

- (2) whether OWCP properly denied merit review pursuant to 5 U.S.C. § 8128(a); and
(3) whether OWCP properly denied appellant's request for a hearing.

On appeal appellant asserts that the reports of his treating physicians establish greater right upper extremity impairment, and that OWCP improperly denied his request for a hearing.

FACTUAL HISTORY

This case has previously been before the Board. In a November 15, 2010 decision, the Board affirmed September 29, 2009 and January 4, 2010 OWCP merit decisions that denied appellant's claim for a schedule award.³ In a February 14, 2013 decision, the Board found that, by a July 26, 2012 decision, OWCP properly denied appellant's request for a hearing.⁴ In a second February 14, 2013 decision, the Board affirmed in part an August 17, 2012 OWCP decision, finding that appellant had not demonstrated clear evidence of error in his untimely reconsideration request regarding his claim for disability compensation.⁵ The Board set aside the August 17, 2012 OWCP decision in part as it found that OWCP erroneously denied appellant's reconsideration request regarding his schedule award claim under the clear evidence of error standard. It noted that the record contained a September 15, 2010 impairment analysis from Dr. Henry Leis, an attending Board-certified orthopedic surgeon, who concluded that, under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),⁶ appellant had four percent right arm permanent impairment. The Board remanded the case to OWCP to review and develop the medical evidence and issue an appropriate decision regarding appellant's request for a schedule award.⁷ The facts as set forth in the Board's prior decisions are incorporated herein by reference.

Regarding appellant's entitlement to a schedule award, on April 1, 2013 OWCP referred the medical record, including Dr. Leis' September 15, 2010 report, to an OWCP medical adviser for an impairment evaluation of appellant's right upper extremity in accordance with the sixth edition of the A.M.A., *Guides*. In an April 1, 2013 report, Dr. James W. Dyer, an OWCP medical adviser who is Board-certified in orthopedic surgery, noted his review of the medical evidence, including Dr. Leis' September 15, 2010 report. He advised that maximum medical

³ Docket No. 10-823 (issued November 15, 2010). OWCP accepted that on July 8, 2008 appellant, then a 49-year-old materials handler, sustained employment-related sprains of the right elbow and forearm and right lateral epicondylitis when he injured his arm unloading pallets. He had right arm surgery on February 16, 2009 and returned to modified duty on March 2, 2009. Appellant was removed from federal employment for cause in April 2009. Appellant filed claims for disability compensation (Forms CA-7) for the period February 16 to July 27, 2009. By decision dated September 29, 2009, OWCP noted that appellant was paid compensation for all periods claimed as a result of the surgery, but it denied appellant's claim for compensation for the period after March 13, 2009 because his absence was not due to the accepted injury. In a separate decision dated September 29, 2009, OWCP denied appellant's claim for a schedule award as the medical evidence of record did not establish a permanent impairment.

⁴ Docket No. 12-1699 (issued February 14, 2013).

⁵ *Supra* note 3.

⁶ A.M.A., *Guides* (6th ed. 2nd prtng. 2009).

⁷ Docket No. 12-1906 (issued February 14, 2013).

improvement (MMI) was reached on September 10, 2010. Dr. Dyer concluded that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had seven percent permanent impairment of the right upper extremity.

By decision dated April 3, 2013, OWCP granted appellant a schedule award for seven percent permanent impairment of the right arm, for 21.84 weeks, to run from September 15, 2010 to February 14, 2011.⁸

Appellant appealed to the Board. In a March 14, 2014 decision, the Board affirmed the April 3, 2013 schedule award decision.⁹ The Board reviewed the reports of Dr. Leis and Dr. Dyer, the only impairment evaluations of record. The Board noted that Dr. Dyer, who relied on the physical findings provided by Dr. Leis, properly applied the A.M.A., *Guides* and concluded that appellant had seven percent permanent impairment of the right upper extremity.

In monthly reports, Dr. Brian K. Tsang, Board-certified in anesthesiology and pain medicine, provided examination findings, described appellant's current right arm condition, and diagnosed right elbow and forearm sprain, lateral epicondylitis, and long term use of high-risk medications. On August 8, 2013 Dr. Tsang advised that appellant was permanently impaired due to the July 8, 2008 work injury and could not return to his position as a supplier.

