

It authorized a right carpal tunnel release performed on March 1, 2010 and a left carpal tunnel release performed on April 5, 2010. Both surgeries were performed by Dr. Andrew G. Gabow, an attending Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation for temporary disability on the supplemental rolls commencing March 1, 2010. Appellant returned to full-time regular-duty work without restrictions on May 3, 2010.

OWCP subsequently received a July 29, 2010 medical report from Dr. Gabow who noted appellant's symptoms and advised that he had probably reached maximum medical improvement (MMI). Dr. Gabow opined that appellant had four percent permanent impairment of each hand due to his bilateral carpal tunnel and resultant release surgeries. He further opined that he had an additional three percent permanent impairment of the right hand due to extensor carpi ulnaris (ECU) tendinosis. Dr. Gabow concluded that appellant had seven percent permanent impairment of the right hand and four percent permanent impairment of the left hand.

On August 10, 2010 appellant filed a claim for a schedule award (Form CA-7).

By letter dated August 31, 2010, OWCP requested that Dr. Gabow clarify his July 29, 2010 report as it was unclear whether he used the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)² to rate appellant's permanent impairment for work-related bilateral carpal tunnel syndrome. It also requested that he indicate the date appellant had reached MMI.

Dr. Gabow responded by letter dated September 7, 2010, reiterating that appellant had seven percent permanent impairment of the right hand and four percent permanent impairment of the left hand.

By letter dated January 13, 2011, OWCP again requested that Dr. Gabow clarify whether he utilized the sixth edition of the A.M.A., *Guides* to rate appellant's bilateral hand impairment.

Dr. Gabow responded in an addendum note dated April 20, 2011, informing OWCP that he had used the fifth edition of the A.M.A., *Guides*³ to rate appellant's permanent impairment. In a subsequent letter dated July 26, 2011, he advised OWCP that he utilized the sixth edition of the A.M.A., *Guides*. Dr. Gabow determined that appellant had three percent permanent impairment of each upper extremity for his bilateral carpal tunnel releases and two percent permanent impairment of the right hand for ECU tendinosis.

On July 2, 2012 OWCP routed Dr. Gabow's July 26, 2011 letter, a statement of accepted facts (SOAF), and the case file to Dr. Morley Slutsky, an OWCP district medical adviser (DMA), Board-certified in occupational medicine, for review and determination regarding whether appellant sustained permanent impairment based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

² A.M.A., *Guides* (6th ed. 2009).

³ *Id.* at (5th ed. 2001).

In a report dated August 25, 2012, Dr. Slutsky utilized the sixth edition of the A.M.A., *Guides* and concluded that appellant had no permanent impairment of either upper extremity. He noted that Dr. Gabow provided no impairment calculations or rationale for his assignment of three percent impairment for bilateral carpal tunnel releases and a right ECU condition. Dr. Slutsky indicated that the right ECU condition had not been accepted by OWCP. He determined that appellant had reached MMI on September 7, 2010, the date of Dr. Gabow's impairment evaluation.

By letter dated December 3, 2013, OWCP requested that Dr. Gabow provide additional medical evidence in support of his impairment ratings. On January 9, 2014 Dr. Gabow responded that his bilateral hand impairment ratings remained unchanged.

OWCP, in a letter dated July 1, 2014, informed appellant that his claim, which had been accepted for right wrist ECU tendinitis under OWCP File No. xxxxxx303, had been combined with the instant claim under OWCP File No. xxxxxx040. It also informed him that his case would be forwarded to a second opinion physician and then to a different DMA to determine his entitlement to a schedule award.⁴

On April 22, 2015 OWCP referred appellant, together with the medical record, the July 2, 2012 SOAF, and a series of questions, to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second opinion to determine the nature and extent of his bilateral upper extremity permanent impairment and to assign a date of MMI.

In a report dated May 11, 2015, Dr. Silver disagreed with Dr. Gabow's three percent permanent impairment rating for bilateral carpal tunnel syndrome and right wrist ECU tendinitis. He explained that Dr. Gabow had not provided rationale to support his impairment ratings. Dr. Silver reported essentially normal findings on physical examination of appellant's right and left upper extremities and diagnosed status post decompression of the right and left carpal tunnels and mild ECU. He concluded that appellant had no bilateral upper extremity permanent impairment based on the sixth edition of the A.M.A., *Guides*. Dr. Silver determined that appellant had reached MMI on September 7, 2010, the date of Dr. Gabow's impairment evaluation.

OWCP, by letter dated June 2, 2016, provided Dr. Gabow a copy of Dr. Silver's May 11, 2015 report for review and requested that he respond to the assessment presented by the referral physician within 30 days. In a report dated June 13, 2016, Dr. Gabow utilized the sixth edition of the A.M.A., *Guides* and reiterated that appellant had three percent permanent impairment of each upper extremity as a result of his accepted carpal tunnel syndrome. He opined that appellant had three percent permanent impairment of the right upper extremity for ECU tendinitis.

On November 28, 2016 OWCP routed Dr. Silver's May 11, 2015 report and a new SOAF to Dr. Arthur S. Harris, a DMA Board-certified in orthopedic surgery, for review. It specifically noted that this version of the SOAF superseded all prior versions. The SOAF noted that appellant's accepted conditions included bilateral carpal tunnel syndrome under the instant claim OWCP File

⁴ The Board notes that OWCP did not identify a master file number for the combined cases.

