

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

_____)	
T.C., Appellant)	
)	
and)	Docket No. 17-0800
)	Issued: May 2, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Lakewood, CA, Employer)	
_____)	

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 February 28, 2017 appellant filed a timely appeal from an October 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated January 26, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

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

FACTUAL HISTORY

On August 28, 2007 appellant, then a 38-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a bilateral foot condition causally related to factors of her federal employment. OWCP initially accepted her claim for left-sided plantar

¹ 5 U.S.C. § 8101 *et seq.*

fibromatosis and osteoarthritis of the right ankle and right foot. It subsequently expanded the acceptance of appellant's claim for additional foot conditions, including bilateral plantar fibromatosis, bilateral exostosis, other bilateral peripheral enthesopathies, other bilateral synovitis and tenosynovitis, bilateral bone cyst, right villonodular synovitis of the right ankle and right foot, right tarsal tunnel syndrome, and acute osteomyelitis of the right ankle and right foot.

On March 28, 2008 appellant stopped work and, on that same date, underwent OWCP-approved surgery, including left-sided plantar fascial release to ameliorate the condition of plantar fascia of the left foot. OWCP paid her disability compensation on the daily rolls beginning March 28, 2008.

On May 3, 2008 appellant underwent surgery for partial exostectomy of the first metatarsal bone with arthrotomy and synovectomy of the first metatarsophalangeal joint to ameliorate the condition of metatarsophalangeal degenerative joint disease. On March 25, 2011 she underwent a second procedure for partial exostectomy of the first metatarsal bone with arthrotomy and synovectomy of the first metatarsophalangeal joint, in addition to partial exostectomy of the proximal phalanx (to ameliorate degenerative joint disease of the first metatarsophalangeal joint), and exostosis of the proximal phalanx. These procedures were authorized by OWCP.

In a January 9, 2012 report, Dr. Charles Xeller, a Board-certified orthopedic surgeon, found that appellant had left lower extremity permanent impairment of 1 percent and right lower extremity permanent impairment of 13 percent pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² He calculated the impairment rating for the left lower extremity by using Table 16-2 (Foot and Ankle Regional Grid) on page 502. Dr. Xeller found that appellant's left plantar fascial release surgery yielded one percent permanent impairment of the left lower extremity, finding that she had a class C default permanent impairment under class 1. With regard to the right foot and ankle, he rated a class 1 impairment for metatarsal fracture (nondisplaced with minimal findings, ongoing pain, and decreased range of motion for metatarsal angulation) and metatarsalgia, which produced 10 percent default value for right lower extremity permanent impairment according to Table 16-2, page 504. Dr. Xeller found a grade modifier two for functional history under Table 16-3, page 515, for a moderate problem; a grade modifier one for physical examination, for a mild problem, pursuant to Table 16-3; and a grade modifier one for clinical studies, for a mild problem, under Table 16-3. He found that, after application of the net adjustment formula, appellant had 13 percent permanent impairment of the right lower extremity.

On March 15, 2012 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted employment conditions.

In an April 7, 2012 report, Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed Dr. Xeller's findings and determined that appellant had 1 percent permanent impairment of the left lower extremity for plantar fasciitis and 12 percent

² A.M.A., *Guides* (6th ed. 2009).

permanent impairment of the right lower extremity for metatarsal angulation and metatarsalgia under the A.M.A., *Guides*.³

By decision dated May 29, 2012, OWCP granted appellant a schedule award for 1 percent permanent impairment of the left lower extremity and 12 percent permanent impairment of the right lower extremity. The award ran for 37.44 weeks from January 9 to September 27, 2012 and was based on the impairment rating of Dr. Simpson.

On August 2, 2013 appellant underwent surgery for left-sided decompression of the intermediate dorsal cutaneous nerve, partial exostectomy of the middle cuneiform, and removal of a ganglionic cyst. On June 6, 2014 she underwent surgery for right-sided plantar fascial release to ameliorate the condition of plantar fascia of the right foot. The procedures were authorized by OWCP.

On July 24, 2015 appellant filed a Form CA-7 seeking schedule award compensation for additional permanent impairment.

In a May 23, 2015 report, Dr. Xeller found that appellant had sustained an additional 1 percent permanent impairment of the right lower extremity, which totaled 14 percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. He based this additional one percent rating on appellant's June 6, 2014 right-sided plantar fascia release surgery. Dr. Xeller advised that appellant had palpatory findings and pain at the area of the incision, which yielded a class 1 impairment and an additional one percent impairment rating pursuant to Table 16-2, page 504, and Table 16-3, page 515. He noted that she also underwent an excision of a ganglion of her left foot, but found that this procedure did not warrant an impairment rating because it did not result in any additional permanent impairment for the left lower extremity.

