



## **FACTUAL HISTORY**

On March 9, 2009 appellant, then a 65-year-old plate printer, filed a traumatic injury claim (Form CA-1) alleging that, on February 20, 2009, he injured his left knee when he tripped on a raised diamond plate and struck his knee on a table while in the performance of duty. By decision dated April 3, 2009, OWCP accepted his claim for sprain of the lateral collateral ligament of the knee, tear of the medial meniscus of the left knee, and unspecified internal derangement of the left knee.

By decision dated July 15, 2010, OWCP issued appellant a schedule award for 13 percent permanent impairment of the left lower extremity.

On May 27, 2011 appellant requested reconsideration of OWCP's July 15, 2010 decision, arguing that OWCP had miscalculated his schedule award due to his work at two separate agencies.

By decision dated September 20, 2011, OWCP reviewed the merits of appellant's claim and found that it had calculated appellant's schedule award correctly based on his pay rate on the date disability began, April 16, 2009, by not including his Office of Personnel Management (OPM) annuity in calculating his pay rate.

Appellant retired from the employing establishment, effective April 1, 2012.

By decision dated February 6, 2013, OWCP expanded the acceptance of appellant's claim to include additional conditions of traumatic arthropathy of the left lower leg and tenosynovitis of the left foot and ankle.

On July 22, 2015 appellant requested an increased schedule award for his left lower extremity.

In a report dated May 3, 2015, Dr. Marvin Van Hal, a Board-certified orthopedic surgeon, examined appellant and calculated that he had 41 percent left lower extremity impairment after a total knee arthroplasty. He rendered his impairment rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> and indicated a date of maximum medical improvement of September 22, 2014.

OWCP forwarded the case record and a statement of accepted facts to a district medical adviser (DMA) on August 3, 2015. In a report dated August 5, 2015, the DMA concurred with Dr. Van Hal's total lower extremity impairment rating of 41 percent, yielding an additional award due to appellant of 28 percent, as he had previously received a schedule award for 13 percent permanent impairment of the left lower extremity.

By decision dated March 10, 2016, OWCP granted appellant an increased schedule award for an additional 28 percent permanent impairment of the left lower extremity. It noted weekly pay of \$2,255.00, which, multiplied by the 75 percent compensation rate, resulted in weekly compensation of \$1,691.25. After cost-of-living adjustments, appellant's weekly compensation

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

was calculated to be \$1,728.75. His payment during the period February 7 to March 5, 2016 was noted to be \$6,915.00. Finally, OWCP calculated appellant's continuing compensation payments every four weeks as \$4,052.00. The period of the award ran for 80.60 weeks.<sup>3</sup>

On February 28, 2017 appellant requested reconsideration of OWCP's March 10, 2016 decision. With his request for reconsideration, appellant included a calculation of his monthly annuity from OPM. He also included a letter in which he asked OWCP to check the mathematics on the calculation of his March 10, 2016 schedule award. Appellant noted that, while his weekly compensation at the 75 percent compensation rate was \$1,691.25, and that with a cost-of-living adjustment his weekly compensation was \$1,728.75, he had received a schedule award with a weekly compensation amount of \$1,242.80, which reflected 55 percent compensation rate. He further noted that each monthly deposit was for the amount of \$4,052.00.

By decision dated March 30, 2017, OWCP denied appellant's request for reconsideration. It found that he had not raised substantive legal questions, nor included new and relevant evidence with his 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.<sup>4</sup> Section 10.608(b) of OWCP's regulations provide that 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.<sup>5</sup>

### **ANALYSIS**

OWCP issued a decision dated March 10, 2016 granting appellant a schedule award for an additional 28 percent permanent impairment of his left lower extremity. It noted weekly pay of \$2,255.00, which, multiplied by the 75 percent compensation rate, resulted in weekly compensation of \$1,691.25. After cost-of-living adjustments, appellant's weekly compensation was calculated to be \$1,728.75. Finally, it calculated his continuing compensation payments every four weeks as \$4,052.00. On February 23, 2017 appellant requested reconsideration of this decision alleging that OWCP had made a mathematical error as to his weekly compensation rate.

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<sup>3</sup> An ACPS supplemental rolls payment form report dated March 3, 2016 related that a schedule award would be paid on the supplemental rolls from May 3, 2015 through November 17, 2016 at a weekly pay rate of \$1,242.80 and a 75 percent compensation rate. No insurance or miscellaneous deductions would be taken resulting in a net payment of \$44,574.86. The record reflects however that appellant received schedule award compensation totaling \$81,691.16.

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

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

As noted above, the Board does not have jurisdiction over the merits of the December 17, 2015 decision. 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 his claim.

The Board finds that appellant has raised a legal argument that has a reasonable color of validity as to whether OWCP erroneously applied or interpreted a specific point of law.

In his February 23, 2017 request for reconsideration, appellant alleged that OWCP erroneously applied a compensation formula in determining his schedule award pay rate. The Board notes that \$1,728.75, appellant's weekly schedule award compensation after cost-of-living adjustments, multiplied by four to arrive at his continuing payments, does not equal \$4,052.00, as noted by OWCP. One thousand seven hundred twenty eight dollars and seventy-five cents multiplied by four equals \$6,915.00, the amount OWCP indicated that he would receive during the period February 7 to March 5, 2016. As such, appellant's allegation of a mathematical error has a reasonable color of validity. A request for reconsideration predicated on a legal premise need only contain an assertion of an adequate legal premise having some reasonable color of validity.<sup>6</sup>

Thus, as appellant had not previously raised this legal argument, the Board finds that he is entitled to a review of the merits of his claim based on the first above-noted requirement under section 10.606(b)(3). The Board finds that OWCP, therefore, improperly denied appellant's request for reconsideration of the merits in its March 30, 2017 decision pursuant to 20 C.F.R. § 10.608. The case shall be remanded to OWCP to conduct a merit review of appellant's schedule award claim. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>6</sup> See *T.B.*, Docket No. 10-2336 (issued September 28, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: June 13, 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