

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

FACTUAL HISTORY

On December 22, 2014 appellant, then a 42-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2014 he sustained sharp low back pain going down into his left leg while he was taking toilet paper rolls out of boxes and placing them in a garbage bag while in the performance of duty. He stopped work on December 15, 2014. OWCP accepted the claim for lumbar sprain, temporary aggravation of lumbar disc degeneration, and lumbar radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls as of January 29, 2015 and he was placed on the periodic rolls as of March 8, 2015. On April 17, 2015 appellant underwent an OWCP-approved L5-S1 microdecompression partial facetectomy, foraminotomy, and discectomy.³

On March 10, 2017 OWCP referred appellant for a second opinion examination with Dr. Laura Sciaroni, a Board-certified orthopedic surgeon, to determine the status of his work-related condition, the extent of his disability, and appropriate treatment.

In an April 7, 2017 report, Dr. Sciaroni noted appellant's history of injury and treatment. She provided range of motion findings for the right and left lumbar spine to include: 20 degrees of flexion, 15 degrees of extension, and 20 degrees of lateral flexion, due to pain. Dr. Sciaroni noted that appellant was guarding with range of motion, self-limited with complaints of pain, and also noted that when he was not being formally examined he had lumbar flexion to at least 40 degrees. She conducted additional tests and diagnosed back sprain, lumbar radiculopathy, and hand pain of unclear cause. Dr. Sciaroni opined that the lumbar injury was connected to the work injury by direct cause as well as aggravation of a previous lumbar disc herniation injury. She further indicated that there were no objective findings to support appellant's complaints other than some degree of persistent back pain, that his hand complaints did not correspond with an industrial injury, and that he had reached maximum medical improvement (MMI). Dr. Sciaroni completed a work capacity evaluation (Form OWCP-5c) and prescribed sedentary work for up to four hours a day.

On August 1, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated August 24, 2017, OWCP informed appellant that additional medical evidence was necessary to establish his schedule award claim. It advised him to submit a report from his treating physician which evaluated his permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ OWCP afforded appellant 30 days to submit the necessary evidence.

³ Appellant also has prior claims before OWCP. In OWCP File No. xxxxxx268, he alleged that on June 13, 2014 he sustained an injury to the left foot when walking. OWCP administratively accepted the claim without formal adjudication. In OWCP File No. xxxxxx461, appellant alleged that on June 14, 2011 he sustained an injury when lifting trash bags out of the work truck and into a dumpster. OWCP accepted a lumbosacral strain as work related.

⁴ A.M.A., *Guides* (6th ed. 2009).

In a September 14, 2017 report, Dr. Victoria Barber, a Board-certified orthopedic surgeon, noted appellant's history, conducted a physical examination, and provided her findings. She diagnosed status post L5-S1 microdiscectomy, residual low back pain, radiculopathy, and lower extremity weakness on the left. Dr. Barber determined that appellant continued to have residuals of lower back pain, but he was permanent and stationary. She provided range of motion findings for the lumbar spine to include: 10 degrees of extension, 40 degrees of flexion, 30 degrees for lateral bending on the right, and 20 degrees for lateral bending on the left. Dr. Barber also noted 3/5 motor strength on the left, with 5/5 on the right. She utilized the fifth edition of the A.M.A., *Guides*,⁵ and explained that her findings were consistent with 13 percent whole person impairment.

On February 8, 2018 OWCP referred the case to a district medical adviser (DMA) to determine if appellant had a work-related spinal injury which caused a permanent impairment of his lower extremities.

In a February 22, 2018 report, Dr. Slutsky, the DMA, utilized the A.M.A., *Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (The Guides Newsletter)*. He explained that Dr. Barber provided a nonspecific examination, as opposed to Dr. Sciaroni, who provided a very specific lower extremity examination and found evidence of lower extremity sensory or motor deficits associated with lumbar spine nerve roots. The DMA found that these findings were consistent with a normal lower extremity electromyography (EMG) scan and nerve conduction velocity (NCV) tests. He also noted that the most recent magnetic resonance imaging scan showed no nerve root impingement. The DMA explained that Dr. Barber found no lower extremity loss, only noted 3/5 weakness on the left, and provided no details regarding which muscles and lumbar nerve root innervations were involved. He also noted that she utilized the fifth edition of the A.M.A., *Guides*, as opposed to *The Guides Newsletter July/August 2009* for rating nerve root deficits related to the spine. The DMA indicated that Dr. Sciaroni's findings were more specific, consistent with the diagnostic testing, and reflected appellant's best effort. He found that appellant had reached MMI on April 7, 2017. The DMA opined that the evidence did not demonstrate a permanent, measurable, scheduled impairment.

On March 12, 2018 OWCP requested clarification from the DMA with regard to his findings and history that appellant had not previously received a schedule award. In a March 25, 2018 report, the DMA clarified that he merely noted that there was no mention of a prior schedule award. He explained that Dr. Sciaroni provided a specific lower extremity neurologic evaluation, whereas Dr. Barber's examination was nonspecific. The DMA determined that there were no findings of specific lower extremity sensory or motor deficits related to lumbar spine nerve roots and, therefore, appellant was not eligible for a lower extremity impairment using *The Guides Newsletter* for rating nerve root deficits related to the spine.