In an August 3, 2015 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed Dr. Xeller's May 23, 2015 report and found that his report did not provide a basis for an additional impairment rating under the sixth edition of the A.M.A., *Guides*. He noted that appellant had six percent residual impairment of the right great toe from an accepted July 24, 2007 injury pursuant to Table 16-2, page 504, which was less than the 12 percent right lower extremity impairment she was already awarded and which was subsumed into the original award. Dr. Harris further found that, while Dr. Xeller rated an additional one percent right lower extremity permanent impairment for the June 6, 2014 plantar release surgery, Dr. Simpson's 12 percent right lower extremity impairment rating encompassed any impairment for right plantar fasciitis. He, therefore, found that appellant was not entitled to additional impairment for the right lower extremity.

By decision dated August 12, 2015, OWCP found that appellant was not entitled to schedule award compensation for more than 1 percent permanent impairment of the left lower extremity and 12 percent permanent impairment of the right lower extremity, for which she

³ Dr. Simpson indicated that he agreed with Dr. Xeller's right lower extremity rating, but he actually calculated 12 percent permanent impairment of the right lower extremity whereas Dr. Xeller calculated 13 percent permanent impairment for that extremity.

received a schedule award. It found that Dr. Harris' August 3, 2015 report represented the weight of the medical opinion evidence with respect to this matter.

On October 30, 2015 appellant requested reconsideration of the August 12, 2015 decision.

In an August 22, 2015 report received by OWCP on November 2, 2015, Dr. Xeller reiterated his previous findings and conclusions regarding the permanent impairment of appellant's right lower extremity. With regard to the left lower extremity, he advised that, given the fact that she underwent a procedure for excision of a ganglion, her calcaneal cuboid joint showed arthritic degeneration with a one millimeter cartilage interval. Dr. Xeller found that this yielded a class 1, six percent permanent impairment of the left lower extremity pursuant to Table 16-2, page 507, and Table 16-3, page 515, of the sixth edition of the A.M.A., *Guides*.

In a January 20, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed Dr. Xeller's August 22, 2015 report and found that appellant was not entitled to schedule award compensation for more than 1 percent permanent impairment of the left lower extremity and 12 percent permanent impairment of the right lower extremity. He indicated that Dr. Xeller found that she had sustained an additional 1 percent permanent impairment of the right lower extremity, which totaled 14 percent permanent impairment of the right lower extremity under the sixth edition of the A.M.A., *Guides*. Dr. Katz noted that Dr. Xeller based this additional one percent rating on appellant's June 6, 2014 right-sided plantar fascia release surgery. He advised that she had palpatory findings and pain at the area of the incision, which yielded a class 1 impairment and an additional one percent impairment rating pursuant to Table 16-2, page 504, and Table 16-3, page 515. Dr. Katz further noted that the sixth edition of the A.M.A., *Guides* indicates at page 497 (section 16.1a) that if a patient has two significant diagnoses, the examiner should use the diagnosis with the highest causally related impairment rating for the impairment calculation. Based on this principle, he found that appellant was not entitled to an additional schedule award because Dr. Simpson's April 7, 2012 report utilized Dr. Xeller's previous findings, which had already provided a basis for impairment ratings for the bilateral lower extremities. Dr. Katz found that Dr. Xeller's August 22, 2015 impairment rating was duplicative and inconsistent with the methodology used for the regional grids. He therefore opined that Dr. Xeller's report could not be accepted as probative for the purpose of recommending an additional schedule award.

By decision dated January 26, 2016, OWCP found that appellant was not entitled to schedule award compensation for more than 1 percent permanent impairment of the left lower extremity and 12 percent permanent impairment of the right lower extremity, for which she previously received a schedule award. It found that Dr. Katz' January 20, 2016 report represented the weight of the medical opinion evidence with respect to this matter.

On July 18, 2016 appellant requested reconsideration of the January 26, 2016 decision.

