



of disability, commencing October 5, 2015, causally related to his accepted April 22, 2013 employment injury.

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are as follows.

On April 23, 2013 appellant, then a 29-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on April 22, 2013 he injured his lower back and right gluteus lifting bags onto a table while in the performance of duty. OWCP assigned OWCP File No. xxxxxx033 and accepted the claim for lumbar sprain and a herniated disc at L5-S1.<sup>3</sup> On April 1, 2014 appellant underwent a right hemilaminectomy at L5 and S1, an S1 foraminotomy, a partial facetectomy of the L5 nerve root, and an excision of a disc herniation at L5-S1. OWCP paid him wage-loss compensation for disability on the supplemental rolls beginning April 1, 2014, and on the periodic rolls effective April 6, 2014.

On August 22, 2014 Dr. Jonathan A. Hyde, an orthopedic surgeon, released appellant to return to work without restrictions.

On August 25, 2014 appellant resumed his regular employment.

In an undated report received by OWCP on October 5, 2015, Dr. Jesse Shaw, an osteopath, provided a history of the April 22, 2013 employment injury. He noted that appellant complained of pain radiating into his right leg. Dr. Shaw diagnosed right quadriceps muscle weakness and atrophy, effusion of the right knee, and a cartilage defect of the right trochlea.

In a progress report dated October 5, 2015, Dr. Shaw discussed appellant's complaints of pain in the right thigh and knee. On examination he found 4/5 strength in the left thigh with intact sensation, no swelling, and a normal gait. Dr. Shaw diagnosed unspecified right joint effusion, right muscle wasting and atrophy, and right muscle weakness. He related, "There is atrophy of the right quadricep leading to a non-physiological altered gait mechanics leading to pathological knee symptoms. I do believe [appellant's] symptoms are a result from a prior injury." Dr. Shaw provided similar progress reports on November 16, 2015 and February 15, 2016.

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<sup>2</sup> *Order Remanding Case*, Docket No. 19-1241 (issued June 23, 2020); Docket No. 23-0156 (issued August 22, 2023).

<sup>3</sup> OWCP further accepted that on May 14, 2013 appellant sustained an aggravation of a herniated disc at L5-S1, assigned OWCP File No. xxxxxx403. It denied his claims for traumatic injuries on August 6 and December 9, 2014, assigned OWCP File Nos. xxxxxx404 and xxxxxx125, respectively, and his occupational disease claim (Form CA-2) for an emotional condition, assigned OWCP File No. xxxxxx667. These claims, together with the current claim, have been administratively combined by OWCP with OWCP File No. xxxxxx033 serving as the master file number. By decision dated August 8, 2023, the Board set aside an August 5, 2020 OWCP decision denying appellant's request to expand the acceptance of his claim to include a right quadricep or right knee condition causally related to, or as a consequence of, the accepted May 14, 2013 employment injury, finding that a conflict in medical opinion existed. Docket No. 23-0157 (issued July 25, 2023).

In a report dated November 6, 2015, Dr. Jonathan A. Hyde, an orthopedic surgeon, advised that he had last evaluated appellant on January 23, 2015 for right calf cramping and low back pain. He recommended a magnetic resonance imaging (MRI) scan, but appellant had sought treatment from another physician who told him that his knee pain was from his back. Dr. Hyde diagnosed lumbar intervertebral disc displacement. He deferred work restrictions to the physician who treated appellant for his knee problem as it did not “appear to be associated with the L5-S1 region.” In a state workers’ compensation form of even date, Dr. Hyde found that appellant had no work restrictions.

A November 12, 2015 MRI scan of the lumbar spine revealed disc bulging at L2 through L5 resulting in mild stenosis, changes at L5-S1 consistent with a right laminotomy, and disc bulging with mild bilateral lateral recess stenosis and disc material abutting the descending S1 nerve roots.

