

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

T.C., Appellant

and

**DEPARTMENT OF THE AIR FORCE, JOINT
BASE SAN ANTONIO, Randolph, TX, Employer**

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**Docket No. 16-1067
Issued: November 16, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 25, 2016 appellant filed a timely appeal of a February 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 13, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that his condition had deteriorated since his schedule award decision.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 19, 2011 appellant, then a 56-year-old financial specialist, filed a traumatic injury claim (Form CA-1) alleging that he fractured his right femur and dislocated his right hip when he tripped and fell on September 6, 2011 in the employing establishment parking lot. On September 8, 2011 appellant, who has a history of cerebral palsy as well as multiple bilateral lower extremity surgeries and ambulates with crutches, underwent an open reduction and internal fixation of his right femur fracture. The fracture occurred near the tip of his one-month-old right total hip arthroplasty. Appellant received a locking plate and multiple proximal locking screws and cables with distal locking and unlocking screws in his right femur. He also has had a left total hip arthroplasty. OWCP accepted appellant's claim for periprosthetic fracture right femur and closed fracture of the shaft of the right femur on November 1, 2011. Appellant continued to work at the employing establishment.

Appellant underwent a magnetic resonance imaging (MRI) scan of this right knee on October 25, 2011 which demonstrated high-grade patellofemoral and lateral femoral condyle chondromalacia with diffuse thinning of the weight-bearing medial femoral condyle cartilage. The scan also demonstrated a tear in the lateral meniscus and chronic sprain of the medial collateral ligament as well as a Baker's cyst.

A bone scan on June 12, 2013 demonstrated possible loosening of the femoral component of the right hip arthroplasty. On October 25, 2013 appellant reported severe right hip and thigh pain. Dr. Cory J. Lamblin, a Board-certified orthopedic surgeon, noted that appellant had a significant limp partially due to pain and partially due to significant leg shortening of the right leg. On February 7, 2014 appellant reported a dramatic improvement in his symptoms with a shoe lift.

OWCP referred appellant for a second opinion evaluation on April 21, 2014 with Dr. Lawrence G. Splitter, an osteopath Board-certified in preventative medicine. In his May 16, 2014 report, Dr. Splitter reviewed appellant's medical records. He described appellant's history of injury and noted that appellant had residual decreased tolerance and endurance in his right leg. Appellant currently required a three-centimeter shoe lift and an additional crutch. He reported his current pain level was 7/10 in the right midthigh. Dr. Splitter reported appellant's right thigh measurement of 43 centimeters and his left of 42.5 centimeters. Appellant's right calf was 32 centimeters while his left was 33.5 centimeters. His right leg was 87 centimeters long while his left was 90 centimeters.

Appellant demonstrated active range of motion in the right hip, 50 degrees of flexion and 0 degrees of extension. His right hip abduction was 20 degrees while his adduction was 30 degrees. Dr. Splitter could not measure appellant's internal and external rotation due to his inability to lie flat on the examination table. He found full strength across the right hip. Dr. Splitter reported appellant's right knee motion as 90 degrees of flexion and negative 20 degrees of extension. He indicated that appellant's gait was scissoring due to cerebral palsy and was assisted with bilateral crutches. Dr. Splitter found increased muscle tone throughout the lower extremities. He noted that appellant's reflexes were present and symmetric at L4 and L5 and absent at S1. Appellant's plantar reflexes were positive bilaterally, while sensation was decreased in the bilateral lower extremities. Dr. Splitter found that appellant had reached

maximum medical improvement. He applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) and found that appellant had eight percent permanent impairment of the lower extremity due to his proximal femur fracture due to malalignment.

On August 5, 2014 appellant filed a claim for compensation (Form CA-7) and requested a schedule award. OWCP's medical adviser reviewed the case record on August 8, 2014 and found no malalignment, but did find mild motion loss and determined that appellant had nine percent impairment of his right lower extremity.

By decision dated August 13, 2014, OWCP granted appellant a schedule award for nine percent permanent impairment of his right lower extremity.

Appellant requested reconsideration on January 22, 2016 received by OWCP on January 27, 2016. He argued that his impairment was greater than that awarded by OWCP. Appellant described his loss of motion, pain and weakness, deformity, loss of strength, sensitivity to heat and cold, as well as scarring. He noted that prior to his accident he was able to do many of the activities of daily function, but many were now difficult if not impossible. Appellant noted that, because of walking distance and daily job-related duties, he now uses a wheelchair at work to perform normal daily functions. He alleged additional impairment due to his limb length discrepancy. Appellant asked that OWCP notify him if additional information was needed. He resubmitted Dr. Splitter's May 16, 2014 report. Appellant also submitted information from a website regarding schedule awards and amended schedule awards.

By decision dated February 3, 2016, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁴

² 5 U.S.C. §§ 8101, 8107.

³ 20 C.F.R. § 10.404.

⁴ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

To the extent that a claimant asserts that a schedule award decision was erroneous based on his or her medical condition at that time, this would properly be considered a request for reconsideration.⁵ A claimant may, however, seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury. 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.⁶ A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.⁷

A claimant may seek an increased schedule award based on a new exposure or on medical evidence that indicates that the progression of an employment-related condition -- without new exposure to employment factors -- has resulted in a greater permanent impairment than previously calculated.⁸

ANALYSIS

The Board finds the case not in posture for a decision.

Appellant requested reconsideration through a letter dated January 22, 2016 and received by OWCP on January 27, 2016. He argued that his condition had worsened and that he now required a wheelchair to work. Appellant described his loss of motion, pain and weakness, deformity, loss of strength, sensitivity to heat and cold, as well as scarring. He specifically alleged that ongoing factors of his employment, namely, his walking of distances and other daily job-related work assignments necessitated the use of the wheelchair for normal daily functions.

In its February 3, 2016 decision, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error. However, its procedures provide that, if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the original schedule award decision, this should not be treated as a reconsideration request and OWCP should develop the issue of entitlement to an additional award.⁹

It is evident from the record that appellant was seeking an increased schedule award based on new factors and additional exposure. Appellant described his new inability to perform activities of daily living and the necessity to use a wheelchair to perform his work duties. He

⁵ See *J.K.*, Docket No. 14-1082 (issued November 24, 2014).

⁶ *B.K.*, 59 ECAB 228 (2007).

⁷ *W.H.*, Docket No. 15-1167 (issued November 10, 2015); *R.P.*, Docket No. 10-1123 (issued January 25, 2011).

⁸ *A.A.*, 59 ECAB 726 (2008).

⁹ See *A.C.*, Docket No. 13-1810 (issued January 6, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (October 2011).

alleged that these new inabilities were tied to the culmination of the residuals of his work injury and his ongoing job duties. 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, it should be considered a claim for an increased schedule award and OWCP should address the schedule award claim, rather than adjudicate an application for reconsideration.¹⁰

The Board finds that OWCP improperly adjudicated appellant's request for an additional schedule award as a request for reconsideration under the clear evidence of error standard.¹¹ The case will be remanded for further development on the issue of whether appellant has a permanent impairment of his right lower extremity entitling him to an additional schedule award. After this development is carried out, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2016 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: November 16, 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

¹⁰ See *B.K.*, 59 ECAB 228, 229-30 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.b (February 2013).

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