On August 20, 2014 appellant submitted a statement requesting wage-loss compensation for the period 2009 to present.

In a September 2, 2014 report, Dr. Leis noted appellant's complaint of right elbow pain which appellant described as related to playing tennis. Following physical examination, he diagnosed lateral epicondylitis, loose body elbow, localized forearm osteoarthritis, and cubital tunnel syndrome.

On January 7, 2015 Dr. Leis performed revision of a right lateral epicondylectomy. Dr. Tsang continued to submit reports describing appellant's pain management regarding his right arm condition.

On January 10, 2015 appellant filed a recurrence claim (Form CA-2a), asserting that he had a recurrence of disability on July 8, 2008 when he stopped work. On January 11, 2015 he filed a schedule award claim (Form CA-7).

In correspondence dated January 23, 2015, OWCP asked Dr. Leis to provide an impairment evaluation in accordance with the sixth edition of the A.M.A., *Guides*. On a medical excuse letter dated February 12, 2015, Dr. Tsang advised that appellant was disabled and could

⁸ On February 25, 2013 appellant requested reconsideration, asserting that he was entitled to wage-loss compensation beginning in 2008. In a March 28, 2013 decision, OWCP noted that the last merit decision on the issue of disability was issued on January 4, 2010. It denied appellant's reconsideration request as his request was untimely filed and failed to demonstrate clear evidence of error.

⁹ The Board also affirmed OWCP's March 28, 2013 decision finding that appellant's request for reconsideration regarding entitlement to wage-loss compensation due to the July 8, 2008 work injury was untimely filed and failed to demonstrate clear evidence of error. Docket No. 13-1275 (issued March 14, 2014).

not return to his previous employment. By letter dated February 27, 2015, OWCP informed appellant that it would not proceed with his schedule award claim because the evidence indicated that he had not yet reached MMI. On April 2, 2015 it advised appellant to file a Form CA-7 claim to consider wage-loss compensation following his recent surgery.

On April 17, 2015 Deborah Thompson-Spencer, a nurse practitioner and associate of Dr. Leis, advised that appellant's chronic recalcitrant right arm pain remained, status post January 7, 2015 surgery. She noted a significant concern for secondary gain as appellant had not worked since 2008 secondary to lateral epicondylitis despite revision and pain management. On May 28, 2015 Dr. Leis reported that appellant had continuing right elbow pain. He recommended a functional capacity evaluation (FCE). An FCE, completed on June 5, 2015, demonstrated that appellant was capable of medium level work. Dr. Tsang continued to submit monthly pain management reports.

On August 7, 2015 appellant again filed a schedule award claim (Form CA-7).¹⁰ In an August 6, 2015 treatment note, Dr. Leis noted his review of the FCE. He provided physical examination findings and indicated that appellant had a five degree loss of elbow extension secondary to pain. Dr. Leis advised that, "in accordance with the most recent guidelines from the American Medical Association," appellant had eight percent permanent impairment of the right elbow. On August 18, 2015 OWCP asked Dr. Leis to further explain the impairment rating. In telephone calls on October 1 and 5, 2015, it informed appellant that it had not received a supplemental report from Dr. Leis explaining his impairment evaluation in accordance with the A.M.A., *Guides*.

On October 8, 2015 OWCP asked its medical adviser, Dr. Dyer, to evaluate appellant's right arm for schedule award purposes. In an October 9, 2015 report, Dr. Dyer related that he had reviewed the record and advised that MMI was reached on August 6, 2015, seven months following appellant's right elbow surgery. He indicated that under Table 15-4, appellant had a grade E, class 1 impairment due to repeat surgery, for seven percent permanent impairment of the right arm, the highest value allowed under Table 15-4.

In a merit decision dated October 14, 2015, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Dyer, its medical adviser, and concluded that appellant was not entitled to a right arm schedule award greater than the seven percent previously awarded.