In a November 13, 2015 progress report, Dr. Hyde diagnosed lumbar intervertebral disc displacement. He reviewed the MRI scan and found that it showed only post-laminectomy changes at L5-S1 with “a full resolution of the herniation.” Dr. Hyde found that appellant’s back was intact neurologically and that he had “no permanent restrictions since there is no recurrence of herniation.” He opined that appellant’s knee pain was “not a direct consequence of his herniated disc or the resultant spine surgery” but was instead caused by a biomechanical problem. In a state workers’ compensation form of even date, Dr. Hyde found no change in appellant’s restrictions.

On November 16, 2015 appellant filed a claim for compensation (Form CA-7) for disability from work for the period November 16 to 25, 2015.

In a development letter dated November 24, 2015, OWCP advised appellant of the deficiencies of his claim and of the factual and medical evidence required to establish a recurrence of disability. It noted that he returned to his usual employment on August 25, 2014 and worked until November 16, 2015. OWCP afforded appellant 30 days to submit the requested information.

On November 17, 2015 Dr. Hyde advised appellant that he required no further treatment due to his “workers’ compensation back injury” and indicated that he would no longer serve as his physician.

By decision dated January 25, 2016, OWCP denied appellant’s claim for a recurrence of disability, beginning November 16, 2015, causally related to his accepted April 22, 2013 employment injury. It also noted that he had not submitted probative medical evidence supporting a consequential knee condition.

In a progress report dated February 15, 2016, Dr. Shaw discussed appellant’s complaints of low back pain and pain and weakness in his right thigh. He diagnosed right joint effusion, right muscle wasting and atrophy, generalized right muscle weakness, and lumbar radiculopathy. On examination Dr. Shaw found tenderness to palpation of the lumbar paraspinal muscles with spasms and decreased motion and 4/5 strength of the right thigh with tenderness to light palpation. He submitted a similar progress report on March 30, 2016.

An MRI scan of the right knee, obtained on March 31, 2016, revealed joint effusion with findings of a ruptured popliteal cyst and a possible bone bruise without definite fracture.

On April 5, 2016 Dr. Samy F. Bishai, an orthopedic surgeon, described appellant's complaints of back pain, weakness and atrophy of the right quadriceps, pain and swelling in the right knee joint, calf swelling, and right leg radiculopathy. He recounted appellant's history of employment injuries on April 22 and May 14, 2013 treated with surgery on April 1, 2014. On examination Dr. Bishai found right knee tenderness and some "wasting or atrophy of the vastus medialis of the quadriceps muscle group of the right knee." For the right lower extremity, he diagnosed slight atrophy of the vastus medialis of the right knee joint and to rule out internal derangement. Dr. Bishai related that "the vastus medialis atrophy is not related to a primary pathology in the right knee joint, but is rather related to [appellant's] back condition." He attributed the right knee condition to the May 14, 2013 employment injury.

In a report dated April 15, 2016, Dr. Mark Fishman, an osteopath, indicated that appellant complained of low back pain due to an April 22, 2013 employment injury. He noted that his back pain had worsened in December 2015 and he had "not worked since that point in time." Dr. Fishman provided findings on examination and diagnosed lumbar disc degeneration, lumbosacral spondylosis, lumbar stenosis, lumbar myofascial pain syndrome, and lumbar post-laminectomy syndrome. He recommended a functional capacity evaluation (FCE) to determine work capacity. Dr. Fishman submitted a similar report on April 29, 2016.

On September 27, 2016 appellant requested reconsideration.

By decision dated December 15, 2016, OWCP denied modification of its January 25, 2016 decision.

Appellant again requested reconsideration on December 28, 2016. He related that his back problems worsened after his workload increased on December 2014 and he was moved to a baggage checkpoint from a sedentary position. Appellant maintained that his injuries of April 22 and May 14, 2013 were related.

By decision dated February 28, 2017, OWCP denied modification of its December 15, 2016 decision, for a recurrence commencing November 16, 2015.

