



## **FACTUAL HISTORY**

On September 25, 2008 appellant, then a 38-year-old mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed soreness in his hands, wrists, and arms working with wrenches and other tools while in the performance of duty. He identified September 24, 2006 as the date he first became aware of his condition. However, it was not until September 24, 2008 that appellant first realized his condition was caused or aggravated by factors of his federal employment. Appellant continued to work.

On March 27, 2009 OWCP advised appellant that his claim had been accepted for bilateral carpal tunnel syndrome and left ulnar nerve compression.<sup>2</sup>

On May 26, 2009 appellant underwent authorized left open carpal tunnel release and release of the left canal of Guyon. He stopped work and received wage-loss compensation for temporary total disability. On September 15, 2009 appellant underwent authorized right endoscopic carpal tunnel release. He continued to receive wage-loss compensation for temporary total disability.

On November 30, 2009 appellant filed a schedule award claim (Form CA-7).

By development letter dated December 10, 2009, OWCP requested that appellant submit an impairment evaluation from his attending physician with an opinion as to whether he had reached maximum medical improvement (MMI) and whether he had a permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> It afforded him 30 days to submit the necessary evidence.

On January 11, 2010 appellant returned to full-time, limited duty as a modified auto technician.

A March 8, 2010 report by Dr. Leonard F. Hubbard, a Board-certified orthopedic hand surgeon, was received. He indicated that appellant had reached MMI on March 8, 2010. Dr. Hubbard reported that appellant had no objective findings and no restriction of motion upon physical examination. He completed a permanent impairment worksheet, which showed that according to the Right Upper Extremity table and Left Upper Extremity table, appellant had zero percent permanent impairment of the bilateral upper extremities.

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<sup>2</sup> OWCP initially denied appellant's occupational disease claim by decision dated November 19, 2008. Appellant subsequently requested a review of the written record, and by decision dated March 19, 2009, an OWCP hearing representative reversed the November 19, 2008 decision and accepted appellant's claim for bilateral carpal tunnel syndrome and left ulnar nerve compression.

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On January 29, 2013 appellant was separated from his employment.<sup>4</sup>

Dr. Hubbard continued to treat appellant. In a March 8, 2013 examination note, he reported a *QuickDASH* (Disabilities of the Arm, Shoulder, and Hand) score of 73 bilaterally and symmetrical grip strength. Dr. Hubbard indicated that appellant was at MMI. He opined that based on appellant's lack of function and altered sensation, he had seven percent permanent impairment of each upper extremity according to the fifth edition of the A.M.A., *Guides*.<sup>5</sup>

In a July 3, 2013 letter and impairment evaluation form, Dr. Hubbard recounted that appellant was at MMI. He reported that according to the sixth edition of the A.M.A., *Guides*, appellant had five percent permanent impairment of the left upper extremity and four percent permanent impairment of the right upper extremity. In a July 18, 2013 letter, Dr. Hubbard again noted that appellant had reached MMI. He reported that according to the sixth edition of the A.M.A., *Guides* appellant had four percent permanent impairment of each upper extremity as a result of the injury and treatment.

In an August 14, 2013 letter, Dr. Hubbard explained that appellant was seen for "an end result examination and loss of use rating." He indicated that according to the sixth edition of the A.M.A., *Guides* appellant had four percent whole person impairment, four percent left upper extremity impairment, and four percent right upper extremity impairment. Dr. Hubbard noted that appellant had reached MMI. He provided a medical impairment rating report, which indicated that he utilized Table 15-23 and Table 15-7 of the A.M.A., *Guides*.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether appellant sustained ratable impairment of his upper extremities in accordance with the A.M.A., *Guides*. In a January 7, 2014 report, Dr. Silver reviewed appellant's history of injury and discussed his medical records. Upon physical examination of appellant's upper extremities, he observed decreased sensation in the thumb, index, long, ring, and little fingers on the left and right hands. Dr. Silver also reported opponens pollicis atrophy, weakness, and decreased range of motion of the bilateral wrists. He diagnosed status post carpal tunnel release of the bilateral wrists, status post ulnar nerve release of the left wrist, recurrent carpal tunnel syndrome of the bilateral wrists, ulnar nerve impingement of the right wrist, and partial ankyloses of the right hand.

