

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Greensboro, NC, Employer**

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**Docket No. 12-307
Issued: June 4, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2011 appellant filed a timely appeal from the June 24, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. Since more than 180 days elapsed from the last merit decision of May 25, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's May 31, 2011 reconsideration request under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 3, 2010 appellant, a 52-year-old mail handler, filed an occupational disease claim alleging that his elbow condition was a result of performing the duties of his position. OWCP accepted his claim for left medial epicondylitis.

Appellant claimed a schedule award. On May 25, 2011 OWCP issued a schedule award for a one percent impairment of the left arm. It acknowledged that it had received a note from appellant's health care provider that it was unable to provide an impairment evaluation. OWCP based its rating on the report of its medical adviser, who reviewed appellant's medical record. It notified appellant that any request for reconsideration must be made within one calendar year of the decision.

Appellant requested reconsideration on May 31, 2011. He submitted a statement explaining that he did not realize OWCP was going to make an award because his physician was unable to send a final rating according to OWCP guidelines. Appellant assumed OWCP was going to recommend another physician. His legal argument, he stated, was that he disagreed with the rating and desired to be seen by a second opinion specialist. Appellant suggested one physician but noted OWCP could select another.

In a June 24, 2011 decision, OWCP denied appellant's reconsideration request. It found that mere disagreement with the prior decision was not a valid legal argument. OWCP noted that its prior decision addressed the issue of the attending physician not providing an impairment rating. As appellant submitted no new medical evidence or valid legal argument OWCP denied a merit review of his claim.

Appellant argued on appeal that he should have had the opportunity to receive a final impairment rating. He feels the one percent rating is not justified because he has flexibility issues and some soreness in the injured area. Appellant explained that the reason he did not submit new medical evidence was that the occupational doctor released him back to work at maximum medical improvement.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.² An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and 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.³

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606.

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁴ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

Appellant sent his May 31, 2011 reconsideration request within one calendar year of OWCP's May 25, 2011 schedule award decision. His request was therefore timely. The question is whether appellant's request met at least one of the three standards for obtaining a merit review of his case.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law and did not show how OWCP erroneously applied or interpreted it.

Appellant did not advance a relevant legal argument not previously considered by OWCP. He noted that he was surprised to receive a rating because his physician was unable to provide one and assumed OWCP would recommend another physician. Appellant's mere disagreement with the impairment rating is not a legal argument, nor is his desire to see another physician. To justify the reopening of his case under this standard, he must offer a sufficiently precise legal argument that is relevant to the schedule award and that has not been previously considered by OWCP. Appellant's unexplained disagreement with the rating does not allow such a determination. As the May 25, 2011 schedule award shows, OWCP explicitly considered the fact that his health care provider was unable to provide an impairment evaluation. That was the reason OWCP's medical adviser offered a rating based on information available in appellant's medical record.

Appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

Because appellant's May 31, 2011 reconsideration request did not meet at least one of the three standards for obtaining a merit review of his case, the Board finds that OWCP properly denied his request. The Board will therefore affirm OWCP's June 24, 2011 decision.

Appellant makes arguments on appeal that he did not make in his May 31, 2011 reconsideration request. He argues that he should have had an impairment evaluation, with the opportunity to give feedback on his condition, before OWCP issued an award. Appellant argues that his one percent rating was not justified because he has flexibility issues and some soreness in the injured area.

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608.

The issue before the Board is whether appellant's May 31, 2011 reconsideration request met at least one of the three standards for obtaining a merit review of his case. The Board must therefore base its decision on the contents of his request and not on arguments made for the first time on appeal.⁶ In his reconsideration request, appellant offered no reason for his disagreement with the rating or for his desire to see another physician. His request, therefore, could not meet the second standard. The Board may not now use appellant's arguments on appeal to find that his May 31, 2011 reconsideration request was, in fact, sufficient to meet that standard. Further, the Board has no jurisdiction to review the merits of his case and thus may not directly address the arguments on appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's May 31, 2011 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

⁶ See *id.* at § 501.2(c)(1).