On October 30, 2015 appellant requested reconsideration of the October 14, 2015 decision. He maintained that the medical evidence was sufficient to establish greater impairment. Appellant submitted evidence previously of record and an October 23, 2015 letter in which Dr. Leis again concluded that, under the A.M.A., *Guides*, appellant had eight percent impairment of the right elbow. Dr. Leis indicated that appellant had reached MMI and was released from his care. Appellant also forwarded an additional schedule award claim (Form

¹⁰ By order dated July 21, 2015, the Board dismissed a September 8, 2014 appeal of a February 14, 2013 decision. The Board noted that on February 14, 2013, Docket No. 12-1699, the Board affirmed OWCP's July 26, 2012 decision that denied appellant's hearing request. *See supra* note 4. The Board further noted that there was no final OWCP decision issued within 180 days of the filing of that appeal. Docket No. 14-2006 (issued July 21, 2015).

CA-7). The record also includes monthly pain management reports from Dr. Tsang which did not include an impairment evaluation.

In a nonmerit decision dated November 16, 2015, OWCP denied merit review of the October 14, 2015 schedule award decision. It found the evidence submitted was either immaterial or repetitive and cumulative.

On November 24, 2015 appellant requested a hearing before OWCP's Branch of Hearings and Review regarding his schedule award claim. Evidence submitted subsequent to this request included monthly treatment notes from Dr. Tsang who described appellant's pain management. On November 18, 2015 Dr. Tsang advised that appellant remained disabled due to a right arm injury.

By decision dated December 16, 2015, OWCP's Branch of Hearings and Review denied appellant's request for a hearing as a matter of right because he had previously requested reconsideration. OWCP, in its discretion, considered the request, but determined that his request is further denied because the case could equally well be addressed by requesting reconsideration with OWCP and submitting new evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,¹¹ and its implementing federal regulation,¹² 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.¹³ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁴

The latest version of the A.M.A., *Guides* is the sixth edition, first printed in 2007. Within months of the initial printing, the A.M.A. issued a 52-page document (errata/supplement) entitled *Clarifications and Corrections*, A.M.A., *Guides* (6th ed.). The document included various changes to the original text. *Clarifications and Corrections* initially served as a supplement to the first printing. These changes were formally incorporated in the bound version of the sixth edition during its April 2009 second printing. OWCP adopted the latest edition to the A.M.A., *Guides* more than a year after its initial publication. Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2nd prtg. 2009).¹⁵

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404.

¹³ *Id.* at § 10.404(a).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5a (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁵ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish more than seven percent permanent impairment of the right arm, for which he received a schedule award.

OWCP accepted that appellant sustained right elbow and forearm sprains and right lateral epicondylitis. On April 2, 2013 appellant was granted a schedule award for seven percent permanent impairment of the right arm. On March 14, 2014 the Board affirmed this decision. The Board noted that reports of Dr. Leis and Dr. Dyer provided the only impairment evaluations of record. The Board found that Dr. Dyer, who relied on the physical findings provided by Dr. Leis, properly applied the A.M.A., *Guides* and concluded that appellant had seven percent permanent impairment of the right upper extremity.¹⁶

Appellant again filed a schedule award claim on January 11, 2015. By letter dated February 27, 2015, OWCP informed appellant that it would not proceed with this claim because the evidence of record indicated that he had not yet reached MMI following the January 7, 2015 revision surgery. Appellant filed another schedule award claim on August 7, 2015.

In an August 6, 2015 treatment note, Dr. Leis noted his review of a June 5, 2015 FCE which demonstrated that appellant could perform medium level work. He provided examination findings and indicated that appellant had a five-degree loss of elbow extension secondary to pain. Dr. Leis advised that, "in accordance with the most recent guidelines from the American Medical Association," appellant had eight percent impairment of the right elbow. On August 18, 2015 OWCP asked Dr. Leis to further explain the impairment rating. Dr. Leis did not respond.

In an October 9, 2015 report, Dr. Dyer indicated that he had reviewed the record and noted appellant's recent surgery and recurrent pain. He advised that MMI was reached on August 6, 2015 and, under Table 15-4, appellant had a grade E, class 1 impairment due to repeat surgery, for seven percent permanent impairment, the highest value allowed under Table 15-4.