On March 21, 2017 Dr. Scott S. Katzman, an orthopedic surgeon, discussed appellant's history of an April 22, 2013 employment injury treated with surgery. He diagnosed low back pain, right leg radiculitis, and status post-surgery at L5-S1. Dr. Katzman found that appellant should remain on his "present work status which is no bending, stooping, twisting, partial rest with prolonged sitting, standing, and walking, and no heavy lifting greater than 50 pounds." In a state workers' compensation form of even date, he provided work restrictions.<sup>4</sup>

On June 14, 2017 Dr. Bishai related that appellant's second injury on May 14, 2013 had aggravated his April 22, 2013 injury and resulted in "the development of radiculopathy due to compression of a nerve root in the back." He noted that appellant's work duties, including constant

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<sup>4</sup> In progress reports and state workers' compensation forms dated April 10 to December 2017, Dr. Katzman discussed his treatment of appellant and provided work restrictions.

kneeling, may have contributed to his right knee joint injury. Dr. Bishai advised that he should avoid further kneeling as it would aggravate his knee condition.

Subsequently, OWCP received a November 16, 2015 memorandum from the employing establishment indicating that prior to beginning his recertification process on November 9, 2015 appellant advised that he was unable to lift 50 to 70 pounds and filed claims for wage loss. The employing establishment noted that he had requested leave without pay beginning November 16, 2015, pending OWCP's decision on his claim.

On November 27, 2017 appellant requested reconsideration.

Thereafter, OWCP received an undated report from Dr. Shaw. Dr. Shaw related that he was currently treating appellant for employment injuries sustained on April 22 and May 14, 2013. He found that based on physical examinations, history, and MRI scans of the right knee, appellant would not be able to work in a position that required kneeling or squatting as of October 5, 2015. Dr. Shaw opined that strenuous activity or repetitive squatting or kneeling would aggravate appellant's right knee symptoms.

Appellant submitted physical therapy reports from 2018.

By decision dated February 22, 2018, OWCP denied modification of its February 28, 2017 recurrence decision. By decision dated February 23, 2018, it denied appellant's schedule award claim.

In a Form CA-7 dated January 5, 2018, received by OWCP on March 2, 2018, appellant requested wage-loss compensation beginning October 5, 2015.

On February 27, 2018 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on October 26, 2017 he sustained a recurrence of disability causally related to his accepted April 22, 2013 employment injury. He advised that he stopped work on October 26, 2017. Appellant related that he had resigned from work before being terminated for excessive absences and noted that he had subsequently worked as a driver and as an on-call security bailiff.

In a progress report dated March 5, 2018, Dr. Katzman noted that appellant had a history of an L5-S1 disc herniation on the right side that required intervention. Appellant currently complained of left-sided back pain and radiculopathy. Dr. Katzman diagnosed low back pain, lumbar disc desiccation, degeneration, and displacement at L5-S1 with bilateral foraminal narrowing, and improved L4-5 facet synovitis and foraminal narrowing. He attributed the new complaints on the left to the April 22, 2013 employment injury. Dr. Katzman related that L5-S1 degeneration caused "bilateral foraminal narrowing with left lumbar radiculopathy complaints." He opined that appellant could continue to work with modification. In a state workers' compensation form of even date, a healthcare provider listed work restrictions.

In a development letter dated March 7, 2018, OWCP indicated that it had received appellant's Form CA-7 claiming compensation beginning October 5, 2015. It advised him of the factual and medical evidence required to establish a recurrence of disability and noted that it had previously denied his claim for a recurrence of disability for the period November 16, 2015 and

ongoing. OWCP requested a reasoned opinion from appellant's physician addressing why he was unable to work for the period October 5 through November 15, 2015. It afforded him 30 days to submit the requested information.

By decision dated April 27, 2018, OWCP found that appellant had not established a recurrence of disability from October 5 through November 15, 2015, causally related to his accepted April 22, 2013 employment injury.

In a statement dated May 6, 2018, appellant asserted that he had sustained left sciatica due to his accepted work injury.

In a progress report dated May 10, 2018, Dr. Katzman related that he was treating appellant for an April 22, 2013 employment injury. He noted that the most recent lumbar MRI scan on April 11, 2017 showed worsening disc desiccation and collapse at L5-S1 with facet synovitis and foraminal narrowing. Dr. Katzman discussed appellant's complaints of left leg radiculopathy. He diagnosed low back pain, lumbar disc desiccation, degeneration at L5-S1 with bilateral foraminal narrowing, facet synovitis and foraminal narrowing at L4-5, and left lumbar radiculitis with left-sided lumbar sciatica. Dr. Katzman found that appellant could work light duty lifting 25 pounds frequently and a maximum of 50 pounds.

