

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

C.S., Appellant)	
)	
and)	Docket No. 19-0851
)	Issued: November 18, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Fayetteville, NC, 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
JANICE B. ASKIN, Judge

JURISDICTION

On March 11, 2019 appellant filed a timely appeal from a December 3, 2018 merit decision and a March 5, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the March 5, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish more than three percent permanent impairment of her left lower extremity, for which she previously received a schedule award and whether she has established permanent impairment of the right lower extremity warranting a schedule award; and (2) 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 February 17, 1993 appellant, then a 32-year-old office automation clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 16, 1993 she sustained a lower back injury when she fell while in the performance of duty. OWCP accepted her claim for lumbar sprain, other psychogenic pain, and adhesive capsulitis of right shoulder.

By decision dated February 28, 2000, OWCP granted appellant a schedule award for three percent permanent impairment of her left lower extremity.

On December 21, 2015 OWCP expanded acceptance of appellant's claim to include lumbar radiculopathy. On June 13, 2017 it further expanded acceptance of her claim to include lumbar spondylosis with myelopathy.

In a report dated July 6, 2018, Dr. Howard Weiss, an osteopathic physician specializing in physical medicine and rehabilitation, noted appellant's history of injury, conducted a physical examination, and provided findings. He diagnosed chronic low back pain, lumbar degenerative disc disease, fusion of lumbar spine, and lumbar radiculopathy. Dr. Weiss indicated that appellant had sustained three percent lower extremity permanent impairment related to her chronic lumbar radiculopathy from her accepted February 16, 1993 employment injury.

On August 6, 2018 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated August 16, 2018, OWCP informed appellant that additional medical evidence was needed to establish her schedule award claim. It advised her to submit a report from her treating physician which evaluated her permanent impairment pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ OWCP also requested a supplemental report from Dr. Weiss to remedy the deficiencies in his July 6, 2018 report. It afforded appellant days for submission of the necessary evidence.

In a supplement to his July 6, 2018 report, dated September 26, 2018, Dr. Weiss noted appellant's physical examination findings regarding the lower extremities. Regarding motor deficit, he noted that she had normal bilateral lower extremity findings, regarding sensory deficit, he related that she had decreased sensation of the left foot at the L5-S1 distribution. Dr. Weiss related that he was clarifying that appellant's impairment rating of three percent was for the right

³ A.M.A., *Guides* (6th ed. 2009).

leg related to her right lumbosacral radiculopathy, and based on Table 17-4 on page 571 of the A.M.A., *Guides*. He also indicated that she had sustained 12 percent whole body impairment.

In a letter dated October 22, 2018, OWCP notified Dr. Weiss that his impairment rating of three percent of the right lower extremity secondary to the February 16, 1993 employment injury was deficient as it neither referenced the A.M.A., *Guides* nor specified the tables and pages used to calculate appellant's impairment rating. It informed him of the correct source to calculate an impairment rating and specifically what information he needed to include. OWCP afforded Dr. Weiss 30 days to submit the necessary evidence. It subsequently received a duplicate copy of his September 26, 2018 report.

On November 7, 2018 OWCP referred appellant's case, along with a statement of accepted facts and medical record, to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA). In his permanent impairment rating evaluation report dated November 8, 2018, Dr. Katz utilized the A.M.A., *Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*). Regarding the right lower extremity, he determined that, for spinal nerves L3, L4, L5, and S1, appellant had no motor deficit and no sensory deficit, which equaled a total permanent impairment of 0 percent. Regarding the left lower extremity at L5, the DMA determined that she had a mild sensory deficit, a class of diagnosis (CDX) of 1, a grade modifier of 1 for functional history (GMFH), and a grade modifier of 4 for clinical studies (GMCS). He reported that, following assignment of grade modifiers, application of the net adjustment formula resulting in +2, which amounted to a class 1, grade D or two percent permanent impairment. The DMA also noted no motor deficit. Regarding the left lower extremity at S1, he concluded the same grade modifier calculations as L5, which resulted in class 1 with an adjustment +2 from the default value which equaled class 1, grade E totaling 1 percent permanent impairment. The DMA combined the L5 and S1 left lower extremity impairment ratings to total three percent permanent impairment of the left lower extremity. He indicated that Dr. Weiss' impairment determination could not be accepted as probative because FECA neither allowed a schedule award for the spine nor recognized whole person impairment except for the lung. Therefore, the DMA explained that Dr. Weiss' whole person impairment rating of 12 percent could not be accepted as probative. He recommended a permanent impairment rating of three percent for the left lower extremity, 0 percent for the right lower extremity, and indicated the date of maximum medical improvement (MMI) was July 6, 2018.

By decision dated December 3, 2018, OWCP denied appellant's schedule award claim finding that the medical evidence of record was insufficient to establish entitlement to a schedule award for her right lower extremity, and the evidence did not support impairment to the left lower extremity greater than what was already paid in OWCP's February 28, 2000 decision.

On February 21, 2019 appellant requested reconsideration of OWCP's December 3, 2018 decision. She submitted additional medical evidence along with her request including duplicate diagnostic reports, duplicate operative reports, treatment notes, and other medical evidence that did not address a permanent impairment rating.

By decision dated March 5, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁴ and its implementing federal regulations,⁵ 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

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.⁸ However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.⁹ The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment.¹⁰ It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in OWCP's procedure manual.¹¹

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 applied.¹² 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.¹³ In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*,

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ 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).

⁸ 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).

⁹ *See supra* note 7 at Chapter 2.808.5(c)(3) (March 2017).