Dr. Silver noted that appellant had reached MMI on or about August 14, 2013. He reported that according to the sixth edition of the A.M.A., *Guides*, Table 15-23 on page 449, appellant had grade modifiers of 2 for functional history and physical examination and 1 for test findings for loss of function of his median nerves, resulting in six percent loss of function of the bilateral upper extremities. Regarding appellant's left ulnar nerve, Dr. Silver noted grade modifiers of 2 for physical examination and functional history and 1 for test findings, resulting in a functional scale of 3. He calculated that appellant's loss of function was a 5/3 with an increase of grade modifier

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<sup>4</sup> Appellant subsequently filed a notice of recurrence (Form CA-2a) claiming disability, which OWCP denied by decision date May 29, 2013.

<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

3 due to severe symptoms and a total loss of function of 6. Dr. Silver concluded that appellant had right upper extremity loss of function of nine and left upper extremity loss of function of nine.

In a March 11, 2014 report, Dr. Morley Slutsky, a Board-certified occupational medicine specialist and OWCP medical adviser, reviewed appellant's claim, including Dr. Silver's January 7, 2014 report, and disagreed with his findings. He reported that appellant had three percent permanent impairment of the right upper extremity and five percent permanent impairment of the left upper extremity for his accepted conditions of bilateral carpal tunnel syndrome and left ulnar nerve compression. Dr. Slutsky noted a date of MMI of January 7, 2014, the date of Dr. Silver's examination. He explained that when there is more than one compression neuropathy in the same upper extremity, the highest impairment is taken at 100 percent and the next highest is taken at 50 percent. Accordingly, Dr. Slutsky reported that with regard to appellant's left upper extremity, he had one impairment of three percent for carpal tunnel syndrome combined with another impairment of two percent for left cubital tunnel syndrome for a total of 5 percent left upper extremity impairment.<sup>6</sup> Regarding appellant's bilateral carpal tunnel syndrome, he utilized Table 15-23 on page 449, and indicated that appellant had grade modifiers of 1 for testing and history and 2 for physical examination, resulting in a final bilateral upper extremity impairment of three percent. Regarding appellant's left cubital tunnel syndrome, Dr. Slutsky reported that appellant had grade modifiers of 1 for testing, history, and physical examination for a left upper extremity permanent impairment rating of three percent.

In an April 16, 2014 report, Dr. Silver reviewed Dr. Slutsky's March 11, 2014 report and noted that he had "no disagreement with Dr. Slutsky's evaluation."

OWCP referred appellant's claim back to Dr. Slutsky for clarification and review. He explained that he agreed with Dr. Silver's impairment rating of six percent for the right upper extremity due to appellant's carpal tunnel condition, but determined that appellant had eight percent total left upper extremity impairment instead of Dr. Silver's assignment of nine percent. Dr. Slutsky noted that he assigned two percent nerve impairment while Dr. Silver assigned three percent impairment. He explained that he disagreed with Dr. Silver's assignment of grade modifiers in obtaining his impairment rating.<sup>7</sup>

On October 21, 2014 OWCP granted appellant a schedule award for eight percent permanent impairment of the left upper extremity and six percent permanent impairment of the right upper extremity, for a total of 43.68 weeks' compensation. The award ran from January 7 to November 8, 2014. OWCP found that the weight of the medical evidence rested with the

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<sup>6</sup> Dr. Slutsky calculated that  $\frac{1}{2}$  of 3 percent was 1.5 percent, which was rounded to 2 percent impairment. He combined the 3 percent impairment for left carpal tunnel syndrome and the 2 percent impairment for left cubital tunnel syndrome for a total of 5 percent left upper extremity impairment.

<sup>7</sup> Dr. Slutsky indicated that he assigned a grade modifier of 2 for functional history, as opposed to Dr. Silver's assignment of 3, because there was documentation that appellant was unable to perform at least one of the activities of daily living and he described mild, intermittent symptoms. He also noted a grade modifier of 1 for physical examination, instead of Dr. Silver's assignment of 2, because of decreased sensation in the ulnar nerve distribution. Dr. Slutsky explained that two-point discrimination testing was not documented, so appellant was not eligible for a score of 1 or higher.