On May 14, 2018 appellant requested reconsideration.

By decision dated May 16, 2018, OWCP denied modification of its February 22, 2018 decision for a recurrence commencing November 16, 2015.

By decision dated May 17, 2018, OWCP denied modification of its April 27, 2018 decision, for a recurrence commencing October 5, 2015.

By decision dated May 21, 2018, OWCP denied modification of its February 23, 2018 schedule award decision.

Subsequently, OWCP received a March 31, 2017 lumbar MRI scan, which found a left posterior disc herniation at T12-L1, a disc bulge with mild central stenosis at L3-4 and L4-5, and a disc bulge with enhancing soft tissue consistent with granulation tissue that seemed adjacent to the exiting S1 nerve roots at L5-S1.

On May 27, 2018 appellant requested reconsideration of the May 16, 17, and 21, 2018 decisions. He related that he was unable to lift 70 pounds as required by his job at the employing establishment.

An MRI scan of the lumbar spine, obtained on June 18, 2018, revealed disc bulges without stenosis or neural foramina at L2 to L5, a stable disc herniation at T12-S1, and a disc herniation with tearing of the annulus and central canal stenosis at L5-S1.

By decision dated June 29, 2018, OWCP denied appellant's request for reconsideration of the merits of the schedule award claim, pursuant to 5 U.S.C. § 8128(a).

On August 1, 2018 Dr. Christopher McCarthy, who specializes in pain management, diagnosed low back pain, a left T12-L1 disc herniation without significant stenosis, mild-to-moderate foraminal stenosis at L4-5 with facet hypertrophy, and left groin pain. He recommended a sacroiliac injection. In a state workers' compensation form of even date, Dr. McCarthy indicated that appellant had unchanged restrictions.

In a progress report dated August 3, 2018, Dr. Katzman diagnosed low back pain after a left facet block at L5-S1. He advised that appellant could continue with the same work restrictions. In a state workers' compensation form of even date, a physician assistant provided work restrictions.

By decision dated August 20, 2018, OWCP denied modification of its May 17, 2018 decision for a recurrence commencing October 5, 2015.

On August 17, 2018 Dr. Katzman noted that appellant had sustained an injury on April 22, 2013 and that had been treated with an L5-S1 laminectomy and discectomy. He advised, "The fact that he has L5-S1 continued symptomatology is probably related but it is facetogenic, he still can do modified work activities." Dr. Katzman found that appellant could not perform heavy lifting, but could work modified duty. He related, "I do believe that his continued complaints would be still related to the original injury...." In a state workers' compensation form of even date, Dr. Katzman provided work restrictions.

On August 22, 2018 appellant requested reconsideration. He asserted that he had also sustained a December 10, 2014 injury at work, but had not filed a claim. Appellant advised that he was wrongfully terminated from the employing establishment after the December 10, 2014 injury but was subsequently reinstated. He returned to work on October 26, 2015 and requested a reasonable accommodation, which was denied by the employing establishment. Appellant was separated from employment on July 6, 2016. He obtained disability retirement.

On August 24, 2018 Dr. Katzman reviewed medical evidence from appellant's original injury and noted that on January 23, 2015 Dr. Hyde reported that he had left low back discomfort. He diagnosed facetogenic low back pain and lumbar disc displacement at L5-S1 with left-sided back and hip pain. Dr. Katzman related, "It is our opinion that [appellant] is likely to continue to aggravate his back pain indefinitely with continued bending and lifting." He provided permanent restrictions of no lifting over 25 pounds.

By decision dated November 20, 2018, OWCP denied modification of its August 20, 2018 decision, for a recurrence commencing October 5, 2015.

Appellant appealed to the Board.

On June 25, 2019 and April 28, 2020 Dr. Katzman treated appellant for left low back pain after an April 22, 2013 work injury. He diagnosed facetogenic low back pain.

