

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

A.H., Appellant	)	
	)	
and	)	<b>Docket No. 20-1115</b>
	)	<b>Issued: May 18, 2021</b>
U.S. POSTAL SERVICE, ST. PETERSBURG	)	
MAIN POST OFFICE, St. Petersburg, FL,	)	
Employer	)	
	)	

*Appearances:*  
Joanne M. Wright, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 7, 2020 appellant, through his representative, filed a timely appeal from an April 24, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 20, 2019, to the filing

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.<sup>3</sup>

### **ISSUE**

The issue is 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 March 2, 2011 appellant, then a 39-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx665 alleging that on that date he sustained contusions to his right shoulder and arm, chest, and bilateral thighs when he was involved in a motor vehicle accident (MVA) while in the performance of duty.<sup>4</sup> OWCP accepted his claim for contusions to the chest wall, bilateral thighs, right shoulder region, and right upper arm. Appellant stopped work following the MVA and returned to a modified job on April 16, 2011. He stopped work again on June 7, 2011. On March 28, 2012 OWCP expanded its acceptance of the claim to include lumbar sprain, neck sprain, and temporary aggravation of lumbar herniated nucleus pulposus. On July 1, 2013 it again expanded its acceptance of the claim to include additional conditions of right shoulder impingement, permanent aggravation of cervical degenerative disc disease, and permanent aggravation of cervical disc herniation at C3-4, C4-5, and C5-6. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls until February 9, 2013 and on the periodic rolls as of February 10, 2013. Appellant returned to a modified-duty position on October 20, 2014. By decision dated September 14, 2016, OWCP found that appellant's employment as a letter carrier, effective October 20, 2014, fairly and reasonably represented his wage-earning capacity with no wage loss.

By decision dated October 11, 2016, OWCP granted appellant a schedule award for 16 percent permanent impairment of the left lower extremity and 16 percent permanent impairment of the right lower extremity based on a moderate weakness and moderate sensory deficit over the bilateral L5 nerve root. The schedule award ran for 92.16 weeks for the period June 21, 2016 to March 28, 2018. The weight of the medical opinion evidence was accorded to the August 29, 2016 report of Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA). The DMA concurred with the June 21, 2016 medical opinion of Dr. Samy F. Bishai, an attending orthopedic surgeon, that appellant had 16 percent left lower extremity (left leg) impairment and 16 percent right lower extremity (right leg) impairment based

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the April 24, 2020 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.*

<sup>4</sup> Under OWCP File No. xxxxxx844, OWCP accepted a May 30, 2009 traumatic injury claim for lumbar sprain, herniated disc at L5-S1 and disc bulge at L3-4. Appellant underwent OWCP-approved lumbar discectomy at L3-4 and L5-S1 on May 7, 2010. He returned to modified duty on February 16, 2011. The current OWCP file has been combined with File No. xxxxxx844, with the latter serving as the master file.

on a bilateral L5 nerve root impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

On November 14, 2016 OWCP issued an amended schedule award of compensation based on the correct pay rate.

On June 29, 2018 appellant filed a claim for an increased schedule award (Form CA-7). In support thereof, he submitted a May 31, 2018 report, wherein Dr. Mark A. Seldes, a Board-certified family physician, opined that, under the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), appellant had 12 percent permanent impairment of the left lower extremity and 12 percent permanent impairment of the right lower extremity due to a bilateral S1 nerve root radiculopathy with moderate sensory and moderate motor deficits.

In a July 30, 2018 report, the DMA, Dr. Berman, opined that there was no change or additions from appellant's previously awarded 16 percent permanent impairment of the right and left lower extremities. He opined that Dr. Seldes' impairment rating for the left and right lower extremities due to a moderate sensory deficit and moderate motor deficit of the S1 nerve root was properly calculated under the A.M.A., *Guides*. However, the DMA opined that the 16 percent permanent impairment of the right and left lower extremities, which was previously awarded, should be utilized because there was moderate weakness and moderate sensory deficit over the bilateral L5 nerve root. He also opined that Dr. Seldes' June 6, 2018 date of maximum medical improvement (MMI) represented a stable clinical picture with no change anticipated within the coming year with or without treatment.

By decision dated August 14, 2018, OWCP denied an increased schedule award.

On October 12, 2018 appellant, through his representative, requested reconsideration. The representative contended that *The Guides Newsletter* allows for multiple levels of impairment to the nerve roots, including the S1 nerve root. Thus, she concluded that appellant had an additional 12 percent permanent impairment of his bilateral lower extremities.

In a September 7, 2018 report, Dr. Seldes advised that he correctly used the A.M.A., *Guides* in calculating appellant's 12 percent permanent lower extremity impairment for the left side and 12 percent permanent lower extremity impairment for the right side for the moderate motor deficit and moderate sensory deficit of the bilateral S1 nerve root. He indicated that *The Guides Newsletter* allowed for the combined impairment of multiple level or bilateral radiculopathy, not to exceed 56 percent of the lower extremity impairment. Dr. Seldes opined that combining the 16 percent bilateral lower extremity impairment for the bilateral L5 nerve root with the 12 percent bilateral lower extremity impairment for the S1 nerve root totaled a 28 percent permanent impairment of each lower extremity.