On October 14, 2015 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Dyer, its medical adviser, and concluded that appellant was not entitled to a right arm schedule award greater than the seven percent previously awarded.

The Board has long held that medical evidence is of little probative value where the A.M.A., *Guides* are not properly followed.¹⁷ While Dr. Leis noted in his August 6, 2015 report that he had followed the A.M.A., *Guides*, he did not reference a specific diagnosis or table in the A.M.A., *Guides* and merely concluded that appellant had eight percent permanent impairment. As Dr. Leis did not properly follow the A.M.A., *Guides*, his calculation for appellant's right arm impairment is of diminished probative value.

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and extent of

¹⁶ Docket No. 13-1275 (issued March 14, 2014).

¹⁷ *Richard A. Neidert*, 57 ECAB 474 (2006).

impairment in accordance with the A.M.A., *Guides*, with Dr. Dyer providing rationale for the percentage of impairment specified.¹⁸ Dr. Dyer did so in this case. There is no probative medical evidence establishing a greater degree of impairment.¹⁹

It is appellant's burden to prove that the condition for which a schedule award is sought is causally related to employment.²⁰ OWCP's medical adviser properly rendered his impairment rating based on the accepted conditions and relied on the physical examination findings of Dr. Leis. He reviewed the medical record and, in his October 9, 2015 report, properly determined that, based on appellant's diagnosis of complicated lateral epicondylitis, under Table 15-4 he was entitled to the maximum impairment allowed for this condition, seven percent.²¹

Appellant may at any time 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

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.²² Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards enumerated in section 10.606(b)(3).²³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁴ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²⁵

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹⁹ See *M.P.*, Docket No. 15-383 (issued July 1, 2015). Although Dr. Tsang submitted monthly pain management reports, he did not include an impairment evaluation.

²⁰ *D.H.*, 58 ECAB 358 (2007).

²¹ A.M.A., *Guides*, *supra* note 6 at 399.

²² 5 U.S.C. § 8128(a).

²³ 20 C.F.R. § 10.608(a).

²⁴ *Id.* at § 10.608(b)(3).

²⁵ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

With his October 30, 2015 reconsideration request, appellant merely maintained that the medical evidence submitted established entitlement to a greater award. He therefore did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).²⁶

As to the third above-noted requirement under section 10.606(b)(3), appellant submitted an October 23, 2015 letter in which Dr. Leis repeated, word-for-word, that appellant had eight percent permanent impairment of the right elbow. Dr. Leis had included this opinion in an August 6, 2015 treatment note, that was reviewed by OWCP in its October 14, 2015 decision on the merits of appellant's schedule award claim. Thus, his October 23, 2015 letter is duplicative and irrelevant as to whether appellant was entitled to an additional schedule award. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.²⁷

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied merit review.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of FECA provides that a claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.²⁸ A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.²⁹ The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.³⁰ Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.³¹

²⁶ *Id.* at § 10.606(b).

²⁷ *J.P.*, 58 ECAB 289 (2007).

²⁸ 5 U.S.C. § 8124(b)(1).

²⁹ *Claudio Vazquez*, 52 ECAB 496 (2001).

³⁰ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

³¹ 20 C.F.R. § 10.617(b); *see R.E.*, Docket No. 13-553 (issued July 25, 2013).

ANALYSIS -- ISSUE 3

On November 24, 2015 appellant requested an oral hearing with regard to the November 16, 2015 nonmerit decision that denied appellant's reconsideration request. Because appellant had previously requested reconsideration under section 8128 of FECA, he was not entitled to a hearing as a matter of right under section 8124(b)(1) of FECA.³² OWCP exercised its discretion and considered appellant's request, but determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of additional evidence. The Board finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing in its December 16, 2015 decision.³³

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish more than seven percent permanent impairment of the right arm for which he received a schedule award. The Board further finds that OWCP properly denied merit review pursuant to 5 U.S.C. § 8128(a), and that OWCP properly denied appellant's request for a hearing.

³² *Supra* note 30.

³³ *J.D.*, Docket No. 15-1679 (issued December 14, 2015).

ORDER

IT IS HEREBY ORDERED THAT the December 16, November 16, and October 14, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 24, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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