

Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

ISSUES

The issues are: (1) whether appellant established that he is entitled to a schedule award for his accepted employment conditions; (2) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on April 6, 2015 causally related to his accepted March 7, 2011 injury; and (3) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that OWCP failed to consider his doctor's statement when denying his claim for disability.

FACTUAL HISTORY

This case has previously been before the Board. On March 14, 2011 appellant, then a 48-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back on March 7, 2011 while loading bio-hazard containers onto a flat cart. He stopped work on March 7, 2011, returned to intermittent limited-duty work. OWCP accepted the claim for a lumbar sprain/strain, which was subsequently expanded to include temporary aggravation of sacroiliac pain and temporary aggravation of preexisting chronic sacroiliac. In a December 6, 2013 decision, the Board affirmed a March 5, 2013 decision denying appellant's claim for a schedule award as the evidence did not establish that maximum medical improvement (MMI) had been reached.⁴

In a November 21, 2014 report, Dr. Matthew P. Jaycox, a treating Board-certified anesthesiologist with a subspecialty in pain medicine, opined that on October 9, 2014 appellant

¹ The Board notes that appellant filed a request for a hearing of the June 25, 2015 decision regarding recurrence of disability, with OWCP's Branch of Hearings and Review on July 10, 2015, prior to his request for an appeal with the Board. OWCP cannot exercise simultaneous jurisdiction with the Board over the same issue in the same case. See 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal with the Board, OWCP does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. By letter dated November 10, 2015, the Clerk of the Board requested that appellant clarify whether he wanted to pursue his request for review by the Branch of Hearings and Review, or the appeal before the Board. Appellant was advised that the Board would proceed with the processing of his appeal if appellant did not respond within 10 days. The Board received no response. Any decision rendered by OWCP while the Board has jurisdiction on the same issue is null and void. See *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990); see also 20 C.F.R. § 501.2(c)(3).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 25, 2015 decision denying appellant's recurrence claim and July 30, 2015 decision denying reconsideration on his claim for a schedule award, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ Docket No. 13-1283 (issued December 6, 2013).

had reached MMI and provided an impairment rating. Diagnoses included lumbar radiculopathy and lumbar facet arthropathy. A physical examination revealed an antalgic gait, tenderness on palpation of the lumbar spine, positive right straight leg raise test, bilateral extremities intact sensations, 5/5 muscle strength, 40 degrees lumbar flexion and 10 degrees lumbar extension. Using Table 16-12, page 535 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Jaycox rated appellant as a class C, “severe problem, with an impairment range of 40 percent based on peripheral nerve entrapment of the lower extremity impairments, ... given his history of lumbar radiculopathy specifically causing him sciatica.”

In a March 27, 2015 report, an OWCP medical adviser reviewed Dr. Jaycox’s November 21, 2014 report and concluded that appellant had zero percent bilateral lower extremity impairment. He noted that none of the medical reports from Dr. Jaycox mentioned any sensory loss. Using *The Guides Newsletter*, July/August 2009 and Table 16-11, page 533 of the A.M.A., *Guides*, the medical adviser determined that appellant had a class zero for bilateral extremity sensory and motor loss with a value of zero percent.

By decision dated April 8, 2015, OWCP denied appellant’s claim for a schedule award as the medical evidence was insufficient to establish that appellant had any permanent impairment to a scheduled member.

On April 17, 2015 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period April 5 to 18, 2015.

On April 8, 2015 Dr. Fakhruddin Adamji, Board-certified in internal and occupational medicine, reported that appellant was disabled from work until his next medical evaluation on April 21, 2015.

On April 16, 2015 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing April 6, 2015.

By letter dated April 23, 2015, OWCP informed appellant of the definition of a recurrence and that the evidence in the record was insufficient to support his recurrence claim. It advised him as to the evidence required to support his claim and afforded him 30 days to provide the requested information.

On April 21, 2015 Dr. Thiti Joajaroenkul, Board-certified in internal medicine, reported that appellant was receiving treatment and was unable to work until May 6, 2015, which was the date of his next evaluation.