On October 17, 2018 OWCP again requested that the DMA review the record, including Dr. Seldes' September 7, 2018 report, to determine appellant's lower extremity impairments emanating from the spine. It requested that its DMA provide a clear explanation regarding his

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<sup>5</sup> A.M.A., *Guides*, 6<sup>th</sup> ed. (2009).

calculations as determined under *The Guides Newsletter*. OWCP noted that, when providing the current impairment, the DMA should stipulate whether the percentage provided included the prior percentage awarded or if it should be considered an addition to the prior percentage awarded. The DMA was also asked to address Dr. Seldes' reports and discuss any points of disagreement.

In a November 17, 2018 report, the DMA, Dr. Berman, reiterated that Dr. Seldes' 12 percent impairment rating to the left and right lower extremities based on the S1 nerve root was properly calculated under the A.M.A., *Guides*. He also reiterated that the bilateral impairment rating stemming from the L5 nerve root should be utilized, over that of the bilateral impairment rating stemming from the S1 nerve root, due to the moderate motor weakness and moderate sensory deficit of the bilateral L5 nerve root. Dr. Berman also again opined that the date of MMI was May 31, 2018.

By decision dated May 20, 2019, OWCP denied modification of its August 14, 2018 decision for an increased schedule award.

On April 8, 2020 appellant, through his representative, requested reconsideration. The representative argued that OWCP incorrectly determined that the weight of the medical evidence should be given to DMA Dr. Berman. She noted that both Dr. Seldes and Dr. Berman agreed that appellant had 16 percent permanent impairment of each lower extremity at L5 for which he received a schedule award, and that appellant had 12 percent permanent impairment of each lower extremity due to permanent impairment at S1. However, the DMA did not properly address *The Guides Newsletter* provisions, which allowed for the combining of the multilevel nerve root impairments not to exceed 56 percent lower extremity impairment. The representative contended that OWCP failed to follow the procedures outlined in *The Guides Newsletter*, which allowed for the combination of the multilevel nerve root impairments.

By decision dated April 24, 2020, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>6</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>7</sup> 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.<sup>8</sup> A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a

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<sup>6</sup> 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 (we are to pick which one it is – and our current Secretary is a male) own motion or on application." 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.607.

<sup>8</sup> *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 the OWCP 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 (iFECS). *Id.* at Chapter 2.1602.4b.

specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

### 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).

In support of his timely request for reconsideration, appellant's representative contended that OWCP had failed to address the question of whether *The Guides Newsletter* allowed multi-level nerve root impairments to be combined up to a maximum rating of 56 percent permanent impairment of a lower extremity. The underlying issue on reconsideration is the medical question of whether appellant is entitled to an additional schedule award for permanent impairment of his lower extremities, due to his accepted spinal conditions. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairment consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.<sup>11</sup>

While appellant previously argued on October 12, 2018 that *The Guides Newsletter* allowed for a combined impairment of multilevel nerve root impairments,<sup>12</sup> the record does not indicate that OWCP requested that the DMA, Dr. Berman, address this specific issue following his November 17, 2018 report, which did not address whether the nerve root impairments from L5 and S1 should be combined for an increased schedule award. Rather, the DMA continued to opine that the bilateral impairment rating stemming from the previously awarded L5 nerve root should be utilized due to the moderate motor weakness and moderate sensory deficit of the bilateral L5 nerve root.<sup>13</sup> OWCP's regulations provide that benefits payable under section 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) OWCP finds that the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.<sup>14</sup> The Board has

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<sup>9</sup> 20 C.F.R. § 10.606(b)(3).

<sup>10</sup> *Id.* at § 10.608(a), (b).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> Page 3 of *The Guides Newsletter* states that the combined impairment for multiple-level or bilateral radiculopathy cannot exceed 37 percent upper extremity impairment or 56 percent lower extremity impairment.

<sup>13</sup> The Board notes that the bilateral impairment stemming from the bilateral S1 nerve root was also due to moderate motor weakness and moderate sensory deficit.

<sup>14</sup> 20 C.F.R. § 10.404(d). *See E.B.*, Docket No. 19-0530 (issued August 9, 2019).

explained that simply comparing the prior percentage of impairment awarded to the current impairment for the same member is not always sufficient.<sup>15</sup> The issue is not whether the current impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.<sup>16</sup> Thus, the Board agrees that OWCP erred in according weight to its DMA's opinion in denying appellant an increased schedule award without acknowledgement or consideration of the provisions in *The Guides Newsletter*, which allows for a combined impairment of multilevel nerve root impairments.<sup>17</sup>

As appellant has shown that OWCP erroneously applied or interpreted a specific point of law not previously considered by OWCP, he is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.<sup>18</sup> Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding appellant's increased schedule award 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).

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<sup>15</sup> See *E.M.*, Docket No. 19-1041 (issued January 3, 2020); *T.S.*, Docket No. 16-1406 (issued August 9, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> See *supra* note 13.

<sup>18</sup> *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). See *L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 24, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 18, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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