

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

N.E., Appellant)

and)

DEPARTMENT OF THE ARMY,)
INSTALLATION MANAGEMENT)
COMPOUND, Fort Campbell, KY, Employer)

**Docket No. 13-187
Issued: April 19, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1, 2012 appellant filed a timely appeal from the October 23, 2012 Office of Workers' Compensation Programs' (OWCP) nonmerit decision which denied his request for reconsideration. Appellant also timely appealed an October 3, 2012 decision, which denied his claim for a schedule award. 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 nonmerit decision and the schedule award determination.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he is entitled to a schedule award; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 30, 2009 appellant, then 35-year-old supervisory firefighter filed a traumatic injury claim on November 30, 2009. He alleged that he was getting gear from the gear room and twisted his back, possibly aggravating a preexisting back condition. Appellant stopped work on November 30, 2009. OWCP accepted the claim for herniated nucleus pulposus at L5-S1. Appellant received appropriate compensation benefits.

In a December 9, 2009 report, Dr. Barbara Schibly, Board-certified in preventative medicine, advised that, on November 30, 2009, she saw appellant for “complaints of sudden onset of severe lower back pain sustained when he bent over to pick up his firefighting gear that morning.” She advised that the pain was primarily located in the right lower lumbar area with radiation and numbness to the right buttock. Dr. Schibly examined appellant and determined that appellant was “extremely uncomfortable in any position and was having difficulty walking due to pain.” She indicated that diagnostic tests revealed a mild right central and paracentral herniation of the L5-S1 disc with slight impingement on the L5 root sleeve. Dr. Schibly explained that, while appellant had back pain in the past, the MRI scan finding of herniation of the L5-S1 disc was consistent with the history, symptoms and physical examination. She opined that appellant’s herniation at L5-S1 disc occurred when he bent over to pick up his gear. Dr. Schibly placed appellant on three months of light duty with no lifting. Appellant continued to be treated for his condition by several physicians.

In 2011 OWCP referred appellant for a second opinion examination with Dr. James G. Warmbrod, a Board-certified orthopedic surgeon. In a May 26, 2011 report, Dr. Warmbrod noted appellant’s history of injury and treatment. He determined that appellant’s work injury had not resolved and opined that the surgery at L5 was necessary and due to the work injury.

On August 11, 2011 Dr. Richard Berkman, a Board-certified neurological surgeon, performed an authorized lumbar laminectomy and discectomy at L5-S1 and an osteotomy at L5 vertebral body to reduce retrolisthesis. On March 20, 2012 he released appellant to work without restrictions.

On August 24, 2012 appellant claimed a schedule award. He later submitted an April 16, 2012 report from Dr. Charles Kaelin, a Board-certified orthopedic surgeon, who advised that he could return to regular duty. Dr. Kaelin utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*) and opined that appellant had 11 percent whole person impairment to the back. He indicated that appellant reached maximum medical improvement on April 12, 2012.

By letter dated August 30, 2012, OWCP advised that FECA does not allow for an award of permanent impairment to the spine.² It stated that such awards can be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP noted that, if appellant had a work-related spinal nerve injury which has caused impairment to the extremities, he should submit an impairment rating of the affected extremities using the article entitled “Rating Spinal Nerve Extremity Impairment Using the Sixth Edition” which was published in the July/

² The letter was sent to Dr. Berkman and to appellant.

August 2009 *The Guides Newsletter*, a supplemental publication of the A.M.A., *Guides*, which had been incorporated into OWCP's procedure manual. OWCP did not receive a rating.

In a September 6, 2012 report, an OWCP medical adviser noted appellant's history of injury and treatment. He explained that appellant did well following his surgeries for L5-S1 herniated nucleus pulposis and retrolisthesis and right S1 radiculopathy. Additionally, the medical adviser indicated that appellant had good motion and no pain on straight leg raising postoperatively. He noted that appellant had normal motor strength and normal sensation in both lower extremities with no postoperative evidence of radiculopathy in the lower extremity. OWCP's medical adviser indicated that while appellant's physician gave 11 percent whole person impairment for spinal impairment using lumbar spine regional grids in the A.M.A., *Guides*, OWCP did not consider impairment of the spine or whole person. He indicated that, since there was no motor or sensory deficit of the lower extremities from spinal nerve root extremity impairment, the schedule award for the lower extremities was equal to zero percent.