In an order dated June 23, 2020, the Board set aside the November 20, 2018 decision and remanded the case for OWCP to combine OWCP File Nos. xxxxxx033, xxxxxx403, and xxxxxx404 to be followed by *de novo* decisions on appellant's claims.<sup>5</sup>

By decision dated August 6, 2020, OWCP denied modification of its August 20, 2018 decision. It found that there was no evidence that appellant sustained a recurrence of disability on or after October 10, 2014 or thereafter.

Appellant appealed to the Board. By decision dated August 22, 2023, the Board affirmed the August 6, 2020 decision.<sup>6</sup> The Board found that appellant had not established a recurrence of disability commencing October 5, 2015 causally related to his accepted April 22, 2013 employment injury.

In an impairment evaluation dated August 9, 2023, Dr. James Brien, a Board-certified anesthesiologist, discussed appellant's history of injury and continuing complaints of low back pain radiating into the bilateral lower extremities, worse on the left, and weakness of the bilateral lower extremities, worse on the right. He reviewed physical findings obtained on July 6, 2023 from an occupational therapist, and noted that appellant had normal lower extremity sensation, 4+/5 muscle strength of the right lower extremity, and 5/5 muscle strength of the left lower extremity, except for 4+/5 for great toe flexion and extension. Dr. Brien referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>7</sup> (A.M.A., *Guides*), and advised that appellant had no right knee impairment. Using *The Guides Newsletter, Rating Spinal Nerve Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), he found using proposed Table 2 that appellant had five percent permanent impairment due to motor loss at L5 bilaterally and three percent permanent impairment due to motor loss at S1 bilaterally, which he combined to find eight percent permanent impairment of each lower extremity.

On September 21, 2023 appellant filed a Form CA-7 for a schedule award.

In a development letter dated September 22, 2023, OWCP requested that appellant submit an impairment evaluation addressing the extent of any permanent impairment consistent with the provisions of the A.M.A., *Guides*.<sup>8</sup> In an October 4, 2023 response, appellant's counsel advised that he had submitted the August 24, 2023 report from Dr. Brien in support of his schedule award claim.

OWCP subsequently received a July 3, 2023 report from Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon. Dr. Bush reviewed the history of the April 22, 2013 employment

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<sup>5</sup> Docket No. 19-1241 (issued June 23, 2020).

<sup>6</sup> Docket No. 23-0156 (issued August 22, 2023).

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed 2009).

<sup>8</sup> On November 27, 2023 OWCP notified appellant that it had updated his accepted condition from International Classification of Disease (ICD)-9 codes to the ICD-10 equivalent. It listed the accepted conditions as a sprain of the ligaments of the lumbar spine, other intervertebral disc displacement of the lumbar region, thoracic region radiculopathy, and lumbosacral region radiculopathy.

injury and provided findings on examination. He diagnosed a disc herniation at L5-S1 with “associated chronic pain and radicular symptomatology.” Dr. Bush attributed appellant’s low back and lower extremity symptoms to his April 22, 2013 employment injury and his thoracolumbar junction symptoms to a disc herniation at T12-S1 in April 2017. He found that his right knee symptoms were unrelated to the accepted employment injury. Dr. Bush advised that appellant had a reported work injury on December 10, 2014 which he found a continuation of prior April 22, 2013 injury. He advised that he had continued work restrictions, but no permanent impairment to the extremities. In an addendum based on a May 14, 2023 record review and the July 3, 2023 examination, Dr. Bush diagnosed lumbar intervertebral disc displacement due to the April 22, 2013 work injury, and lumbar strain due to the May 14 and December 2014 injuries.

On January 30, 2024 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Brien’s August 9, 2023 impairment evaluation and concurred with his finding of eight percent permanent impairment of each upper extremity due to a mild motor impairment of the spinal nerve roots at L5 and S1 bilaterally. He opined that appellant had reached maximum medical improvement (MMI) on August 9, 2023.

In a progress report dated February 26, 2024, Dr. Katzman diagnosed clinically improving low back pain.