¹⁰ *E.L.*, Docket No. 18-1492 (issued March 19, 2019); *see also supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *See supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010); *C.S.*, Docket No. 18-0394 (issued August 15, 2019).

¹² *Supra* note 10.

¹³ *E.R.*, Docket No. 18-1646 (issued May 17, 2019); *D.S.*, Docket No. 14-0012 (issued March 18, 2014).

as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish more than three percent permanent impairment of her left lower extremity, for which she previously received a schedule award, or permanent impairment of the right lower extremity warranting a schedule award.

Regarding the left lower extremity, Dr. Weiss has not offered a permanent impairment rating of appellant's left lower extremity.

The DMA, Dr. Katz, utilized *The Guides Newsletter* to find three percent permanent impairment of appellant's left lower extremity due to her L5 and S1 spinal nerve impairments pursuant to page 6, Table 2. In rating the L5 impairment, he found a GMFH of 1, a GMCS of 4. Using the net adjustment formula $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$, the DMA calculated that appellant had a net adjustment of $(1-1) + (4-1) + (1-1) = 3$ equaling a grade C, the maximum, rating for two percent permanent impairment due to mild sensory deficit. In rating her S1 permanent impairment, for mild sensory deficit, he found a GMFH of 1, a GMCS of 4. Using the net adjustment formula, the DMA calculated that appellant had a net adjustment of $(1-1) + (4-1) + (1-1) = 3$ equaling a grade C, the maximum allowable, rating of 1 percent. Based on these calculations, he properly concluded that she had a combined three percent permanent impairment of the left lower extremity, based upon L5/S1 mild sensory deficits, related to her accepted lumbar spine conditions. The Board finds that the DMA properly determined that appellant had three percent permanent impairment of her left lower extremity, based upon mild sensory loss at L5/S1.

Regarding appellant's right lower extremity, in support of her claim, appellant submitted a July 6, 2018 report from Dr. Weiss, who indicated that she had sustained a three percent lower extremity impairment related to her chronic lumbar radiculopathy from her accepted February 16, 1993 employment injury. OWCP requested a supplemental report from Dr. Weiss. In his September 26, 2018 supplemental report, Dr. Weiss noted that appellant's impairment rating of three percent was for the right left related to right lumbosacral radiculopathy and based on Table 17-4 on page 571 of the A.M.A., *Guides*. He noted that she had no sensory or motor deficits of the right lower extremity. In an October 22, 2018 development letter, OWCP again notified Dr. Weiss that his calculations were deficient, explained what evidence he needed to submit, and afforded him 30 days to submit the necessary evidence. However, Dr. Weiss did not submit additional calculations. He failed to adequately explain how the A.M.A., *Guides* supported his findings of three percent permanent impairment of the right lower extremity.¹⁵

The DMA, reviewed Dr. Weiss' report and explained that appellant had no right lower extremity sensory or motor deficits related to spinal nerve roots and therefore no applicable impairment using *The Guides Newsletter*. The Board finds that the DMA properly applied *The*

¹⁴ *E.R., id.*; *see A.R.*, Docket No. 17-1504 (issued May 25, 2018); *E.D.*, Docket No. 13-2024 (issued April 24, 2014).

¹⁵ *See J.T.*, Docket No. 17-1465 (issued September 25, 2019).

Guides Newsletter, which requires sensory or motor loss of the lower extremity due to radiculopathy to establish permanent impairment of the lower extremity.¹⁶ Appellant has therefore not established permanent impairment of her right lower extremity.

Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, addressing a ratable permanent impairment of the left or right lower extremities. While Dr. Weiss also indicated that she had a permanent impairment of the whole body, there is no statutory basis for the payment of a schedule award for whole body impairment under FECA.¹⁷ Accordingly, the Board finds that appellant has not met her burden of proof to establish greater impairment than that which was previously awarded.

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.

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 request 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

¹⁶ See *M.T.*, Docket No. 19-0373 (issued August 22, 2019).

¹⁷ See *K.Y.*, Docket No. 18-0730 (issued August 21, 2019).

¹⁸ This section provides in pertinent part: the 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. *Supra* note 7 at 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).

ANALYSIS -- ISSUE 2

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

Preliminarily, the Board finds that OWCP did not receive additional evidence of permanent impairment with appellant's February 21, 2019 reconsideration request. The Board will therefore consider this a proper reconsideration request as opposed to a claim for an increased schedule award.²³

In her February 21, 2019 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, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).²⁴

In support of her reconsideration request, appellant submitted additional medical evidence including duplicate diagnostic reports, duplicate operative reports, treatment notes, and other medical evidence that did not address a schedule award impairment rating. The Board has held that evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case.²⁵ The underlying issue in this case is the degree of permanent impairment of appellant's lower extremities due to her employment injury. The Board finds that the new evidence submitted was not relevant and pertinent as it does not contain new evidence addressing the current extent of her employment-related permanent impairment.²⁶ Thus, appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 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 her burden of proof to establish more than three percent permanent impairment of the left lower extremity, for which she previously received a schedule award, and that she has not established permanent impairment of the right lower extremity warranting a schedule award. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²³ *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

²⁴ *E.R.*, *supra* note 13; *see J.B.*, Docket No. 17-0628 (issued June 28, 2017).

²⁵ *E.R.*, *id.*; *E.N.*, Docket No. 16-1000 (issued September 20, 2016); *D.K.*, 59 ECAB 141 (2007).

²⁶ *L.S.*, Docket No. 19-0592 (issued September 6, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2019 and December 3, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 18, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board