Appellant filed Form CA-7s claiming intermittent wage-loss compensation for the period April 5 to June 11, 2015.

In a May 7, 2015 report, which updated a November 21, 2014 report, Dr. Jaycox reported that as of October 9, 2014 appellant was at MMI and physical examination findings were unchanged. He opined that appellant was at MMI, had permanent light-duty restrictions and might be a candidate for spinal surgery.

On May 6, 2015 appellant requested reconsideration of the April 8, 2015 decision denying his claim for a schedule award.⁵ In support of his request, he resubmitted the November 21, 2014 impairment rating and provided a cursory impairment rating by Dr. Jaycox hand dated on May 7, 2015.

On May 14, 2015 OWCP received an April 27, 2015 disability note from Dr. Joajaroenkul indicating that appellant was disabled from working due to increasing back pain until June 13, 2015.

In a June 2, 2015 report, Dr. Jaycox reiterated findings from his November 14, 2014 report, which included that appellant was being treated for lumbar radiculopathy and lumbar facet arthropathy due to the March 7, 2011 employment injury. He reiterated impairment findings made in previous reports regarding lumbar range of motion, lumbar physical examination findings, and bilateral extremity sensations. Using page 535 of the sixth edition of the A.M.A., *Guides*, Dr. Jaycox assigned a class C or severe problem for appellant's bilateral lower extremity nerve entrapment of sciatica and lumbar radiculopathy, resulting in 40 percent impairment. He reported that appellant's functional abilities were limited by complaints of low back pain which disrupted his sleep. Dr. Jaycox opined that appellant was unable to work due to his employment-related lumbar facet arthropathy and lumbar radiculopathy.

By decision dated June 25, 2015, OWCP denied appellant's claim for a recurrence of disability beginning April 6, 2015 as due to the accepted March 7, 2011 employment injury.

Subsequent to the denial of his recurrence claim OWCP received a June 13, 2015 disability note from Dr. Joajaroenkul indicating that appellant was receiving treatment and was currently totally disabled from working until August 19, 2015.

A July 16, 2015 disability note with an illegible signature on letterhead of Rush Pain Center at Oak Park Hospital indicated that appellant had not been released to return to work and that his next appointment was in two months. The note indicated that appellant had disabling back pain.

On July 27, 2015 OWCP received Dr. Jaycox's May 7, 2015 progress note, previously submitted, which diagnosed lumbar radiculopathy and lumbar facet arthropathy and noted that appellant had stopped work due to back pain.

By decision dated July 30, 2015, OWCP denied reconsideration of the April 8, 2015 decision denying a schedule award.

⁵ The Board notes that the record contains April 27, 2015 request for review of the written record by an OWCP hearing representative of the April 8, 2015 decision. On May 6, 2015 appellant withdrew his request for review of the written record as he would be requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 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.⁸ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁹

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.¹¹ In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹²

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* for decades has offered an alternative approach to rating spinal nerve impairments.¹³ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 494-531.

¹¹ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Richard R. LeMay*, 56 ECAB 341 (2005); *Pamela J. Darling*, 49 ECAB 286 (1998).

¹² *K.H.*, Docket No. 09-341 (issued December 30, 2009); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *Rozella L. Skinner*, 37 ECAB 398 (1986).

section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009, *The Guides Newsletter*.¹⁴

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁵ In determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.¹⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that he has a ratable impairment of either lower extremity. OWCP accepted appellant's claim for lumbar sprain/strain, temporary aggravation of sacroiliac pain, and temporary aggravation of preexisting chronic sacroiliac.