By decision dated April 4, 2024, OWCP granted appellant a schedule award for eight percent permanent impairment of each lower extremity. The period of the award ran for 48 weeks from August 9, 2023 to July 9, 2024.

On May 17, 2024 Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, provided an impartial medical examination in OWCP File No. xxxxxx403 regarding whether appellant sustained a right knee or quadriceps condition due to his May 14, 2013 employment injury. He reviewed appellant’s history of injuries in April and May 2013 treated with a lumbar discectomy in April 2014. Dr. Hutter diagnosed status post lumbar decompression for lumbar radiculopathy and right knee pain with a history of a Baker’s cyst. He opined that the lumbar injury was employment related but not the right knee pathology. Dr. Hutter found that appellant could work with restrictions of no repetitive bending or lifting over 50 pounds.

On June 1, 2024 appellant requested reconsideration of the recurrence denial. He asserted that the May 17, 2024 report from Dr. Hutter supported his claim that he was disabled from work beginning October 2015. Appellant also referenced May and July 2023 reports from Dr. Bush, which he noted were available under other file numbers.

On June 14, 2024 appellant requested reconsideration of OWCP’s December 15, 2016 decision. He submitted copies of the December 15, 2016 decision and a letter to OWCP dated December 22, 2016 in which he asked for a time to talk about his April 22 and May 14, 2013 injury claims. In the December 2016 correspondence, appellant alleged that his condition had worsened due to an increase in his work duties. Appellant asserted that the employing establishment accused him of violence and removed him from employment in January 2015, but that he got his job back around November 2015. He summarized the medical evidence. Appellant argued that OWCP had failed to give proper weight to Dr. Hutter’s report.

By decision dated June 20, 2024, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error.<sup>9</sup>

By decision dated September 12, 2024, OWCP denied modification of its August 6, 2020 decision, for a recurrence commencing October 5, 2015.<sup>10</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA,<sup>11</sup> and its implementing federal regulation,<sup>12</sup> 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. FECA, however, does not specify the way the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.<sup>13</sup> The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.<sup>14</sup>

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.<sup>15</sup> Furthermore, the back is specifically excluded from the definition of an organ under FECA.<sup>16</sup> 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

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<sup>9</sup> OWCP did not specify the decision being reconsideration, but it is evident from the context that it denied appellant's request for reconsideration of its December 15, 2016 decision, for a recurrence commencing November 16, 2015.

<sup>10</sup> OWCP indicated that it was denying reconsideration of the Board's August 22, 2023 decision; however, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's August 22, 2023 decision to file a petition for reconsideration with this Board of its decision. *Id.* at § 501.7; *see also* *G.R.*, Docket No. 22-1200 (issued June 5, 2023); *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *B.B.*, Docket No. 14-0464 (issued June 4, 2014).

<sup>11</sup> *Supra* note 1.

<sup>12</sup> 20 C.F.R. § 10.404.

<sup>13</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>14</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>15</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see R.S.*, Docket No. 24-0030 (issued March 19, 2024); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>16</sup> *See id.* at § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

precludes ratings for the spine, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that the July/August 2009 edition of *The Guides Newsletter* is to be applied.<sup>17</sup>

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP district medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.<sup>18</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish greater than eight percent permanent impairment of each lower extremity, for which he previously received schedule award compensation.

In an impairment evaluation dated August 9, 2023, Dr. Brien reviewed appellant's symptoms of low back pain radiating into the bilateral lower extremities, particularly on the left side, and bilateral lower extremity weakness, especially on the right side. He noted that an occupational therapist had evaluated appellant on July 6, 2023 and found normal sensation, 4+/5 muscle strength of the right lower extremity, and 5/5 muscle strength of the left lower extremity, except for 4+/5 for great toe flexion and extension. Dr. Brien, citing *The Guides Newsletter*, found that appellant had five percent permanent impairment due to motor loss at L5 bilaterally and three percent permanent impairment due to motor loss at S1 bilaterally, using proposed Table 2, which he combined to find eight percent permanent impairment of each lower extremity.