In a report dated March 25, 2016, Dr. Xeller noted that he had previously provided an impairment rating for appellant of 1 percent permanent impairment of the left lower extremity and 13 percent permanent impairment of the right lower extremity. He indicated that, since the time of that impairment rating, she underwent a plantar fascia release on her right foot on June 6, 2004 and excision of ganglion and nerve decompression of her left foot on August 2, 2013. Dr. Xeller posited that appellant was now entitled to schedule award compensation for additional permanent

impairment of the left lower extremity due to permanent effects of the August 2, 2013 surgery. He indicated that she was entitled to schedule award compensation for an additional five percent permanent impairment of the left lower extremity based on ongoing pain and treatment for a left foot ganglion, neuroma, and calcaneal cuboid joint arthritis.⁴ Dr. Xeller acknowledged that the A.M.A., *Guides* indicates that one needs to pick one impairment category for each injury, but he posited that appellant “has had different diagnoses on different dates and different surgical dates.”

Appellant submitted a March 15, 2016 report which presented results from magnetic resonance imaging (MRI) scans of her left and right feet, which were essentially normal. She also submitted reports dated February 9 and July 12, 2016 from Dr. Chul Kim, an attending podiatrist, and the results of a March 25, 2016 functional capacity evaluation.

By decision dated October 12, 2016, OWCP denied appellant’s application for review because that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require OWCP to review its prior decision. It found that Dr. Xeller’s March 25, 2016 report was cumulative and substantially similar to his previous reports. OWCP asserted that while he “might have moved a few sentences around and put a new date on the report” the report was substantially similar to and merely restated the findings of his August 22, 2015 report.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁵

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁹ For OWCP decisions issued on or after

⁴ Dr. Xeller also suggested that appellant had additional permanent impairment of his right lower extremity due to permanent effects of the June 6, 2004 surgery, but he did not discuss the specific degree of this additional permanent impairment.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ 20 C.F.R. § 10.607(a).

August 29, 2011, the date of the application for reconsideration is the “received date” as recorded in the Integrated Federal Employees’ Compensation System (iFECS).¹⁰ If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹¹

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment. OWCP should issue a merit decision on the schedule award claim, rather than adjudicate an application for reconsideration.¹²

ANALYSIS

The Board finds that OWCP improperly denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) as she submitted evidence of increased permanent impairment in support of her claim.

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in greater permanent impairment.¹³ As the Board explained in *Linda T. Brown*,¹⁴ a claimant may seek an additional schedule award if the evidence establishes that she sustained an impairment causally related to the employment injury. Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). See also *C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP’s decision for which review is sought.

¹¹ *Id.* at Chapter 2.1602.4. See also *M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹² See *H.B.*, Docket No. 17-0414 (issued March 17, 2018).

¹³ See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994); *C.M.*, Docket No. 17-0310 (issued February 15, 2017); see also *B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate an application for reconsideration); see also *J.F.*, Docket No. 13-0112 (issued November 6, 2013); *R.B.*, Docket No. 16-1863 (issued April 3, 2017).

¹⁴ *Id.* In *Brown*, OWCP issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that it reconsider in 1997, submitting a current report with an opinion that she had 25 percent permanent impairment to the arms and legs. OWCP found that she submitted an untimely request for reconsideration that did not demonstrate clear evidence of error. The Board remanded the case for a merit decision.

the prior schedule award decision, it should be considered a claim for an increased schedule award. A request for an increased schedule award is not subject to time limitations.

The Board finds that with her request for reconsideration appellant submitted additional evidence in support of an increased permanent impairment in the form of a March 25, 2016 report from Dr. Xeller, an attending physician. In a report dated March 25, 2016, Dr. Xeller noted that he had previously provided an impairment rating for appellant of 1 percent permanent impairment of the left lower extremity and 13 percent permanent impairment of the right lower extremity. He indicated that, since the time of that impairment rating, appellant underwent a plantar fascia release on her right foot on June 6, 2004 and excision of ganglion and nerve decompression of her left foot on August 2, 2013. Dr. Xeller posited that she was now entitled to schedule award compensation for an additional permanent impairment of the left lower extremity due to permanent effects of the August 2, 2013 surgery. He indicated that appellant was entitled to schedule award compensation for an additional five percent permanent impairment of the left lower extremity based on ongoing pain and treatment for a left foot ganglion, neuroma, and calcaneal cuboid joint arthritis.¹⁵

Therefore the Board finds that the case should be remanded to OWCP to conduct a merit review of appellant's increased schedule award claim. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's request for an additional schedule award.

CONCLUSION

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

¹⁵ Dr. Xeller also indicated that appellant had additional permanent impairment of his right lower extremity due to permanent effects of the June 6, 2004 surgery, but he did not discuss the specific degree of this additional permanent impairment. He acknowledged that the A.M.A., *Guides* indicates that one needs to pick one impairment category for each injury, but he posited that appellant "has had different diagnoses on different dates and different surgical dates."

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for action consistent with this decision.

Issued: May 2, 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