On October 3, 2012 OWCP denied appellant's claim for a schedule award finding that the medical evidence did not support a ratable impairment of a scheduled body member.

On October 8, 2012 appellant requested reconsideration and submitted additional evidence. He indicated that he believed he was entitled to receive a schedule award as he was in daily pain. Appellant submitted a copy of the April 12, 2012 report from Dr. Kaelin. Also submitted was a partial copy of Dr. Warmbrod's May 26, 2011 report.

By decision dated October 23, 2012, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that his request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

A schedule award can be paid only for a condition related to an employment injury. A claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.³

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the

³ *Veronica Williams*, 56 ECAB 367 (2005).

⁴ 5 U.S.C. § 8107.

⁵ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.⁷

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.⁸ In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁰ OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹¹

ANALYSIS -- ISSUE 1

The evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the sixth edition of the A.M.A., *Guides*.

OWCP accepted appellant's claim for herniated nucleus pulposus at L5-S1. Appellant claimed a schedule award and submitted a report from his treating physician, Dr. Kaelin, who opined that he had 11 percent whole person impairment for spinal impairment. FECA does not provide a schedule award based on whole person impairments.¹² Additionally, Dr. Kaelin did not otherwise provide findings that correlated with the sixth edition of the A.M.A., *Guides* or *The Guides Newsletter* that showed a ratable permanent impairment of a scheduled body member due to the accepted conditions. Thus, his opinion is of diminished probative value.

⁶ 20 C.F.R. § 10.404.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹² *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither FECA, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

In a September 6, 2012 report, OWCP's medical adviser reviewed Dr. Kaelin's report¹³ and explained that appellant did well following his surgeries with good motion and no pain on straight leg raising. He noted that appellant had normal motor strength and normal sensation in both lower extremities with no postoperative evidence of radiculopathy in the lower extremity. OWCP's medical adviser noted that spine and whole person impairment could not be considered. He indicated that, since there was no motor or sensory deficit of the lower extremities from spinal nerve root impairment, there was no basis under the A.M.A., *Guides*, on which to attribute any permanent impairment of the lower extremities to appellant's accepted conditions. OWCP's medical adviser concluded that there was no ratable impairment to the lower extremities.

The Board finds that OWCP's medical adviser properly explained that there was no objective medical evidence to support impairment to the lower extremities. Appellant did not submit any other medical evidence to support that he was entitled to a schedule award, under the A.M.A., *Guides*, or *The Guides Newsletter*, for a scheduled member of the body under FECA. Accordingly, the Board finds that appellant has not established entitlement to a schedule award.

On appeal, appellant argues that he submitted diagnostic reports which show that his injury has worsened. However, as noted above, the medical evidence does not demonstrate a ratable impairment.

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

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”¹⁵

¹³ Although he indicated Dr. Berkman, this appears to be a transcription error as the record indicates that it was from Dr. Kaelin.

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁶

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for a schedule award and requested reconsideration on October 8, 2012

Appellant does not make any argument that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. He argued that he continued to be in pain and suffer from his accepted condition. However, appellant did not submit any new medical evidence to support that he sustained ratable impairment. He submitted a portion of Dr. Warmbrod's second opinion report. However, the Board notes that the report of Dr. Warmbrod is not new and relevant. Likewise, Dr. Kaelin's April 16, 2012, report, noting whole person impairment, was also previously of record and considered by OWCP.¹⁷

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered. OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits in its October 23, 2012 nonmerit decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he is entitled to a schedule award. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.608(b).

¹⁷ See *James W. Scott*, 55 ECAB 606 (2004) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the October 23 and 3, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 19, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board