

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

R.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Atlanta, GA, Employer**

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**Docket No. 17-1069
Issued: June 6, 2018**

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 April 17, 2017 appellant filed a timely appeal from a November 2, 2016 merit decision and a January 26, 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 over the merits of the claim.²

ISSUES

The issues are: (1) whether appellant has established permanent impairment of his right lower extremity, warranting a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The record provided the Board includes evidence received after OWCP issued its January 26, 2017 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On May 26, 2015 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right ankle when he stepped in a pothole while in the performance of duty. He stopped work on May 26, 2015. OWCP accepted the claim for closed fracture fifth metatarsal bone, right and right foot sprain. It paid wage-loss compensation on the supplemental rolls commencing July 11, 2015. Appellant returned to work in full-duty status on August 5, 2015. He continued to submit medical evidence to OWCP.

In a July 29, 2016 report, Dr. Daniel R. Orcutt, a Board-certified orthopedic surgeon, advised that appellant was at maximum medical improvement (MMI). Physical examination of the right ankle and foot was reported as normal with mild tenderness of the fifth metatarsal. Dr. Orcutt provided an assessment of healed comminuted right fifth metatarsal fracture, minimally displaced with some mild intermittent pain. He noted that a magnetic resonance imaging (MRI) scan showed that the fracture was healed.

On September 21, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a September 28, 2016 letter, OWCP requested that appellant submit a medical report from his treating physician evaluating permanent impairment, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).³ Appellant was afforded 30 days to submit the required medical evidence.

In an October 3, 2016 report, Dr. Orcutt assessed comminuted right fifth metatarsal fracture, minimally displaced with routine healing. As appellant continued to have mild intermittent pain in his lateral foot, Dr. Orcutt recommended orthotics. He also indicated that appellant was at MMI. Dr. Orcutt advised that, if appellant's foot pain was not improved with orthotics, then he would be rated for permanent impairment. An October 3, 2016 durable medical equipment order for custom orthotic was provided, which OWCP approved.

By decision dated November 2, 2016, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body.

On January 17, 2017 appellant requested reconsideration of OWCP's November 2, 2016 decision. In an accompanying January 9, 2017 letter, he also requested a copy of his medical records and billing information.

Medical reports from Dr. Orcutt dated November 11 and December 12, 2016 were received. Dr. Orcutt noted that appellant had lateral foot pain with the orthotics. He continued to report that appellant was at MMI. Dr. Orcutt again reiterated that if appellant's foot pain was not improved with orthotics, then he would be rated for permanent impairment.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated January 26, 2017, OWCP denied appellant's request for reconsideration of its November 2, 2016 decision. It found that appellant had not submitted new and relevant evidence or argument in support of his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions 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.⁴ 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.⁵

It is the claimant's burden of proof to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁶ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁷ The evaluation of permanent impairment should include a detailed report that provides history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.⁸

ANALYSIS -- ISSUE 1

Appellant claimed a schedule award based on his accepted right foot injury. By decision dated November 2, 2016, OWCP denied his schedule award claim finding that he had failed to submit medical evidence of a permanent impairment resulting from his work injury.

The Board finds that appellant has not submitted evidence sufficient to establish permanent impairment to a scheduled member warranting a schedule award. By development letter dated September 28, 2016, OWCP informed him of the type of evidence necessary to establish his schedule award claim and specifically requested that he submit an impairment evaluation from his

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

⁵ *K.H.*, Docket No. 09-0341 (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).

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *Id.* at 2.808.6(a).

attending physician in accordance with the sixth edition of the A.M.A., *Guides*. Appellant was afforded 30 days to submit the necessary evidence.

The October 3, 2016 medical report from Dr. Orcutt noted appellant's continued foot pain and recommended orthotics. Dr. Orcutt indicated that appellant was at MMI. He also advised that if appellant's foot pain was not improved with orthotics, then he would undergo a permanent impairment evaluation. The Board finds that Dr. Orcutt's report is insufficient to establish a permanent impairment. While Dr. Orcutt indicated MMI had been reached, he failed to provide an impairment rating for the right lower extremity, noting that it was dependent upon appellant's success with orthotics.⁹ His report is therefore insufficient to establish permanent impairment of the right lower extremity.

It is appellant's burden of proof to establish a permanent impairment of a scheduled member.¹⁰ The medical evidence must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.¹¹ Appellant did not submit such evidence and thus, he did not meet his burden of proof to establish his schedule award claim.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously

⁹ *E.D.*, Docket No. 10-0967 (issued January 7, 2011).

¹⁰ *Supra* note 5.

¹¹ *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹² *See D.T.*, Docket No. 17-0102 (issued April 13, 2017); *V.W.*, Docket No. 09-2026 (issued February 16, 2010); *L.F.*, Docket No. 10-0343 (issued November 29, 2010).

¹³ This section provides in pertinent part: “[t]he 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).

¹⁴ 20 C.F.R. § 10.607.

¹⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

considered by OWCP.¹⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁷

ANALYSIS -- ISSUE 2

OWCP issued a November 2, 2016 decision finding that appellant had not established permanent impairment of a scheduled member or function of the body, warranting a schedule award under FECA. On January 9, 2017 appellant requested reconsideration of that decision.

The Board finds that OWCP properly denied appellant's request for reconsideration.

In his request for reconsideration, appellant 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. Rather, he submitted a January 9, 2017 statement which requested a copy of his medical records and billings. This is immaterial or irrelevant as it does not challenge the correctness of the schedule award decision to require merit review. It is not a basis for reopening the case.¹⁸ Thus, appellant is not entitled to a review of the merits of his 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 permanent impairment related to his accepted injury. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case. While appellant submitted new progress reports from Dr. Orcutt dated November 11, 2016 and December 12, 2016, those reports do not contain an impairment rating in accordance to the A.M.A., *Guides*.¹⁹ Rather, they again appear to hinge an impairment rating on appellant's success with the orthotics. As such, they are insufficient to warrant reconsideration of appellant's claim. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁰

The Board accordingly findings that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹⁶ 20 C.F.R. § 10.606(b)(3).

¹⁷ *Id.* at § 10.608(a), (b).

¹⁸ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁹ *See B.D.*, Docket No. 16-1177 (issued October 27, 2016).

²⁰ *See Y.C.*, Docket No. 17-1212 (issued April 11, 2018).

On appeal appellant contends that his physician had submitted a schedule award rating. However, such a report was not part of the record at the time of the January 26, 2017 decision. OWCP did not err by failing to consider evidence that was not of record in this case.²¹

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 appellant has not established permanent impairment of his right lower extremity entitling him to a schedule award. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2017 and November 2, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 6, 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

²¹ See *N.T.*, Docket No. 14-1895 (issued March 4, 2015).