On January 30, 2024 Dr. Katz reviewed the August 9, 2023 impairment evaluation from Dr. Brien and concurred with his findings. The Board finds that Dr. Brien and Dr. Katz properly calculated appellant's lower extremity impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*. As there is no current medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides* showing greater than eight percent permanent impairment of each lower extremity, the Board finds that appellant has not met his burden of proof.

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

### **LEGAL PRECEDENT -- ISSUE 2**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>19</sup> This discretionary authority, however, is subject to certain restrictions. For

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<sup>17</sup> *Supra* note 13 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>18</sup> *Supra* note 13 at Chapter 2.808.6(f) (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

<sup>19</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>20</sup> Timeliness is determined by the document receipt date *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).<sup>21</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>22</sup>

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>23</sup> Its procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.<sup>24</sup> In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>25</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>26</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>27</sup>

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further

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<sup>20</sup> 20 C.F.R. § 10.607(a).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020).

<sup>22</sup> *W.B.*, Docket No. 23-0473 (issued August 29, 2023); *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>23</sup> *See* 20 C.F.R. § 10.607(b); *R.C.*, Docket No. 21-0617 (issued August 25, 2023); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>24</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 21 at Chapter 2.1602.5 (September 2020).

<sup>25</sup> *S.D.*, Docket No. 23-0626 (issued August 24, 2023); *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>26</sup> *J.M.*, Docket No. 22-0630 (issued February 10, 2023); *S.C.*, Docket No. 18-0126 (issued May 14, 2016).

<sup>27</sup> *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *Robert G. Burns*, *supra* note 25.

development, is not clear evidence of error.<sup>28</sup> The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>29</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim as it was untimely and failed to demonstrate clear evidence of error.

Appellant requested reconsideration of OWCP's December 15, 2016 decision denying his claim for a recurrence of disability beginning November 16, 2015 causally related to his accepted April 22, 2013 employment injury. The last merit decision on this issue was dated May 16, 2018. As appellant's request for reconsideration was not received by OWCP until June 14, 2024, more than one year after May 16, 2018, pursuant to 20 C.F.R. § 10.607(a), the request for reconsideration was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.<sup>30</sup>

In support of his request for reconsideration, appellant provided his summary of the medical evidence and contended that OWCP failed to give proper weight to the opinion of Dr. Hutter, who provided an opinion regarding claim expansion under OWCP File No. xxxxxx403. The underlying issue, however, is whether he has met his burden of proof to establish disability from employment beginning November 16, 2015 due to his April 22, 2013 employment injury. As this issue is medical in nature, it can only be resolved through the submission of probative medical evidence.<sup>31</sup> Appellant's lay opinion does not constitute probative medical evidence.<sup>32</sup> Therefore, his contentions are insufficient to raise a substantial question concerning the correctness of OWCP's last merit decision.

Appellant also submitted copies of the December 15, 2016 decision and a December 2016 letter asserting that his condition had worsened due to his work duties. However, as noted, the underlying issue in the case is medical in nature and must be resolved by medical evidence.<sup>33</sup> The Board finds that appellant's argument that his condition worsened does not manifest on its face that OWCP committed an error in its decision.<sup>34</sup>

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<sup>28</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 21 at Chapter 2.1602.5(a) (September 2020).

<sup>29</sup> *L.J.*, Docket No. 23-0282 (issued May 26, 2023); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

<sup>30</sup> 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

<sup>31</sup> *See W.M.*, Docket No. 18-0565 (issued August 14, 2018); *S.J.*, Docket No. 17-1214 (issued April 16, 2018); *George C. Vernon*, 54 ECAB 319 (2003).

<sup>32</sup> *See R.C.*, Docket No. 21-0617 (issued August 25, 2023); *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *James A. Long*, 40 ECAB 538 (1989).

<sup>33</sup> *Supra* note 32.

<sup>34</sup> *See T.S.*, Docket No. 24-0698 (issued August 12, 2024); *Y.J.*, Docket No. 23-0797 (issued December 5, 2023); *V.G.*, Docket No. 19-0038 (issued June 18, 2019); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

Accordingly, the Board finds that OWCP properly denied appellant's untimely request for reconsideration as it failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT -- ISSUE 3**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>35</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.<sup>36</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>37</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, based on a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>38</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>39</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing October 5, 2015 causally related to his accepted April 22, 2013 employment injury.

