

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

J.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Douglas, GA, Employer**

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**Docket No. 14-1947
Issued: February 11, 2016**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2014 appellant timely appealed the August 28, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration. The latest merit decision regarding appellant's claim for a schedule award is dated March 1, 2013, which is more than 180 days prior to the filing of the instant appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

This case was previously before the Board.² Appellant, a 59-year-old former city carrier, has an accepted claim for bilateral carpal tunnel syndrome, which arose on or about April 22, 1992.³ When the case was last before the Board, OWCP granted an October 27, 2011 schedule award for four percent impairment of each upper extremity, for a total of eight percent. The Board set aside the October 27, 2011 award because of deficiencies in the district medical adviser's (DMA) September 15, 2011 impairment rating. The case was remanded to OWCP for further development. The Board's August 10, 2012 decision is incorporated herein by reference.

On August 30, 2012 the DMA reviewed appellant's file and calculated two percent bilateral upper extremity impairment under Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008).

On December 12, 2012 OWCP granted a schedule award for two percent impairment of each upper extremity, for a total of four percent. It further advised that because appellant had already received payment for a total of eight percent impairment of the upper extremities, an overpayment existed, which would be addressed in a separate decision.

On December 19, 2012 appellant requested reconsideration. He did not submit any additional evidence at the time, but instead requested authorization for further evaluation.⁴

On January 17, 2013 OWCP instructed appellant to arrange for the submission of an impairment rating under the A.M.A., *Guides* (6th ed. 2008).⁵ It further advised that his physician could submit his fee for the evaluation using the appropriate form (HCFA-1500). Appellant was afforded 30 days to submit additional evidence; however, no evidence was received within the allotted time.

By decision dated March 1, 2013, OWCP denied modification of the December 12, 2012 schedule award.

Appellant subsequently advised OWCP that the physician he selected to provide an impairment rating was unfamiliar with the sixth edition of the A.M.A., *Guides* (2008). He also did not know of anyone who could provide an impairment rating under the sixth edition of the A.M.A., *Guides*.

On April 10, 2013 OWCP advised appellant that it would schedule him for a second opinion evaluation and impairment rating under the A.M.A., *Guides* (6th ed. 2008). It later

² Docket No. 12-653 (issued August 10, 2012).

³ Appellant underwent bilateral carpal tunnel releases in 1992 and retired from federal service in October 2001. His retirement was due to unrelated cervical and lumbar conditions. Appellant later accepted part-time employment at a hardware store.

⁴ OWCP ultimately approved appellant's request for an evaluation by a Dr. Kenneth DePersio.

⁵ OWCP also provided copies of the DMA's September 15, 2011 and August 30, 2012 reports.

advised appellant that he would first have to file a new schedule award claim (Form CA-7) before referral for a second opinion.

On April 17, 2013 OWCP made a preliminary finding of overpayment in the amount of \$4,433.20. The amount represented the difference between the October 27, 2011 and December 12, 2012 schedule awards. OWCP determined that appellant was without fault in the creation of overpayment.

Appellant requested a prerecoumpment hearing, which was held on October 22, 2013. He also submitted an overpayment recovery questionnaire, along with banking records and tax returns.

By decision dated January 24, 2014, the hearing representative affirmed the fact and amount of the overpayment. She also found that appellant was without fault in creating the overpayment. Based on appellant's reported income and expenses, the hearing representative found that recovery of the overpayment would defeat the purpose of FECA. Accordingly, she granted waiver of recovery of the \$4,433.20 overpayment.

On July 14, 2014 appellant requested that OWCP award an additional six percent based on the June 10, 2014 rating from Dr. Richard M. Blecha, a Board-certified orthopedic surgeon, who found five percent impairment of each upper extremity under Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008).

In a decision dated August 1, 2014, OWCP found that appellant's July 14, 2014 request was untimely and that he failed to present clear evidence of error. The senior claims examiner noted that appellant "sent in a letter requesting an additional schedule award but did not provide any evidence the 2013 decision was issued in error..."

On August 5, 2014 appellant filed a claim (Form CA-7) for an additional schedule award. In an August 6, 2014 letter, he stated that he was not asking for reconsideration, but additional compensation based on Dr. Blecha's June 10, 2014 impairment rating under the A.M.A., *Guides* (6th ed. 2008).

In an August 11, 2014 letter, OWCP advised appellant that it would not process his recent claim (CA-7) for an additional schedule award in light of the August 1, 2014 decision. It further advised that the next course of action would be to follow the appeal rights issued with the August 1, 2014 decision.

By decision dated August 28, 2014, OWCP found that appellant's request for reconsideration, which was received on August 11, 2014, was untimely. It also found that appellant's August 6, 2014 letter failed to provide evidence to support that the March 1, 2013 decision was erroneous.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸ When a request for reconsideration is untimely, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.⁹

A claim for an additional schedule award is not time-dependent like a request for reconsideration of a prior award. If a 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.¹⁰ In this case, the original award is undisturbed and the new award has its own date of maximum medical improvement (MMI), percent of impairment, and period of award.¹¹ 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.¹²

⁶ 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 own motion or on application.” 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607 (2014).

⁸ *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.

⁹ 20 C.F.R. § 10.607(b). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.9b (February 2013).

¹¹ *Id.*

¹² *Id.*

ANALYSIS

On August 5, 2014 appellant filed a claim (Form CA-7) for an additional schedule award. OWCP previously granted an award for two percent impairment of each upper extremity, for a total of four percent. The December 12, 2012 schedule award was based on the DMA's August 30, 2012 finding of two percent bilateral upper extremity impairment under Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008). The August 5, 2014 claim for an additional schedule award is premised on Dr. Blecha's June 10, 2014 finding of five percent impairment of each upper extremity based on Table 15-23, A.M.A., *Guides* 449 (6th ed. 2008).

In an August 6, 2014 letter, appellant stated that he was not asking for reconsideration, but instead was seeking additional compensation based on Dr. Blecha's June 10, 2014 rating. After numerous failed attempts, appellant had finally secured a current rating under the A.M.A., *Guides* (6th ed. 2008). Contrary to appellant's request in his August 6, 2014 letter, OWCP evaluated appellant's latest filing as a request for reconsideration of the March 1, 2013 decision which denied modification of the December 12, 2012 schedule award. In so doing, OWCP determined that appellant's August 6, 2014 correspondence was untimely, and that he failed to present clear evidence of error with respect to the March 1, 2013 decision. The August 28, 2014 decision failed to mention Dr. Blecha's June 10, 2014 impairment rating. Additionally, OWCP did not refer Dr. Blecha's findings to the DMA for review.

The Board finds that OWCP erred in treating appellant's August 6, 2014 correspondence as a request for reconsideration. Appellant had already filed a new CA-7 on August 5, 2014 and clearly indicated that he was seeking additional compensation based on Dr. Blecha's June 10, 2014 impairment rating. OWCP failed to consider the latest CA-7, as well as Dr. Blecha's rating, which ostensibly supports an additional award. Consequently, the August 28, 2014 nonmerit decision shall be set aside, and the case remanded for further development.

On remand, OWCP should refer the case file, including Dr. Blecha's June 10, 2014 report, to the DMA for review.¹³ After it has developed the case record consistent with the Board's directive, a *de novo* decision shall be issued regarding appellant's August 5, 2014 claim for an additional schedule award.

CONCLUSION

The case is not in posture for decision.

¹³ *Id.* at Chapter 2.808.6e and f.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further consideration consistent with this decision.¹⁴

Issued: February 11, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.