With regard to the accepted lumbar conditions schedule awards are not payable for impairment of the lumbar spine. However, impairment of a scheduled member, including the extremities, is payable under FECA even if the impairment originates from the spine.¹⁷ The approach for rating impairment of the upper or lower extremities caused by a spinal injury is provided in section 3.700 of OWCP procedures, which memorializes proposed tables outlined in a July/August 2009 *The Guides Newsletter*.¹⁸

Dr. Jaycox did not reference or provide an evaluation in accordance with the July/August 2009 *The Guides Newsletter*. Rather his evaluation was done under Table 16-2, page 535 of the A.M.A., *Guides*. Dr. Jaycox concluded that appellant was assigned to class C for a severe problem with 40 percent impairment range due to the peripheral nerve entrapment of the lower extremities. Appellant bears the burden to prove permanent impairment for a schedule award based upon the proper rating practices, previously noted. Dr. Jaycox did not rate appellant's impairment pursuant to *The Guides Newsletter*, and his rating is therefore insufficient to establish that appellant is entitled to a schedule award of the lower extremities due to the accepted conditions of lumbar sprain/strain, temporary aggravation of sacroiliac pain, and temporary aggravation of preexisting chronic sacroiliac.

¹⁴ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹⁶ *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁷ *Supra* note 13.

¹⁸ See *supra* note 16.

An OWCP medical adviser reviewed the medical evidence and found no basis for an impairment rating to a scheduled member of the body.¹⁹ The medical adviser applied *The Guides Newsletter*, July/August 2009, using Proposed Table 2, Spinal Nerve Impairment, Lower Extremity. He determined that appellant had zero percent right lower extremity and zero percent left lower extremity impairment. The medical adviser noted that FECA did not permit schedule awards for impairment of the spine, but rather a spine condition may be considered for impairment only if it results in impairment to an extremity. He indicated that spinal nerve injury can be the basis of impairment awards of an extremity using the July/August 2009 *The Guides Newsletter*. The medical adviser noted that no motor or sensory deficits in either lower leg were reported and determined that appellant sustained no ratable impairment.

Appellant did not submit sufficient medical evidence establishing that he sustained a permanent impairment to a specified member, organ, or function of the body listing in FECA or its implementing regulations. The Board finds that he has not met his burden of proof for schedule award purposes.

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

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.²⁰ If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.²¹

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative, and substantial evidence, a recurrence of disability and to show that he cannot perform such light duty.²² As part of this burden, the employee must show a

¹⁹ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the treating physician to determine impairment. See *supra* note 16; *Richard R. LeMay*, *supra* note 11.

²⁰ 20 C.F.R. § 10.5(x). See also *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (June 2013); *K.C.*, Docket No. 08-2222 (issued July 23, 2009); *Cecelia M. Corley*, 56 ECAB 662 (2005); *Donald T. Pippin*, 54 ECAB 631 (2003).

²² *K.C., id.*; *Richard A. Neidert*, 57 ECAB 474 (March 10, 2006).

change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.²³

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the OWCP's burden to disprove such relationship.²⁴

ANALYSIS -- ISSUE 2

Appellant filed a claim for a recurrence of disability commencing April 6, 2015, the date he stopped working. By decision dated June 25, 2015, OWCP denied his claim. The issue on appeal is whether the medical evidence of record supports appellant's recurrence claim. The Board finds that appellant failed to meet his burden of proof.

The evidence submitted prior to the June 25, 2015 decision denying appellant's recurrence claim, consists of disability slips from Drs. Adamji and Joajaroenkul, and reports and a progress note from Dr. Jaycox. In a June 2, 2015 report, Dr. Jaycox diagnosed lumbar radiculopathy and lumbar facet arthropathy and found that appellant's functional ability was limited by his low back pain and disrupted sleep. He further opined that appellant was disabled from working due to his lumbar radiculopathy and lumbar facet arthropathy. The Board notes that OWCP has not accepted appellant's claim for lumbar radiculopathy and lumbar facet arthropathy. For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relationship, not OWCP's burden to disprove such a relationship.²⁵ Dr. Jaycox did not provide a medical opinion addressing whether appellant's diagnosed conditions and resultant disability were causally related to the accepted March 7, 2011 employment-related injury in either the report or progress note. The Board has held that a physician's opinion, which does not address causal relationship, is of diminished probative value.²⁶ The record also contains a May 7, 2015 report in which Dr. Jaycox noted appellant had permanent light-duty restrictions. Dr. Jaycox did not address whether appellant sustained a recurrence of disability beginning April 6, 2015. This report is also insufficient to support appellant's claim as the doctor did not offer any opinion that appellant was totally disabled from working. For the above-stated reasons, the Board finds that Dr. Jaycox's reports are insufficient to establish appellant's claim.