No. xxxxxx040, right middle finger strain under OWCP File No. xxxxxx706, and right wrist ECU tendinitis under File No. xxxxxx303.

On December 2, 2016 Dr. Harris reported that appellant was evaluated by Dr. Silver on February 11, 2015 and was felt to have two percent permanent impairment of each upper extremity in accordance with the sixth edition of the A.M.A., *Guides* due to residual problems with mild carpal tunnel symptoms status post carpal tunnel releases. He determined that appellant had reached MMI on February 11, 2015, the date of Dr. Silver's impairment evaluation.

OWCP, on December 28, 2016, requested that Dr. Harris clarify whether appellant had any work-related permanent impairment, noting that Dr. Silver opined in his May 11, 2015 report that appellant had no permanent impairment. On January 3, 2017 Dr. Harris responded that based on Dr. Silver's May 11, 2015 findings, appellant had two percent permanent impairment of each upper extremity according to the sixth edition of the A.M.A., *Guides*.

On January 9, 2017 OWCP requested that Dr. Harris clarify which diagnosis and tables of the A.M.A., *Guides* he used to rate appellant's permanent impairment. In response on January 13, 2017, Dr. Harris identified the diagnoses of status post right carpal tunnel release performed on March 1, 2010 and status post left carpal tunnel release performed on April 5, 2010 as the basis of his impairment ratings. He also identified the A.M.A., *Guides* table and explained his calculations used in finding appellant's two percent bilateral upper extremity permanent impairment.

By decision dated February 8, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity. The period of the award ran for 12.48 weeks from February 11 through May 9, 2015 and was based on Dr. Harris' impairment ratings for authorized bilateral carpal tunnel releases. OWCP noted Dr. Gabow's three percent permanent impairment rating for bilateral carpal tunnel releases and related that his three percent permanent impairment rating for right wrist ECU pertained only to appellant's claim under OWCP File No. xxxxxx303.

In an appeal request form and letter received by OWCP on May 10, 2017, appellant requested reconsideration. He contended that OWCP improperly relied on the sixth edition of the A.M.A., *Guides* and unfairly reduced the percentage of his bilateral upper extremity permanent impairment provided by Dr. Gabow. Appellant also contended that Dr. Harris' opinion was not entitled to the weight of the medical evidence as he was unfamiliar with his physical or emotional condition.

By decision dated October 6, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its February 8, 2017 decision.⁵ It found that he had not submitted corroborating evidence to support his contention that it erred in relying on the sixth edition of the A.M.A., *Guides* to determine the extent of his bilateral upper extremity permanent impairment.

⁵ OWCP noted in its October 6, 2017 decision that, while the evidence submitted on reconsideration was not relevant, a merit review of appellant's claim was conducted because a decision was not issued on his request for reconsideration within 90 days in accordance with Board precedent.

Appellant requested reconsideration on May 1, 2018. In an April 26, 2018 letter, he contended that he was entitled to an increased schedule award for his accepted right wrist ECU tendon condition under OWCP File No. xxxxxx303, which was a constant source of chronic pain and weakness. Appellant explained that his ECU tendon injury had not been fully addressed, which was required according to OWCP's literature pertaining to an existing injury in an open case.

By decision dated June 1, 2018, OWCP denied further merit review of appellant's claim as he failed to present any relevant evidence to show that it erroneously applied or interpreted a specific point of law.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁶ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁷ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.⁸ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

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).

By decision dated February 8, 2017, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity. It based the award on the January 13, 2017 impairment ratings of its DMA, Dr. Harris, noting that his impairment ratings were based on appellant's authorized bilateral carpal tunnel releases. OWCP also noted that while appellant's physician, Dr. Gabow, determined that appellant had three percent permanent impairment as a result of the authorized bilateral carpal tunnel releases, his three percent impairment rating for right wrist ECU tendinitis pertained only to appellant's claim under OWCP File No. xxxxxx303. It denied modification of this schedule award by decision dated October 6, 2017. On May 1, 2018

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.608(a).

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

appellant requested reconsideration of this decision alleging that his schedule award did not include an additional accepted right upper extremity condition.

As noted above, the Board does not have jurisdiction over the merits of the last merit decision issued by OWCP on October 6, 2017. 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.

In his May 1, 2018 request for reconsideration, appellant contended that OWCP failed to consider his right wrist ECU tendinitis, which OWCP accepted under File No. xxxxxx303, in calculating his right upper extremity permanent impairment rating. The Board notes that OWCP subsequently combined this claim with the instant claim assigned File No. xxxxxx040, which it had accepted for bilateral carpal tunnel syndrome.

OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function. If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate. There are no provisions for apportionment under FECA. Rated impairment should reflect the total loss as evaluated for the schedule member at the time of the rating examination.¹⁰

The Board finds that the argument submitted by appellant is a relevant legal argument not previously considered by OWCP as it raises the question of whether he is entitled to a greater schedule award for the right upper extremity as the result of an additional accepted employment-related condition of right extensor carpi ulnar tendinitis. As such, he is entitled to a review of the merits of his claim under section 10.606(b)(3) of OWCP's regulations.¹¹

The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision on the claim.

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).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d (March 2017).

¹¹ See *L.Y.*, Docket No. 15-1344 (issued March 10, 2016).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision.

Issued: February 14, 2019
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