July 31, 2014 report of Dr. Slutsky, an OWCP medical adviser, who accurately applied the A.M.A., *Guides* and provided an impairment rating in accordance with the A.M.A., *Guides*.

In a letter dated September 8, 2017, appellant asserted that the dates of his schedule award from January 7 to November 8, 2014 were incorrect. He alleged that his schedule award should be applied from the date of injury on September 24, 2006 to March 8, 2010, the date of MMI certified by his treating physician. Appellant noted that it was erroneous to use Dr. Silver's examination date as the MMI date because Dr. Silver never treated him, but only reviewed his medical records. He explained that because of the MMI date that OWCP used to calculate his schedule award, the Social Security Administration (SSA) informed him that he had a substantial overpayment which he was expected to reimburse. Appellant alleged that he should not be liable for reimbursement to SSA based on erroneous dates used by OWCP.

On October 17, 2017 an OWCP claims examiner informed appellant *via* telephone that the MMI date on the schedule award decision was medically driven, and not merely an administrative date change. He explained that the MMI date could affect pay rate. The claims examiner also advised appellant that he needed to resolve the issue with SSA because it could not "undo" the schedule award that was already paid.

In an undated letter received by OWCP on December 4, 2017, appellant indicated that he was requesting reconsideration of the dates of his schedule award. He asserted that the award should have run from September 24, 2006, the date of injury, to March 8, 2010, the date he returned to work and the MMI date certified by his treating physician. Appellant alleged that significant weight should be given to his treating physician, as opposed to Dr. Silver, because Dr. Silver did not treat him. He noted that the dates that OWCP used to calculate the period of his schedule award had created an overpayment with his SSA benefits. Appellant requested that OWCP correct the dates so that he was not financially burdened by OWCP's administrative error. No additional evidence was received with his reconsideration request.

By decision dated January 8, 2018, OWCP denied appellant's reconsideration request. It found that his December 4, 2017 reconsideration request was untimely filed and failed to demonstrate clear evidence that OWCP's decision was in error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>8</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>9</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely.<sup>10</sup>

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<sup>8</sup> *Thankamma Matthews*, 44 ECAB 765, 768 (1993).

<sup>9</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>10</sup> 20 C.F.R. § 10.607(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request, that is, the received date in the Integrated Employees' Compensation System (iFECS).<sup>11</sup>

OWCP, however, may not deny an application for reconsideration solely because the application was untimely filed. It may consider an untimely application for reconsideration if the evidence or argument contained in the reconsideration request demonstrates clear evidence of error on the part of OWCP.<sup>12</sup> In this regard, OWCP will conduct a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>13</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.<sup>14</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> The evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or demonstrate a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>17</sup> The Board has held that even a report such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical evidence requiring further development is insufficient to demonstrate clear evidence of error.<sup>18</sup>

The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.<sup>19</sup>

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<sup>11</sup> *Id.* at § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

<sup>12</sup> *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>13</sup> *See id.* at § 10.607(b); *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>14</sup> *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

<sup>15</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>16</sup> *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

<sup>17</sup> *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>18</sup> *A.R.*, Docket No. 15-1598 (issued December 7, 2015).

<sup>19</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, *supra* note 8.

## ANALYSIS

OWCP's last merit decision dated October 21, 2014 granted appellant a schedule award of eight percent left upper extremity permanent impairment and six percent right upper extremity permanent impairment. On December 4, 2017 appellant requested reconsideration of the schedule award decision.<sup>20</sup> He did not take issue with the percentage of impairment awarded, but challenged OWCP's finding that he reached MMI as of January 7, 2014. By decision dated January 8, 2018, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

The Board finds that OWCP properly determined that appellant failed to file a timely application for review. Timeliness is determined by the document receipt date of the reconsideration request (the received date in iFECS).<sup>21</sup> By decision dated October 21, 2014, OWCP granted appellant a schedule award. It received his request for reconsideration on December 4, 2017, which was outside the one-year time limit. Consequently, appellant must demonstrate clear evidence of error by OWCP with regard to his schedule award claim.<sup>22</sup>

The Board has reviewed the record and finds that appellant's arguments on reconsideration do not raise a substantial question as to the correctness of OWCP's October 21, 2014 schedule award decision and are, therefore, insufficient to demonstrate clear evidence of error.