By decision dated April 4, 2018, OWCP denied appellant's schedule award claim. It determined that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as required pursuant to 5 U.S.C. § 8107.

On June 8, 2018 appellant requested reconsideration and submitted an April 6, 2018 report from Dr. Barber, amended on May 25, 2018. Dr. Barber explained that when she evaluated him

⁵ A.M.A., *Guides* (5th ed. 2001).

on September 14, 2017 she had not been advised to use the sixth edition of the A.M.A., *Guides*. She opined that appellant had 13 percent whole person impairment. Dr. Barber referred to the sixth edition of the A.M.A., *Guides*, Table 17-4, Lumbar Spine Regional Grid,⁶ and explained that he had findings consistent with a diagnosis class of 2 which equaled 14 percent whole person permanent impairment. She noted that this described an individual with intervertebral disc herniation single level, with medically documented findings with or without surgery and documented radiculopathy at clinical examination. Dr. Barber explained that her finding of 3/5 motor strength on examination included slight elevation, flexion, and extension of the knee against resistance, dorsiflexion, plantar flexion, inversion and eversion of the foot, and extension of the extensor hallucis. She noted that her findings were identified as being 3/5 on the left when compared with the right lower extremity, as opposed to Dr. Sciaroni, who had not identified any neurologic deficits, or found permanent impairment.

By decision dated June 29, 2018, OWCP denied reconsideration of the merits of appellant's claim. It determined that the additional medical report of Dr. Barber was cumulative and substantially similar to medical evidence previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁷ and its implementing federal regulations,⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

Neither FECA, nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.¹¹ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹² For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be

⁶ A.M.A., *Guides* 570.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.C.*, Docket No. 17-1617 (issued January 8, 2018); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹² *See supra* note 10 at Chapter 2.808.5(c)(3) (March 2017).

applied.¹³ The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.¹⁴ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In support of his claim appellant submitted a September 14, 2017 report from Dr. Barber who utilized the fifth edition of the A.M.A., *Guides* and opined that appellant had 13 percent whole person permanent impairment. Dr. Barber's September 14, 2017 report is of limited probative value as she neither used the sixth edition of the A.M.A., *Guides* nor *The Guides Newsletter* in calculating appellant's permanent impairment.¹⁶ She also provided a whole person impairment rating, which is of no probative value as a whole person permanent impairment rating is not permitted under FECA.¹⁷

The DMA, Dr. Slutsky, provided a February 22, 2018 report noting that he had reviewed Dr. Barber's report and explained why it was insufficient, as it did not address motor and sensory loss caused by accepted peripheral nerve injury. The DMA also reviewed Dr. Sciaroni's April 7, 2017 report and determined that his finding of no lower extremity sensory or motor deficits was consistent with appellant's normal EMG and NCV testing. In a March 25, 2018 report, the DMA further indicated that there were no findings of specific lower extremity sensory or motor deficits related to lumbar spine nerve roots. He opined that appellant was not eligible for a lower extremity impairment using *The Guides Newsletter* for rating nerve root deficits related to the spine.

As appellant has not submitted medical evidence in conformance with the A.M.A., *Guides*, supporting permanent impairment of a scheduled member or function of the body, the Board finds that he has not met his burden of proof to establish his claim for a schedule award.

Appellant may request a schedule award or increased schedule award at any time based on evidence of new exposure, or medical evidence showing a progression of an employment-related condition resulting in impairment or increased impairment.

¹³ *E.L.*, Docket No. 18-1492 (issued March 19, 2019); *see also supra* note 10 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹⁴ *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

¹⁵ *See A.R.*, Docket No. 17-1504 (issued May 25, 2018); *E.D.*, Docket No. 13-2024 (issued April 24, 2014).

¹⁶ *A.R.*, *id.*

¹⁷ *A.L.*, Docket No. 08-1730 (issued March 16, 2009); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

LEGAL PRECEDENT -- ISSUE 2

Section 8128 (a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.²⁰

A timely application for reconsideration, including all supporting documents, must 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.²¹ 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 a review on the merits.²²

ANALYSIS -- ISSUE 2

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

In his June 8, 2018 request for reconsideration, appellant did not argue that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).²³

In support of his reconsideration request, appellant submitted an April 6, 2018 report from Dr. Barber, amended on May 25, 2018. Dr. Barber did not provide new examination findings, but rather restated her finding regarding motor strength testing. The Board finds that her April 6, 2018 report, as amended, is substantially similar to her prior September 14, 2017 report. The Board has held that evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case.²⁴ Dr. Barber's amended report did not provide relevant and pertinent

¹⁸ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.607.

²⁰ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System. *Id.* at Chapter 2.1602.4b.

²¹ *Id.* at § 10.606(b)(3).

²² *Id.* at § 10.608(a), (b); *see also* C.C., Docket No. 18-0316 (issued March 14, 2019).

²³ *See J.B.*, Docket No. 17-0628 (issued June 28, 2017).

²⁴ *E.N.*, Docket No. 16-1000 (issued September 20, 2016); *D.K.*, 59 ECAB 141 (2007).

new evidence regarding appellant's permanent impairment attributable to his accepted employment injuries. Thus, appellant was not entitled to a review of the merits of his claim based on the third above-noted requirements under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 29 and April 4, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 2019
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