In disability slips dated April 21 and 27, 2015, Dr. Joajaroenkul, recommended that appellant remain off work until his next appointment as he was disabled due to back pain. Similarly, Dr. Adamji in an April 8, 2015 disability slip, noted that appellant was disabled from

²³ C.S., Docket No. 08-2218 (issued August 7, 2009); *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

²⁴ G.A., Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

²⁵ *Id.*

²⁶ See *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

work. Although Drs. Adamji and Jaojaroenkul excused appellant from work, neither physician provided any explanation, based on objective medical findings and rationale, demonstrating how his conditions were disabling and how any inability to work was a result of his accepted conditions. The Board has found that medical evidence that offers a conclusion but does not offer any rationalized medical explanation is of limited probative value.²⁷ Thus, the disability slips from Drs. Joajaroenkul and Adamji are insufficient to support appellant's claim.

On appeal appellant argues that OWCP failed to consider the statements by his doctors that he was disabled due to lumbar radiculopathy and lumbar facet arthropathy and he was not allowed to present his case. As discussed above OWCP has not accepted the conditions of lumbar radiculopathy and lumbar facet arthropathy and it is appellant's burden to establish that these conditions are employment related. None of appellant's doctors provided an opinion explaining how these conditions had been caused or aggravated by his accepted employment injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 3

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,²⁸ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a new and relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.²⁹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.³⁰

ANALYSIS -- ISSUE 3

OWCP denied appellant's claim for a schedule award as he failed to submit sufficient evidence with regard to permanent impairment. On May 6, 2015 appellant requested reconsideration of the April 8, 2015 decision denying his claim for a schedule award. The Board finds that OWCP properly declined to reopen his case for further merit review. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He also did not advance a new relevant legal argument not previously considered by OWCP.

²⁷ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.D.*, 58 ECAB 713 (2007); *Cecelia M. Corley*, 56 ECAB 662 (2005).

²⁸ *Supra* note 2. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²⁹ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

³⁰ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

The underlying issue in this case is whether appellant submitted medical evidence establishing a permanent impairment entitling him to a schedule award. That is a medical issue which must be addressed by relevant new medical evidence.³¹ However, appellant did not submit any pertinent new and relevant medical evidence in support of his claim. He submitted May 7 and June 2, 2015 impairment ratings by Dr. Jaycox which reiterated his finding of 40 percent impairment based on Table 16-2 of the sixth edition of the A.M.A., *Guides*. However, this evidence is duplicative of Dr. Jaycox's previously submitted November 21, 2014 report and was considered by OWCP in its April 8, 2015 decision when it found the medical evidence insufficient to establish entitlement to a schedule award. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³²

Appellant also submitted a June 13, 2015 disability note from Dr. Jojaroenkul and a July 16, 2015 disability note with an illegible signature. While this evidence is new, it does not address the relevant issue of whether appellant has a permanent impairment entitling him to a schedule award. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.³³ Therefore, this evidence is insufficient to require OWCP to reopen the claim for a merit review.

The Board finds, therefore, that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit pertinent new and relevant evidence not previously considered. As appellant did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that appellant failed to establish that he is entitled to a schedule award for his accepted employment conditions. The Board further finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on April 6, 2015 causally related to his accepted March 7, 2011 injury. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

³¹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

³² *M.E.*, 58 ECAB 694 (2007); *D'Wayne Avila*, 57 ECAB 642 (2006).

³³ *F.R.*, 58 ECAB 607 (2007); *Ronald A. Eldridge*, 53 ECAB 321 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 30, June 25, and April 8, 2015 are affirmed.

Issued: March 17, 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