

FACTUAL HISTORY

On February 25, 2014 appellant, then a 52-year-old special agent, filed a claim for traumatic injury (Form CA-1) alleging pain in his right shoulder and biceps area on February 20, 2014 while carrying a weighted rifle case, ammunition, and numerous accessories during firearms training.

Appellant underwent a magnetic resonance imaging (MRI) scan of his right shoulder on March 20, 2014 which demonstrated partial thickness tears of the distal infraspinatus tendon, a nondisplaced superior labrum anterior to posterior (SLAP) tear and evidence of subacromial impingement and bursitis. On May 12, 2014 Dr. Sunjay Berdia, a Board-certified orthopedic surgeon, opined that appellant had injured his right shoulder after a full day of firearms training in February 2014. He noted that the MRI scan showed a high grade partial tear of the infraspinatus tendon as well as a SLAP tear with a cyst for which surgical repair was recommended. Dr. Berdia opined that appellant's injuries were caused as a direct result of his work duties in February.

OWCP accepted appellant's claim on June 16, 2014 for sprain of the shoulder and upper arm on the right, superior glenoid labrum lesion, and sprain of the right rotator cuff.

On July 22, 2014 Dr. Berdia performed an authorized arthroscopic SLAP repair, subacromial decompression, mini-open rotator cuff repair and extensive debridement of the right shoulder.

Appellant filed a claim for a schedule award (Form CA-7) on September 4, 2014. In a letter dated September 9, 2014, OWCP requested additional medical evidence in support of this claim. It noted that there was no narrative report describing appellant's condition and whether or not he had permanent impairment as a result of his accepted injuries. OWCP allowed 30 days for a response.

Appellant submitted notes from Dr. Berdia dated March 10, May 8, and September 19, 2014 noting the history of injury and recommending physical therapy. He also submitted notes from Valerie L. Silver, a physical therapist.

By decision dated October 20, 2014, OWCP denied appellant's claim for a schedule award finding that the medical evidence of record had failed to establish a permanent impairment to a scheduled member.

In a form dated October 29, 2014 and received by OWCP on November 4, 2014, appellant requested reconsideration of the October 20, 2014 decision. On October 27, 2014 Dr. Berdia opined that appellant had not reached maximum medical improvement. Appellant continued to submit physical therapy notes from Ms. Silver and resubmitted Dr. Berdia's March 10 and 24 and May 8, 2014 notes.

Dr. Berdia completed a report on November 24, 2014 and opined that appellant had reached maximum medical improvement. He reported that appellant had nearly full range of motion, lacking 10 degrees of abduction, forward flexion and internal rotation. Dr. Berdia found that appellant had good rotator cuff strength.

By decision dated February 2, 2015, OWCP declined to reopen appellant's claim for consideration of the merits as appellant had failed to submit relevant new evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations⁴ 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*.⁵

Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of maximum medical improvement is not to be based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.⁶ The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet his burden of proof to establish permanent impairment due to the accepted shoulder injury.

Appellant requested a schedule award on September 4, 2014. At the time he requested his schedule award, there was no medical evidence of record addressing whether appellant had reached maximum medical improvement or whether he had any permanent impairment of his right shoulder following surgery. Dr. Berdia's notes from March 10 through September 19, 2014 did not discuss appellant's accepted right shoulder condition and did not address whether appellant had reached maximum medical improvement. As noted above, a schedule award is only appropriate where the physical condition of an injured member has stabilized and this is

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ 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); and, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

⁷ *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

known as maximum medical improvement.⁸ Maximum medical improvement is a factual one based on the medical findings in the record.⁹ As there was no medical evidence of record discussing maximum medical improvement, appellant failed to meet his burden of proof to establish permanent impairment warranting a schedule award.

Appellant also submitted notes from Ms. Silver, a physical therapist. As she is not a physician, Ms. Silver's notes do not constitute competent medical evidence and cannot meet appellant's burden of proof to establish his claim for permanent impairment.¹⁰

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

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.¹¹ Section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.¹² Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.¹³ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

⁸ *Supra* note 6.

⁹ *Supra* note 7.

¹⁰ *R.S.*, Docket No. 15-0988 (issued August 12, 2015); *F.D.*, Docket No. 15-0868 (issued August 10, 2015).

¹¹ 5 U.S.C. §§ 8101-8193, 8128(a).

¹² 20 C.F.R. § 10.606(b)(3).

¹³ *Id.* at § 10.608.

¹⁴ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

Appellant submitted a timely request for reconsideration of OWCP's October 29, 2014 decision. In support of his request for reconsideration, appellant submitted a series of reports from Dr. Berdia including a note dated October 27, 2014 finding that he had not reached maximum medical improvement. These notes are not relevant to the underlying issue of permanent impairment as Dr. Berdia opined that appellant had not reached maximum medical improvement, a necessary medical standard prior to the determination of permanent impairment for schedule award purposes. The Board finds that these notes do not constitute relevant and pertinent new evidence requiring OWCP to reopen appellant's claim for consideration of the merits.

Appellant also submitted a report dated November 24, 2014 from Dr. Berdia. He provided an opinion that appellant had reached maximum medical improvement following his surgery and listed appellant's shoulder range of motion and strength deficits. As the underlying issue in OWCP's October 29, 2014 decision was whether appellant had established permanent impairment of a scheduled member, the Board finds that this report which does not include a rating of permanent impairment under the A.M.A., *Guides*, is not relevant and pertinent new evidence requiring OWCP to reopen appellant's claim for consideration of the merits.

In support of his request for reconsideration, appellant also submitted notes from Ms. Silver, a physical therapist. Physical therapists are not considered physicians under FECA.¹⁵ As these notes were not signed by a physician the notes have no probative value in establishing appellant's claim¹⁶ for permanent impairment, and do not constitute relevant and pertinent new evidence requiring OWCP to reopen appellant's claim for consideration of the merits.

Appellant also resubmitted Dr. Berdia's March 10, 24 and May 8, 2014 notes. These notes were previously considered by OWCP in reaching the October 29, 2014 decision. As this evidence is repetitious, it cannot be considered new evidence and does not require OWCP to reopen appellant's claim for consideration of the merits.¹⁷

The Board finds that appellant's request for reconsideration did not include supporting evidence or argument in compliance with section 10.606(b)(3) and was not sufficient to require OWCP to reopen appellant's claim for review of the merits.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish permanent impairment at the time of OWCP's October 20, 2014 merit decision. The Board further finds that OWCP properly denied merit review of appellant's November 4, 2014 request for reconsideration.

¹⁵ 5 U.S.C. § 8101(2); *Thomas R. Horsefall*, 48 ECAB 180 (1996).

¹⁶ *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2015 and October 20, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 28, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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