

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 25, 1994, the Board found that appellant had no more than 35 percent permanent impairment of the left upper extremity and 35 percent permanent impairment of the left lower extremity, for which she had received a schedule award.² The period of the award would run from February 12, 1988 to February 20, 1992, but appellant was advised that the award would be offset by any compensation previously paid for the loss of wage-earning capacity for the same period. The letter stated that the award would be paid in a lump sum of \$13,302.83. Appellant was advised to contact OWCP within 10 days if a check was not received when due. A note in the record reflects that she visited an OWCP office on July 13, 1992 to discuss payment of medical bills, but there is no reference to any discussion at that time regarding the schedule award payment.³ The facts as presented in the previous Board decision are incorporated herein by reference.

On August 25, 2014 appellant filed a claim for an increased schedule award (Form CA-7). In an August 28, 2014 report, Dr. Danielle Schiff, a Board-certified physiatrist, noted that appellant was under her medical care for right frontal intracerebral hemorrhage on February 12, 1986 with continued residual left-sided paralysis and severe cognitive deficits. She noted that appellant continued to struggle with left hemiplegia affecting her independence in self-care and that her severe cognitive deficits inhibit her from working. Dr. Schiff opined that appellant had reached maximum medical improvement. As for her left hemiparesis, strength was anti-gravity, but coordination impaired.

In a September 16, 2014 report, Dr. Jeffrey L. Visotsky, a Board-certified orthopedic surgeon, noted the history of injury and presented examination findings. He opined that appellant was disabled from the 1986 stroke. Dr. Visotsky advised that appellant had paralysis involving the left side. Appellant's primary reason for being disabled was not the arthritic conditions in her shoulder, but the paralysis, hypertension, stroke, and seizure disorder. Dr. Visotsky opined that her disability papers were best completed by her treating physicians.

² Docket No. 92-1860 (issued February 25, 1994). On September 4, 1987 appellant, then a 36-year-old accounting technician, filed an occupational disease claim alleging that factors of her federal employment caused or contributed to her February 12, 1986 intracerebral hemorrhage. She stopped work on January 30, 1986 and has not returned. By decision dated February 21, 1989, OWCP accepted that appellant's February 12, 1986 intracerebral hemorrhage with hematoma formation (cognitive deficits) were causally related to her federal employment and paid benefits. It subsequently accepted other conditions including poisoning by unspecified anticonvulsants, depressive disorder, hypertensive heart disease, and abnormal serum enzyme levels. OWCP paid appellant compensation for temporary total disability from February 19, 1986 to September 7, 1987 and thereafter placed her on the periodic rolls for partial disability, beginning September 8, 1987, following a wage-earning capacity decision based on actual earnings. Appellant subsequently claimed a schedule award (Form CA-7). On May 11, 1992 OWCP issued appellant an award for 35 percent permanent impairment of the left upper extremity and 35 percent permanent impairment of the left lower extremity. The period of the award was February 12, 1988 to February 20, 1992, less previously paid compensation for loss of wage-earning capacity for the same period.

³ The record further reflects that appellant had contacted OWCP several times about the status of her payments. On February 19, 2015 appellant was advised to follow her appeal rights with the January 21, 2015 decision and that the statute of limitations to trace a check had passed. She was informed that the U.S. Treasury had a retention period of seven years.

OWCP referred appellant, along with a statement of accepted facts and her medical record, to Dr. Ricardo Kohn, a neurologist, for a second opinion evaluation as to permanent impairment. In a November 14, 2014 report, Dr. Kohn noted the history of injury, appellant's medical treatment and his review of the records, including the statement of accepted facts. Examination findings were provided and an impression of intracerebral hemorrhage status post right frontal craniotomy and intracranial pressure monitor with residuals, left spastic hemiparesis, severe cognitive impairments, and seizure disorder were provided. Examination findings of the left arm found that appellant had drift without pronation, decreased motor intuition, impaired fine motility, and positive Romberg and Babinski tests. Examination of the left leg found that appellant had a gait with slightly wide base, and drag of the left leg. Dr. Kohn opined that appellant continued to have residuals of her work-related conditions and she was totally disabled from a neurological standpoint secondary to her work-related injuries. He opined that she had reached maximum medical improvement many years ago, noting the records indicated it was in 1998.

On December 27, 2014 OWCP's medical adviser reviewed appellant's file for determination of permanent impairment and maximum medical improvement of the upper and lower extremities due to the accepted conditions. Applying Dr. Kohn's findings to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (hereinafter A.M.A., *Guides*), the medical adviser found maximum medical improvement was reached on February 1, 1988 and appellant had 8 percent left upper extremity impairment and 13 percent left lower extremity impairment.⁵

Under Table 13-11, page 335, appellant's left upper extremity central nervous system (CNS) dysfunction was considered a class 1 diagnosis. She was awarded the greatest percentage of whole person impairment, (five percent) which converted to eight percent left upper extremity impairment under Table 15-11, page 420. Under Table 13-12, page 336, appellant's left lower extremity station and gait disorder was considered a class 1 diagnosis. She was awarded the middle range of 5 percent whole person impairment, which converted to 13 percent left lower extremity impairment under Table 16-10, page 530. The medical adviser noted that Dr. Kohn had not detailed how appellant's cognitive deficits affected the upper and lower extremities and, thus, he did not provide any impairment calculations for the extremities.

By decision dated January 21, 2015, OWCP denied appellant's claim for an increased schedule award as the medical evidence of record did not support an increase in the impairment already compensated.

