accepted employment injury. Dr. Rogachefsky reported that appellant was not compliant and did not participate adequately in the physical examination. He further noted that based on her work activities of walking to a printer, rising from a desk, and walking to elevators, he did not see a work-related causation for the bilateral knee conditions and bilateral degenerative arthritis. Dr. Rogachefsky opined that these were nonwork-related diagnoses/injuries and preexisting conditions. He explained that her conditions were not work related as appellant did not have any acute events and only claimed repetitive work caused her injuries. As such, Dr. Rogachefsky determined that a schedule award would not be appropriate.

By decision dated April 17, 2014, OWCP denied appellant's claim for a schedule award as the evidence was not sufficient to establish that she sustained any permanent impairment to a

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<sup>2</sup> The SOAF indicated that appellant had a prior January 3, 2001 injury accepted for bilateral knee contusions and left hip contusion which was in a closed status. Appellant also had an August 4, 2010 left knee injury accepted for sprain and strain of left knee, for which a schedule award was paid for permanent impairment. She further had an October 27, 2000 right knee injury accepted for right knee contusion, which was also in a closed status. The record before the Board contains no other information pertaining to appellant's prior claims.

member or function of the body. It noted that appellant failed to adequately participate in Dr. Rogachefsky's physical examination and that he found no impairment causally related to her work injury.

On May 20, 2015 appellant filed another claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a June 3, 2015 impairment rating from Dr. Mesfin Seyoum, a treating physician. Dr. Seyoum provided a detailed medical history, reviewed appellant's prior diagnostic and medical reports, and set forth findings on physical examination. In accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*),<sup>3</sup> he determined that maximum medical improvement had been reached. Using Table 16-3, Table 16-6, Table 16-7, and Table 16-8 of the sixth edition of the A.M.A., *Guides*, he classified the right knee cruciate and lateral collateral ligaments in class 2 and calculated a right lower extremity impairment of 22 percent.<sup>4</sup>

By letter dated June 3, 2015, OWCP informed appellant that it received her May 20, 2015 request for a schedule award, but that no further action would be taken on the claim. It noted that it had issued an April 17, 2014 schedule award decision and if she disagreed with the decision, she should file an appeal.

By letter dated June 30, 2015, appellant argued that Dr. Seyoum's report established her entitlement to a schedule award and that OWCP failed to consider her May 20, 2015 request for a schedule award.

On August 7, 2015 appellant requested reconsideration of the April 17, 2014 schedule award decision.

By decision dated November 2, 2015, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

### **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.<sup>5</sup> 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

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<sup>3</sup> A.M.A., *Guides* (2009).

<sup>4</sup> *Id.* at 510-20.

<sup>5</sup> 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

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.<sup>7</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision because OWCP erroneously adjudicated appellant's request for reconsideration under the clear evidence of error standard.<sup>8</sup>

On May 20, 2015 appellant filed a new claim for a schedule award and submitted a June 3, 2015 impairment rating, not previously considered by OWCP, from Dr. Seyoum. By letter dated June 30, 2015, she argued that Dr. Seyoum's report established her entitlement to a schedule award and that OWCP failed to consider her May 20, 2015 schedule award request. On August 7, 2015 appellant also requested reconsideration of the April 17, 2014 schedule award decision per OWCP's June 3, 2015 letter which informed her that no further action would be taken on her May 20, 2015 schedule award request.

In its November 2, 2015 decision, OWCP denied appellant's August 7, 2015 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board finds that appellant submitted new evidence from Dr. Seyoum addressing impairment as of June 3, 2015. In his report, Dr. Seyoum provided findings on physical examination, review of past medical records, and history of injury to determine that appellant sustained 22 percent permanent impairment to the right lower extremity. The Board has held that a claimant may request a schedule award or increased schedule award based on evidence of new exposure or medical evidence showing the progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>9</sup>

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<sup>6</sup> *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).

<sup>7</sup> *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, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994); see *Leonard E. Redway*, 28 ECAB 242, 246-47 (1977).

<sup>8</sup> *S.H.*, Docket No. 15-0809 (issued October 19, 2015); *A.C.*, Docket No. 13-1810 (issued January 6, 2014).

<sup>9</sup> *Id.*

Dr. Seyoum provided an impairment rating of the right knee based on current medical examination. His report addressed the pertinent issue of this case, *i.e.*, whether she was entitled to schedule award compensation for right lower extremity impairment, as it contained an impairment rating that referenced the A.M.A., *Guides*.<sup>10</sup> It is evident from the record that appellant was not seeking reconsideration of the April 17, 2014 OWCP decision, but was seeking a schedule award based on new medical evidence.<sup>11</sup> Moreover, appellant filed a May 20, 2015 Form CA-7 for a schedule award which went unanswered by OWCP. As in *Paul R. Reedy*, OWCP's November 2, 2015 decision treated appellant's claim as a request for reconsideration. The Board finds, however, that she was not seeking reconsideration of the previous schedule award determination, but submitted new evidence requesting an increased impairment of the right lower extremity.<sup>12</sup> 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>13</sup>

The Board finds that OWCP erroneously issued a denial of appellant's request for reconsideration under the clear evidence of error standard and failed to issue an appropriate decision regarding appellant's claim for an increased schedule award.<sup>14</sup> On remand OWCP should review and develop the medical evidence and issue a *de novo* decision regarding appellant's claim for a schedule award.

### CONCLUSION

The Board finds that OWCP improperly adjudicated appellant's schedule award claim as an untimely request for reconsideration.

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<sup>10</sup> *W.H.*, Docket No. 15-1167 (issued November 10, 2015).

<sup>11</sup> *K.D.*, Docket No. 15-0524 (issued August 3, 2015).

<sup>12</sup> *J.F.*, Docket No. 13-112 (issued November 6, 2013).

<sup>13</sup> See *J.K.*, Docket No. 14-1082 (issued November 24, 2014). OWCP's 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. The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (February 2016).

<sup>14</sup> *E.T.*, Docket No. 13-1691 (issued September 25, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: August 26, 2016  
Washington, DC

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

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

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