

FACTUAL HISTORY

On January 11, 2013 appellant, then a 58-year-old office secretary, filed a traumatic injury claim (Form CA-1) alleging that on January 9, 2013, she injured her wrists and left foot when she tripped and fell on a tiled floor. She stopped work on January 9, 2013.

By decision dated September 11, 2013, OWCP accepted appellant's claim for a closed fracture of the fifth left metatarsal bone. On September 19, 2013 it updated appellant's list of accepted conditions to include cellulitis of the left foot, except for the toes. Appellant received medical benefits and wage-loss compensation benefits on the supplemental rolls as of August 20, 2013 and on the periodic rolls as of October 20, 2013.

Appellant filed a claim for a schedule award (Form CA-7) on May 23, 2014. OWCP thereafter received a July 23, 2014 report from Keith L. Blankenship, a physical therapist, who rated appellant's left 5th metatarsal shaft fracture under the sixth edition of the A.M.A., *Guides* as three percent permanent impairment of the left lower extremity. This report was reviewed by Dr. James W. Dyer, a Board-certified orthopedic surgeon, acting as OWCP's medical adviser, on November 19, 2014. Dr. Dyer concurred that pursuant to the A.M.A., *Guides*, Table 16-2, page 504, a 5th metatarsal fracture with complete healing was equal to three percent permanent impairment of the left lower extremity.²

On December 15, 2014 OWCP issued a schedule award for three percent permanent impairment of the left lower extremity. Appellant requested reconsideration of this decision on January 26, 2015.

On April 27, 2015 OWCP received a report from Dr. Sean P. Scully, a Board certified orthopedic surgeon. Dr. Scully noted that appellant's diagnosis was closed fracture of the metatarsal bone. He also noted his belief that she was developing post-traumatic midfoot arthritis. Dr. Scully related that pursuant to the A.M.A., *Guides*, if appellant's arthritis was incorporated into an impairment rating she would be entitled to an award for six percent permanent impairment of the left lower extremity.

On June 4, 2015 another OWCP medical adviser reviewed Dr. Scully's report.³ This medical adviser related that appellant had reached maximum medical improvement on March 26, 2015 and that he concurred with Dr. Scully's assessment that pursuant to Table 16-2 of the A.M.A., *Guides* appellant had an additional three percent permanent impairment of the left lower extremity.

On June 10, 2015 OWCP issued a schedule award for an additional three percent permanent impairment of the left lower extremity leg for a total six percent permanent impairment.

² For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009. See *D.T.*, Docket No. 12-503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

³ The physician's signature is illegible.

Appellant again requested reconsideration on August 20, 2015. With her request she submitted a narrative statement, hospital records, and a narrative report dated September 17, 2013 signed by a nurse practitioner.

By decision dated August 31, 2015, OWCP reviewed the merits of appellant's claim and affirmed its prior decision of June 10, 2015. It noted that none of the evidence submitted by appellant contained evidence of a higher impairment rating.

On November 23, 2015 appellant again requested reconsideration. OWCP received a September 13, 2013 emergency room report signed by Dr. Marshall Frink, a family practitioner. In this report, Dr. Frink related that appellant had developed postoperative cellulitis after hardware was removed from her left foot on August 23, 2013. Appellant submitted medical evidence already of record from Dr. Scully. She also submitted a hospital discharge report dated February 27, 2014, signed by Dr. Scully, which noted that appellant had undergone a total left knee arthroplasty on February 24, 2014.

By decision dated February 1, 2016, OWCP reviewed the merits of appellant's claim and denied modification of the decision of August 31, 2015. It noted that she had not provided sufficient evidence to warrant an increased schedule award.

By letter dated July 10, 2016 and received July 18, 2016, appellant requested reconsideration of OWCP's February 1, 2016 decision. With her request, she attached a narrative statement that referenced the A.M.A., *Guides*; a medical report dated February 17, 2016 from Dr. Scully, diagnosing her with a bunion; several results of diagnostic testing of her right knee and foot; an undated and unsigned document recommending an impairment rating of "more than [three] percent"; an undated letter from her Board-certified psychiatrist, Dr. Tavid Tipton; a letter dated April 14, 2014 from Dr. Scully noting that her knee problems may stem from a left foot injury; a brief from an attorney requesting acceptance of major depressive disorder as a condition under appellant's claim; various records from counselors; and records of her prescribed medications.

By decision dated November 22, 2016, OWCP denied appellant's request for reconsideration. It found that appellant had submitted repetitious or irrelevant evidence and argument in support of her request for reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's 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.⁴ Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three

⁴ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

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.⁵

ANALYSIS

OWCP issued a June 10, 2015 decision granting appellant a schedule award for six percent permanent impairment of the left lower extremity.

The last merit decision in this claim was a February 1, 2016 OWCP decision denying modification of the schedule award for six percent. By letter dated July 10, 2016, appellant requested reconsideration of the February 1, 2016 decision. With her request, she attached a narrative statement; a medical report dated February 17, 2016 from Dr. Scully diagnosing her with a bunion; several results of diagnostic testing of her right knee and foot; an undated and unsigned document recommending an impairment rating of “more than 3 percent”; an undated letter from her Board-certified psychiatrist, Dr. Tavid Tipton; a letter dated April 14, 2014 from Dr. Scully, noting that her knee problems may stem from a left foot injury; a brief from an attorney requesting acceptance of major depressive disorder as a condition under appellant’s claim; various records from counselors; and records of her prescribed medications.

By decision dated November 22, 2016, OWCP denied appellant’s request for reconsideration. It found that appellant had submitted only repetitious or irrelevant evidence in support of her request for reconsideration of the decision of February 1, 2016.

The Board first finds that OWCP properly considered appellant’s letter as a request for reconsideration and not as a claim for an increased schedule award. In her July 10, 2016 letter, appellant specifically claimed reconsideration of facts which she alleged had not been considered in the February 1, 2016 decision.⁶ She was not claiming a new award based on a new rating of permanent impairment.⁷ The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. In her July 10, 2016 request for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant has submitted sufficient evidence to establish entitlement to a schedule award greater than the six percent already awarded. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any pertinent new and relevant evidence with her request for reconsideration. Appellant did not submit any medical evidence containing a greater impairment rating than six percent permanent impairment of her left lower extremity and none of the medical evidence submitted was relevant to the extent of her permanent impairment. While appellant submitted a

⁵ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁶ *See S.H.*, Docket No. 17-0373 (issued April 12, 2017).

⁷ *See A.C.*, Docket No. 13-1810 (issued January 6, 2014).

narrative statement in which she referenced the A.M.A., *Guides*, appellant is not a physician and her own interpretation of the calculation of her permanent impairment is not medical evidence and is thus irrelevant.⁸ As such, the evidence submitted on reconsideration of the February 1, 2016 decision was irrelevant, and insufficient to warrant reconsideration of appellant's claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus properly denied merit review. She did not establish that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2016 is affirmed.

Issued: June 28, 2017
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

⁸ See C.A., Docket No. 13-1877 (issued April 8, 2014).