On March 3, 2015 OWCP received appellant's request for reconsideration. In a February 23, 2015 letter, appellant stated she never received compensation for the schedule award for 35 percent impairment to her left upper extremity and 35 percent impairment to her left lower extremity.

⁴ A.M.A., *Guides* (6th ed. 2008).

⁵ The medical adviser noted that appellant's shoulder and elbow conditions have not been accepted as work related.

By decision dated March 26, 2015, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA and its implementing regulations 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.⁶ 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.⁷

A claimant may seek an increased schedule award if the evidence establishes that she sustained an increased impairment at a later date causally related to her employment injury. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration.⁸ Moreover, OWCP procedures provides that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.⁹

The A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For upper and lower extremity impairments, the evaluator identifies the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰ Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.¹¹

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the percentage of impairment

⁶ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁷ *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

⁸ *Linda T. Brown*, 51 ECAB 115, 116 (1999); *Paul R. Reedy*, 45 ECAB 488, 490 (1994).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.809 (February 2013). In addition, OWCP procedures provide that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his condition or increased exposure.

¹⁰ *R.Z.*, Docket No. 10-1915 (issued May 19, 2011).

¹¹ *J.W.*, Docket No. 11-289 (issued September 12, 2011).

using the A.M.A., *Guides*.¹² In some instances, the medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an attending physician indicates maximum medical improvement has been reached and described the permanent impairment of the affected member, but does not offer an impairment rating. In this instance, a detailed opinion by an OWCP medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.¹³

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained the conditions of intracerebral hemorrhage with hematoma formation (right frontal intracerebral hemorrhage with left hemiplegia) and cognitive deficits as a result of her February 12, 1986 work injury and paid benefits. The Board previously affirmed OWCP's May 11, 1992 decision that appellant had 35 percent permanent impairment of the left upper extremity and 35 percent permanent impairment of the left lower extremity, for which she had received a schedule award. By decision dated January 21, 2015, OWCP denied appellant's request for an additional schedule award.

The Board finds that appellant has not established more than 35 percent impairment of the left upper extremity nor more than 35 percent impairment of the left lower extremity, for which she had received a schedule award. Both Dr. Kohn, the medical adviser, and the medical record support appellant had reached maximum medical improvement in 1998. As Dr. Kohn did not detail any impairment findings, the medical adviser applied Dr. Kohn's findings to the A.M.A., *Guides* and found appellant had 8 percent left upper extremity impairment for appellant's CNS dysfunction and 13 percent left lower extremity impairment for appellant's station and gait disorder. Under Table 13-11, page 335, appellant's left upper extremity was considered a class 1 diagnosis. She was awarded five percent whole person impairment, which converted to eight percent left upper extremity impairment under Table 15-11, page 420. Under Table 13-12, page 336, appellant's left lower extremity was considered a class 1 diagnosis for station and gait disorder. She was awarded 5 percent whole person impairment, which converted to 13 percent left lower extremity impairment under Table 16-10, page 530.

The Board finds that OWCP properly relied on the medical adviser's impairment rating. The medical adviser's opinion was based on the complete record. He properly applied the appropriate portions of the A.M.A., *Guides* to Dr. Kohn's clinical findings in determining permanent impairment to the left upper extremity and left lower extremity. As appellant was previously awarded 35 percent impairments to her left upper and left lower extremities under the sixth edition of the A.M.A., *Guides*, OWCP properly denied an increased schedule award. There is no medical evidence of record supporting a greater impairment than that previously awarded.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013); *see also L.R.*, Docket No. 14-674 (issued August 13, 2014); *D.H.*, Docket No. 12-1857 (issued February 26, 2013).

¹³ *See id. at Developing and Evaluating Medical Evidence*, Chapter 2.810.8(i) (September 2010).

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.¹⁴

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁵ OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁶ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁷ 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.¹⁸

ANALYSIS -- ISSUE 2

The underlying issue on reconsideration is whether appellant has submitted sufficient medical evidence to establish an increased schedule award. Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Rather appellant claimed before OWCP and on appeal that she never received the compensation payment for the previously paid schedule award. The record reflects that the period of the award ran from February 12, 1988 to February 20, 1992 less previously paid compensation for loss of wage-earning capacity for the same period. Appellant's statements regarding this issue did not constitute new and relevant evidence to substantiate her allegation.¹⁹

The Board finds that appellant has failed to show that OWCP erroneously interpreted a specific point of law, has failed to advance a relevant legal argument not previously considered, and has failed to submit relevant and pertinent new evidence not previously considered by

¹⁴ *Paul R. Reedy*, 45 ECAB 488, 490 (1994); *A.A.*, 51 ECAB 115, 116 (1999).

¹⁵ Under section 8128 of FECA, the 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).

¹⁶ 20 C.F.R. § 10.606(b)(3).

¹⁷ *Id.* at § 10.607(a).

¹⁸ *Id.* at § 10.608(b).

¹⁹ Appellant did not contact OWCP at the time that the schedule award was made in 1992 regarding the allegedly missing schedule award payment and did not discuss the status of the payment while visiting OWCP on July 13, 1992. The record also does not reflect that she raised this issue during the prior appeal to the Board in 1994. The record reflects that when appellant contacted OWCP in 2015 regarding the allegedly missing check, on February 19, 2015, she was advised that the statute of limitations to trace a check had passed. Appellant was informed that the U.S. Treasury had a retention period of seven years.

OWCP. Appellant thus has not met any of the regulatory requirements and OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).²⁰

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than 35 percent permanent impairment of the left upper extremity and 35 percent of the left lower extremity, for which she received a schedule award. OWCP also properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 26 and January 21, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 7, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁰ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).