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<sup>35</sup> 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>36</sup> *Id.*

<sup>37</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

<sup>38</sup> *C.Y.*, Docket No. 22-0474 (issued November 14, 2022); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>39</sup> *L.C.*, Docket No. 20-1679 (issued October 20, 2022); *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's August 6, 2020 decision as the Board considered that evidence in its August 22, 2023 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>40</sup>

On May 17, 2024 Dr. Hutter evaluated appellant to determine whether the acceptance of his claim under OWCP File No. xxxxxx403 should be expanded to include a right knee or quadriceps condition causally related to his May 14, 2013 employment injury. He diagnosed status post lumbar decompression for lumbar radiculopathy, which he found was employment related, and right knee pain with a history of a Baker's cyst, which he found was unrelated to employment. Dr. Hutter indicated that appellant could work with no repetitive bending or lifting over 50 pounds. He did not, however, address the relevant issue of whether he was disabled from his employment beginning October 5, 2015. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>41</sup> Thus, Dr. Hutter's opinion is of no probative value. As he failed to address the relevant issue of disability from work beginning October 2015 due to the accepted April 22, 2013 employment injury, his report is insufficient to meet appellant's burden of proof to establish a recurrence of disability.<sup>42</sup>

In a report dated July 3, 2023, Dr. Bush diagnosed an L5-S1 disc herniation with pain and radicular symptoms which he attributed to the accepted April 22, 2013 employment injury. He further found that appellant had sustained a work injury on December 10, 2014 that was a continuation of the April 2013 employment injury. In an addendum based on a May 14, 2023 record review, Dr. Bush diagnosed lumbar intervertebral disc displacement due to the April 22, 2013 work injury, and lumbar strain due to the May 14 and December 2014 injuries. He noted that he had continued work restrictions. Dr. Bush did not however, specify the restrictions or address appellant's disability status during the dates for which compensation was claimed relative to the accepted April 22, 2013 employment injury.<sup>43</sup> Further, he failed to provide any rationale for his opinion. The Board has long held that a report is of limited probative value if it does not contain medical rationale explaining how a given medical condition or level of disability has an employment-related cause.<sup>44</sup> Consequently, Dr. Bush's reports are insufficient to establish appellant's claim.

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<sup>40</sup> *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1988).

<sup>41</sup> *P.L.*, Docket No. 22-0337 (issued September 9, 2022); *K.F.*, Docket No. 19-1846 (issued November 3, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>42</sup> *See D.M.*, Docket No. 21-0930 (issued February 8, 2023); *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *L.B.*, *id.*

<sup>43</sup> *See D.F.*, Docket No. 24-0623 (issued July 26, 2024); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>44</sup> *See L.D.*, Docket No. 23-1108 (issued March 5, 2024); *H.C.*, Docket No. 22-0844 (issued December 5, 2022); *J.S.*, Docket No. 18-0944 (issued November 20, 2018).

In progress reports dated February 26, 2024, Dr. Katzman diagnosed improving low back pain. As he failed to address the relevant issue of disability from work due to a worsening of the accepted April 22, 2013 employment injury, his opinion is of no probative value,<sup>45</sup> and thus it is insufficient to establish appellant's recurrence claim.<sup>46</sup>

As appellant has not submitted any rationalized medical evidence to establish a recurrence of disability, commencing October 5, 2015, causally related to his accepted April 22, 2013 employment injury, the Board finds that he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than eight percent permanent impairment of each lower extremity, for which he received schedule award compensation. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim as it was untimely and failed to demonstrate clear evidence of error. The Board also finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing October 5, 2015, causally related to his accepted April 22, 2013 employment injury.

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<sup>45</sup> *Supra* note 42.

<sup>46</sup> *See L.D., id.; D.M.*, Docket No. 21-0930 (issued February 8, 2023); *A.G.*, Docket No. 21-0756 (issued October 18, 2021).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, June 20, and September 12, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 5, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board