In its most recent merit decision, OWCP granted appellant a schedule award for eight percent permanent impairment of the left upper extremity and six percent permanent impairment of the right upper extremity based on the July 31, 2014 report of Dr. Slutsky, an OWCP medical adviser. The award ran from January 7 to November 8, 2014. In his reconsideration request, appellant alleges that the period of his schedule award should be applied from the date of injury on September 24, 2006 to March 8, 2010, the date of MMI certified by his treating physician. He asserted that it was erroneous for OWCP to use Dr. Silver's examination date as the MMI date because Dr. Silver did not treat him.

In assessing eligibility for a schedule award, the medical evidence must show that the impairment has reached a permanent and fixed state, which is generally referred to as MMI.<sup>23</sup> Assuming MMI has been attained, the date of MMI is usually considered to be the date of the evaluation by the attending physician that is accepted as definitive by OWCP.<sup>24</sup> Schedule awards

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<sup>20</sup> The Board notes that OWCP properly determined that appellant was seeking reconsideration of the October 21, 2014 OWCP schedule award decision, and was not seeking an increased schedule award due to increased impairment and/or additional exposure. See Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.3(b) (February 2016); see also *J.K.*, Docket No. 14-1082 (issued November 24, 2014).

<sup>21</sup> *Supra* note 11 at Chapter 2.1602.4(b) (February 2016).

<sup>22</sup> *Supra* note 12; *Debra McDavid*, 57 ECAB 149 (2005).

<sup>23</sup> *Supra* note 11 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5b(1) (March 2017).

<sup>24</sup> *Id.* at Chapter 2.808.7b(1).

begin on the date of MMI unless circumstances show a later date should be used.<sup>25</sup> A retroactive determination of the date of MMI is not *per se* erroneous.<sup>26</sup> When the medical evidence establishes that the employee did in fact reach MMI by such date, the determination is proper.<sup>27</sup>

In order to demonstrate clear evidence of error, the evidence must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>28</sup> As customarily is the case, OWCP's identified date of MMI coincided with the date of the medical evaluation that formed the basis of the schedule award. Appellant failed to provide medical evidence and/or legal justification for selecting his September 24, 2006 date of injury as the appropriate date of MMI. He also did not articulate why Dr. Hubbard's finding of MMI as of March 8, 2010 was a more appropriate date of MMI.<sup>29</sup> Appellant's statement does not demonstrate clear error on the part of OWCP with respect to its October 21, 2014 schedule award decision, and fails to shift the weight of the evidence in favor of him. He did not provide any additional evidence to show that OWCP erred in assigning an MMI date of January 7, 2014. Appellant has not submitted any evidence, which raises a substantial question concerning the correctness of OWCP's schedule award decision and the dates for which the schedule award applied.<sup>30</sup>

On appeal appellant reiterates his previous contention that OWCP assigned an erroneous MMI date of January 7, 2014. He has not, however, demonstrated clear evidence of error on the part of OWCP. The Board has found that the term "clear evidence of error" is intended to represent a difficult standard.<sup>31</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. The evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>32</sup>

The Board finds that appellant has failed to support his reconsideration request with evidence or argument demonstrating that OWCP's October 21, 2014 schedule award decision was clearly erroneous. Appellant's request was insufficient to raise a substantial question as to the correctness of OWCP's October 21, 2014 decision or shift the weight of the evidence in his favor.

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<sup>25</sup> *Id.* at Chapter 2.808.7b(2).

<sup>26</sup> *Id.* at Chapter 2.808.7b(3).

<sup>27</sup> *Id.*

<sup>28</sup> *Supra* note 17.

<sup>29</sup> At the time, Dr. Hubbard indicated that appellant had zero percent bilateral upper extremity permanent impairment.

<sup>30</sup> *See G.B.*, Docket No. 16-0319 (issued April 6, 2016).

<sup>31</sup> *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.1602.5(a) (October 2011).

<sup>32</sup> *Supra* note 17.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board