

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

_____)	
E.S., Appellant)	
)	
and)	Docket No. 20-0656
)	Issued: February 5, 2021
DEPARTMENT OF THE ARMY, U.S. ARMY)	
PACIFIC, Fort Shafter, HI, Employer)	
_____)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 3, 2020 appellant filed a timely appeal from a November 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 20-0656.¹

This case has previously been before the Board.² The facts of the case as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On May 5, 1989 appellant, then a 28-year-old tools and parts attendant, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral plantar fasciitis and

¹ The Board notes that an August 12, 2019 nonmerit decision is also within the Board's jurisdiction. However, appellant has only sought appeal from the November 21, 2019 nonmerit decision. Thus, the Board will not review the August 12, 2019 decision. *See* 20 C.F.R. § 501.3.

² Docket No. 18-1606 (issued April 16, 2019); Docket No. 15-0259 (issued November 3, 2015), *petition for recon. denied*, Docket No. 15-0259 (issued August 11, 2016); Docket No. 13-0777 (issued June 26, 2013); Docket No. 07-1206 (issued March 6, 2008); Docket No. 05-1349 (issued December 12, 2005); *Order Remanding Case*, Docket No. 02-1171 (issued November 26, 2002); Docket No. 98-1109 (issued May 17, 2000), *petition for recon. denied*, Docket No. 98-1109 (issued December 18, 2000).

heel spur syndrome due to the extended periods of standing required by his job. OWCP accepted appellant's claim for bilateral plantar fasciitis, permanent aggravation of bilateral *pes planus* (flat feet), permanent aggravation of bilateral plantar fibromatosis, bilateral tarsal tunnel syndrome, and mood disorder due to chronic bilateral foot pain with major depressive-like episode. Appellant stopped work for various periods and received appropriate wage-loss compensation for periods of disability.

Between 2010 and 2012, OWCP authorized physical therapy treatment for appellant's feet, including manual therapy. Appellant requested authorization commencing January 1, 2013 for manual foot therapy, including use of a Hivamat deep oscillation machine. Several of appellant's physicians recommended continuing foot therapy, including Dr. Gary R. Goodman, a podiatrist.

By decision dated June 5, 2014, OWCP denied appellant's request for authorization of manual foot therapy commencing January 1, 2013, including use of the Hivamat machine. By decision dated October 28, 2014, OWCP denied modification of the June 5, 2014 decision. Appellant appealed to the Board and, by decision dated November 3, 2015,³ the Board set aside OWCP's June 5 and October 28, 2014 decisions, finding that the case was not in posture for decision because there was a conflict in the medical opinion evidence regarding appellant's need for foot therapy due to his accepted foot conditions. The Board remanded the case to OWCP for referral of appellant to an impartial medical specialist to resolve the outstanding conflict.

By decision dated March 15, 2016, OWCP granted appellant a schedule award for 17 percent permanent impairment of each lower extremity. The award was based on the March 11, 2016 report of Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser, who evaluated the October 15, 2015 examination findings of Dr. John W. Ellis, a Board-certified family practitioner.

After development of the evidence, OWCP determined in early March 2017 that there no longer was a conflict in the medical opinion evidence regarding appellant's need for foot therapy. It referred appellant for a second opinion examination. By letter dated March 21, 2017, OWCP advised appellant of a second opinion examination scheduled for April 7, 2017 at 11:15 a.m. Eastern Standard Time (EST) with Dr. William Dinenberg, a Board-certified orthopedic surgeon. In an April 11, 2017 letter, a case coordinator for OWCP advised that appellant did not attend the examination scheduled with Dr. Dinenberg for April 7, 2017.

By decision dated May 16, 2017, OWCP suspended appellant's entitlement to wage-loss compensation and medical benefits, effective May 17, 2017, pursuant to 5 U.S.C. § 8123(d).

In July 2017 appellant submitted a May 18, 2017 report from Dr. Ellis who determined that he had 28 percent permanent impairment of each lower extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

³ See *id.*

(A.M.A., *Guides*).⁴ On December 29, 2017 appellant filed a claim for an increased schedule award (Form CA-7).

By decisions dated March 5 and June 14, 2018, OWCP denied modification of its decisions suspending appellant's entitlement to wage-loss compensation and medical benefits. Appellant appealed to the Board and, by decision dated April 16, 2019,⁵ the Board affirmed OWCP's March 5 and June 14, 2018 decisions.

In a July 25, 2019 informational letter, OWCP advised appellant that he was not entitled to a schedule award at the present time.

In a July 30, 2019 letter received on August 5, 2019, appellant listed the subject of the letter as "reconsideration under section 5 U.S.C. § 8128," but requested that OWCP issue a formal decision regarding his claim for an increased schedule award. By decision dated August 12, 2019, OWCP denied appellant's claim without reviewing the merits, finding that the reconsideration request was untimely filed and did not demonstrate clear evidence of error.

In an August 24, 2019 letter received on August 28, 2019, appellant requested that OWCP issue a formal decision regarding his claim for an increased schedule award. He indicated that he inadvertently included the word "reconsideration" in the subject heading of his July 30, 2019 letter, but had no desire to file a reconsideration request at that time or at the present time. Appellant produced a similar letter dated August 27, 2019, which was received by OWCP on September 3, 2019. In connection with his request for OWCP to consider his claim for an increased schedule award, he submitted another copy of Dr. Ellis' May 18, 2017 impairment rating report, which was received by OWCP on November 7, 2019. By decision dated November 21, 2019, OWCP denied appellant's request without reviewing the merits, finding that reconsideration request was untimely filed and did not demonstrate clear evidence of error.

The Board has duly considered the matter and finds that the case is not in posture for decision. As noted, by decision dated March 15, 2016, OWCP granted appellant a schedule award for 17 percent permanent impairment of each lower extremity. Subsequently, appellant submitted a May 18, 2017 report of Dr. Ellis who determined that he had 28 percent permanent impairment of each lower extremity under the standards of the sixth edition of the A.M.A., *Guides*. He requested that OWCP address his claim for an increased schedule award in several letters, including those dated August 24 and 27, 2019. By decision dated November 21, 2019, OWCP denied appellant's claim without reviewing the merits, finding that he had filed an untimely reconsideration request, which did not demonstrate clear evidence of error. It did not review Dr. Ellis' May 8, 2017 report.

The Board has held that a claimant 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 impairment.⁶

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ *Supra* note 2.

⁶ *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

When a claimant has requested reconsideration, and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.⁷

In the present case, appellant submitted a May 18, 2017 report of Dr. Ellis after OWCP's March 15, 2016 schedule award decision. This report addressed the pertinent issue of this case, *i.e.*, whether appellant was entitled to additional schedule award compensation for lower extremity impairment, as it contained an impairment rating that referenced the A.M.A., *Guides*. In the letters received by OWCP in mid-2019, it is evident that he was not seeking reconsideration of a prior OWCP decision, but was seeking an increased schedule award based on medical evidence, which had not been previously considered by OWCP. As noted above, where a claimant has requested reconsideration, and has submitted new and relevant evidence not previously considered by OWCP with respect to a claim of increased permanent impairment, then he or she will be entitled to a merit decision on the issue.⁸ The case will therefore be remanded for OWCP to adjudicate this matter as a request for an increased schedule award. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an increased schedule award.

IT IS HEREBY ORDERED THAT the November 21, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: February 5, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁷ See *C.W.*, Docket No. 18-1110 (issued December 28, 2018); *B.K.*, 59 ECAB 228 (2007).

⁸ *Id.*