



## **FACTUAL HISTORY**

On November 6, 1999 appellant, then a 43-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that he injured his left shoulder that day. He was assigned modified work duties. OWCP accepted that the November 6, 1999 employment injury caused cervical strain; left shoulder strain; cervical herniated discs at C4-5, C5-6, and C6-7; and left shoulder impingement.

Appellant was placed on administrative leave for the period June 7 to July 6, 2010 because no work was available within his restrictions. He received wage-loss compensation on the supplemental rolls beginning July 14, 2010, and on the periodic rolls beginning in August 2010. On October 27, 2011 Dr. Eric W. Scott, a Board-certified neurosurgeon, performed an anterior discectomy and decompression at C4-5 and C5-6.

On August 12, 2013 appellant returned to restricted duty for approximately four hours a day and OWCP reduced his wage-loss compensation accordingly. He returned to full-time modified duty on April 1, 2015. By decision dated June 10, 2015, OWCP found that appellant's actual earnings in the modified position of mail processing clerk fairly and reasonably represented his wage-earning capacity with zero loss of wage-earning capacity. Accordingly, it reduced his wage-loss compensation benefits to zero. Medical benefits for the effects of the employment-related injury continued.

On August 24, 2016 appellant filed a schedule award claim (Form CA-7).

By development letter dated August 30, 2016, OWCP informed appellant of the medical evidence needed to support his schedule award claim. This was to include an opinion from his physician that he had reached maximum medical improvement and an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).<sup>2</sup> Appellant was afforded 30 days to submit the necessary evidence.

In treatment notes dated September 28 and October 20, 2016, Dr. Christopher Roberts, Board-certified in anesthesiology and pain medicine, noted appellant's complaints of cervical spine neck pain. He described physical examination findings and diagnosed cervical postlaminectomy syndrome, cervicgia, and cervical facet joint syndrome.

On November 1, 2016 appellant filed a second schedule award claim (Form CA-7).

By letter dated November 7, 2016, OWCP asked Dr. Roberts to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*. Appellant thereafter submitted a November 22, 2016 magnetic resonance imaging scan of the cervical spine that demonstrated postsurgical changes and multilevel degenerative change, and broad-based disc protrusions with associated canal stenosis and foraminal stenosis.

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

By decision dated February 7, 2017, OWCP denied appellant's schedule award claim, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member in accordance with the sixth edition of the A.M.A., *Guides*. On April 25, 2017 appellant requested reconsideration. He forwarded a March 19, 2017 report which was signed by a physician assistant and cosigned by Dr. Roberts. This report noted appellant's cervical spine examination findings of painful limited neck range of motion and a positive facet loading test. Dr. Roberts advised that in accordance with Chapter 17 of the sixth edition of the A.M.A., *Guides*, The Spine and Pelvis, under Table 17-4 appellant had a class 3 cervical spine impairment for multiple disc herniations which equaled nine percent permanent impairment.<sup>3</sup>

By decision dated May 1, 2017, OWCP denied appellant's request for reconsideration of the merits of his schedule award claim. It indicated that the March 19, 2017 medical report was rendered by a physician assistant who did not qualify as a physician under FECA. OWCP noted that, by decision dated February 14, 2017, appellant had been granted a schedule award for five percent permanent impairment of the left arm under File No. xxxxxx889. It denied his reconsideration request under the instant claim, adjudicated by OWCP under File No. xxxxxx494, because the evidence submitted did not contain a medical opinion indicating that he had reached maximum medical improvement and had permanent impairment of a scheduled member as a result of the work injury.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>4</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>5</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>6</sup>

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<sup>3</sup> This correspondence was also dated March 20, 2017.

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.608(b).

An 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.<sup>7</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

In its May 1, 2017 decision, OWCP denied merit review of appellant's request for an increased schedule award. 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. As discussed *infra*, he submitted new and relevant evidence. OWCP, therefore, erred in denying merit review.

The Board first notes that, contrary to OWCP's finding, Dr. Roberts signed the March 19, 2017 report. While the report was signed by a physician assistant, it was also signed by Dr. Roberts.<sup>8</sup> In that report, Dr. Roberts concluded that appellant had nine percent permanent impairment under Table 17-4 as a result of his cervical disc herniations.

Although the A.M.A., *Guides* includes guidelines for rating impairment due to disorders of the spine, under FECA, a schedule award is not payable for injury to the spine.<sup>9</sup> FECA, however, was modified such that a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>10</sup>

In the case at hand, OWCP did not inform Dr. Roberts of the procedures to be used for impairment due to a spinal condition. Section 3.700 of OWCP procedures memorializes proposed tables outlined in a July and August 2009 *The Guides Newsletter*.<sup>11</sup> Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11<sup>12</sup> and upper extremity impairment originating in the spine through Table 15-14.<sup>13</sup>

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<sup>7</sup> See *B.K.*, 59 ECAB 228 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims* Chapter 2.808.9 (February 2013).

<sup>8</sup> Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). Registered nurses, licensed practical nurses, and physician assistants are not "physicians" as defined under FECA. Their opinions are of no probative value. See *Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>9</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>10</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, Exhibit 1, note 5 Chapter 3.700 (January 2010); *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> *Supra* note 2 at 533.

<sup>13</sup> *Id.* at 425.

As noted, 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.<sup>14</sup> As he submitted an impairment evaluation from Dr. Roberts finding nine percent permanent impairment, the Board finds that the case should be remanded to OWCP to conduct a merit review of appellant's schedule award claim.<sup>15</sup> Following this and such further development 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 his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: May 1, 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

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<sup>14</sup> *Supra* note 7.

<sup>15</sup> *Id.* at Chapter 2.808.6e (March 2017).