

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

<p>M.M., Appellant</p> <p>and</p> <p>SOCIAL SECURITY ADMINISTRATION, OFFICE OF MANAGEMENT & BUDGET, New York, NY, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 18-0292 Issued: July 9, 2018</p>
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 27, 2017 appellant filed a timely appeal from an October 2, 2017 merit decision and a November 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant established permanent impairment of a scheduled member or function of the body causally related to her accepted employment injuries, warranting a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 14, 1990 appellant, then a 38-year-old typist, filed a traumatic injury claim (Form CA-1) alleging that, on May 11, 1990, she felt a pulling sensation in her neck after pulling a box of computer paper. She stopped work on May 11, 1990 and returned to modified-duty work for five hours per day on September 17, 1990. OWCP accepted the claim for cervical and lumbar sprains and thoracic or lumbar radiculitis or neuritis. By decision dated August 31, 1992, it issued a loss of wage-earning capacity determination, adjusting her compensation based on her employment as a typist working five hours per day.

On June 16, 2017 appellant filed a claim for a schedule award (Form CA-7).

By development letter dated August 7, 2017, OWCP informed appellant that no medical evidence had been received in support of her schedule award claim. It requested that she submit a medical report from her treating physician which addressed whether she had reached maximum medical improvement (MMI) and whether her accepted conditions caused permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² Appellant was afforded 30 days to provide the requested evidence.

In response to OWCP's request, appellant submitted a July 31, 2017 report from Dr. Igor Stiler, a treating Board-certified neurologist. Dr. Stiler provided lumbar and cervical range of motion findings and upper extremity sensory findings. Physical examination findings noted 5/5 muscle testing for both upper extremities, and that deep tendon reflexes were 1-2/4. Dr. Stiler opined that appellant was 75 percent disabled.

By decision dated October 2, 2017, OWCP denied appellant's schedule award claim. It determined that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as required under 5 U.S.C. § 8107.

On November 7, 2017 appellant requested reconsideration and submitted an October 31, 2017 report from Dr. Stiler. Dr. Stiler related appellant's examination findings which were unchanged from his prior report. He reviewed cervical and lumbar magnetic resonance imaging scans (MRI) and found L4-5 anterolisthesis, L4-5 and L5-S1 bulging disc, C4-5 moderate cervical spondylosis. Dr. Stiler also reviewed electromyography (EMG) test dated October 17, 2017, which showed acute right L5-S1 radiculopathy, chronic C5-6 radiculopathy, carpal tunnel syndrome, and bilateral upper extremity sensory neuropathy. He concluded that appellant had reached MMI and was 75 percent disabled.

By decision dated November 13, 2017, OWCP denied appellant's request for reconsideration of the merits of her schedule award claim. It determined that the evidence submitted was repetitive and substantially similar to evidence previously submitted.

² A.M.A., *Guides* (6th ed. 2009).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,³ and its implementing federal regulations,⁴ 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.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

Neither FECA, nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁷ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.⁸ The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.⁹ It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated into OWCP's procedures.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. As previously noted, no schedule award is payable for permanent loss of use of the back, spine, or body as a whole, but, appellant may receive a schedule award for permanent impairment to the upper or lower extremities even though the cause of impairment originated in the spine.¹¹

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.C.*, Docket No. 17-1617 (issued January 8, 2018); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

⁸ *Supra* note 6 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a(3) (March 2017).

⁹ The methodology and applicable tables were initially published in *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009).

¹⁰ *See supra* note 6 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

¹¹ *J.S.*, Docket No. 13-2129 (issued June 6, 2014).

In support of her claim appellant submitted a July 31, 2017 report from Dr. Stiler who noted examination findings. Dr. Stiler found appellant was 75 percent disabled. Appellant's report is of limited probative value as Dr. Stiler did not address permanent impairment pursuant to the A.M.A., *Guides* or *The Guides Newsletter*. The Board has held that schedule awards are to be based on the A.M.A., *Guides*. An estimate of permanent impairment is irrelevant and not probative where it is not based on the A.M.A., *Guides*.¹²

As appellant has not submitted medical evidence in conformance with the A.M.A., *Guides*, supporting permanent impairment of a scheduled member or function of the body, causally related to the accepted condition, she has failed to meet her burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in 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.¹³ Section 10.606(b)(3) 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.¹⁴ 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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

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).

In her November 7, 2017 request for reconsideration appellant did not make any argument that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, appellant was not entitled to a review of the

¹² *C.B.*, Docket No. 15-503 (issued June 12, 2015); *Shalanya Ellison*, 56 ECAB 150, 154 (2004).

¹³ *Supra* note 1.

¹⁴ 20 C.F.R. § 10.606(b)(3).

¹⁵ *Id.* at § 10.608.

¹⁶ *Id.* at § 10.607(a). *Supra* note 6 at Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁷

However, appellant did submit a new medical report, dated October 31, 2017 from Dr. Stiler. While the report from Dr. Stiler is new, he merely reiterated his prior opinion from his earlier report. Appellant did not submit any new medical evidence containing a permanent impairment evaluation.¹⁸ The report of Dr. Stiler is not relevant and pertinent new evidence related to the issue of whether appellant was entitled to a schedule award. The Board has held that evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case.¹⁹ Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review.²⁰

CONCLUSION

The Board finds that appellant has not established permanent impairment of a scheduled member or function of the body, causally related to her accepted employment injuries, warranting a schedule award. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

¹⁷ See *J.B.*, Docket No. 17-0628 (issued June 28, 2017).

¹⁸ *G.T.*, Docket No. 18-0158 (issued May 11, 2018).

¹⁹ *E.N.*, Docket No. 16-1000 (issued September 20, 2016); *D.K.*, 59 ECAB 141 (2007).

²⁰ See *B.R.*, Docket No. 17-1213 (issued January 18, 2018).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 13 and October 2, 2017 are affirmed.

Issued: July 9, 2018
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