

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

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 12-573
Issued: September 7, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 23, 2012 appellant, through her representative, filed a timely appeal from the November 1, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request. Since more than 180 days elapsed between the last merit decision of September 15, 2010 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's August 2, 2011 reconsideration request.

FACTUAL HISTORY

On March 24, 2005 appellant, a 37-year-old letter carrier, sustained an injury in the performance of duty when she experienced hip pain while pivoting and casing mail. OWCP accepted her claim for enthesopathy of the right hip region.

¹ 5 U.S.C. § 8101 *et seq.*

Appellant filed a claim for a schedule award. On August 27, 2007 Dr. David O. Weiss, an osteopath, found that appellant had a six percent impairment of her right and left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001).

On September 11, 2008 Dr. David Rubinfeld, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had no impairment under the fifth edition of the A.M.A., *Guides*. An OWCP medical adviser concurred.

On July 14, 2010 Dr. Rubinfeld updated his evaluation. As there were no findings on examination, he concluded that appellant had no impairment under the sixth edition of the A.M.A., *Guides* (2009). An OWCP medical adviser concurred.

In a September 15, 2010 decision, OWCP denied appellant's schedule award claim. It noted that decisions issued on or after May 1, 2009 must be in accordance with the sixth edition of the A.M.A., *Guides*.

Appellant requested reconsideration on August 2, 2011. She argued that there was a conflict between Dr. Weiss, who found six percent impairment, and Dr. Rubinfeld, who found no impairment. Appellant argued that the conflict required referral to an impartial medical specialist under 5 U.S.C. § 8123(a).

In a November 1, 2011 decision, OWCP denied appellant's reconsideration request. It found that her legal argument did not have a reasonable color of validity, as Dr. Weiss based his rating on the outdated fifth edition of the A.M.A., *Guides*, while Dr. Rubinfeld based his opinion on the applicable sixth edition.

On appeal, appellant's representative argues that, when a conflict arose between Dr. Weiss and Dr. Rubinfeld and the medical adviser, OWCP erred in not referring the matter to an impartial medical specialist.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.² A request for reconsideration, including all supporting documents, 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

A request for reconsideration must be received by OWCP within one year of the date of OWCP 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

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.607(a).

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

OWCP received appellant's August 2, 2011 reconsideration request within one year of its September 15, 2010 decision denying a schedule award. The request is therefore timely. The question presented on this appeal is whether the request met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would require OWCP to reopen the case for a merit review.

Appellant's reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law. FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician who shall make an examination.⁶ Appellant would therefore have an argument if OWCP had denied her schedule award claim upon receiving the September 11, 2008 opinion of Dr. Rubinfeld, the referral orthopedic surgeon. He found no impairment under the fifth edition of the A.M.A., *Guides*, while Dr. Weiss, appellant's osteopath, found a six percent impairment of the right and left lower extremity.

OWCP did not deny appellant's claim at that time. Instead, it sought an updated impairment evaluation from Dr. Rubinfeld because the fifth edition of the A.M.A., *Guides* was no longer applicable. Decisions on or after May 1, 2009 must be based on the sixth edition.⁷ This rendered the prior conflict between Dr. Weiss and Dr. Rubinfeld moot. Further, if an impartial medical specialist had resolved the conflict under the fifth edition, OWCP would still be required to base its September 15, 2010 merit decision on the sixth edition.⁸ The Board therefore finds that appellant's reconsideration request did not meet the first standard for obtaining a merit review of her case.

Appellant's reconsideration request did not advance a relevant legal argument not previously considered by OWCP. OWCP denied her schedule award claim because the only medical evidence that addressed her impairment under the applicable sixth edition of the A.M.A., *Guides* was Dr. Rubinfeld's July 14, 2010 evaluation, which found no impairment. Dr. Weiss' evaluation under the fifth edition was no longer relevant to the determination of her entitlement, which meant there was no conflict to resolve when OWCP issued its September 15, 2010 decision. The Board therefore finds that appellant has not advanced a relevant legal argument.

⁵ *Id.* at § 10.608.

⁶ 5 U.S.C. § 8123(a).

⁷ For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁸ *See E.M.*, Docket No. 11-885 (issued November 7, 2011) (where a conflict arose under the fifth edition of the A.M.A., *Guides*, and an impartial medical specialist in 2007 found a 12 percent impairment under the fifth edition, the Board affirmed a schedule award for an 8 percent rating from a second opinion physician who in 2010 applied the newer sixth edition).

Appellant's reconsideration request did not contain relevant and pertinent new evidence not previously considered by OWCP. She offered only the legal argument that OWCP erred in not resolving a conflict. As the Board has explained, the conflict became moot.

Accordingly, the Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's August 2, 2011 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 7, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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