

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

T.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sioux Falls, SD, Employer**

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**Docket No. 13-748
Issued: August 21, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 11, 2013 appellant filed a timely appeal from an October 31, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed since the most recent merit decision dated April 6, 2012 and the filing of this appeal on February 11, 2013, the Board lacks jurisdiction to review the merits of the claim 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 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 26, 2009 appellant, a 58-year-old letter carrier, filed an occupational disease claim alleging that he developed degenerative disc disease from his work duties. OWCP accepted his claim for temporary aggravation of multilevel degenerative disc disease and facet arthritis and expanded the claim to include permanent aggravation of degeneration of lumbar and lumbosacral intervertebral disc at L2-3 and L4-5 and L5-S1. Appellant stopped work on February 20, 2009.

Appellant submitted reports from November 20, 2007 to April 25, 2008 from Dr. Geoffrey F. Haft, a Board-certified orthopedic surgeon, who diagnosed left L5-S1 disc herniation with radiculopathy and recommended surgery. In reports dated April 25, 2008 to March 15, 2009, Dr. Haft noted that appellant underwent a microdiscectomy in December 2007. He noted that appellant continued to have left leg radicular pain and diagnosed degenerative disc disease at L2-3, L3-4, L4-5 and L5-S1. Dr. Haft opined that the multilevel degenerative disc disease was caused by and aggravated by his employment as a mail carrier. In an operative report dated February 20, 2009, he performed an authorized left-sided L5-S1 foraminal decompression, transforaminal lumbar interbody fusion. Dr. Haft diagnosed L5-S1 degenerative disc disease with left greater than right neural foraminal stenosis and chronic radiculopathy. In October 13, 2009 to December 8, 2010 reports, he noted complaints of persistent left L5 radiculopathy and recommended surgery.

On January 11, 2012 appellant filed a claim for a schedule award. He submitted a report from Dr. Jonathan Stone, a Board-certified physiatrist, who opined that appellant sustained 13 percent impairment of the whole person in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).²

In a letter dated January 23, 2012, OWCP advised Dr. Stone that it did not grant whole person impairments and requested that he submit a report in accordance with the A.M.A., *Guides*. It advised that, under FECA, awards for permanent impairment may not be made for the spine but that such awards can be paid for impairment of the upper or lower extremities caused by an injury to a spinal nerve.

In a February 23, 2012 report, Dr. Stone opined that appellant sustained nine percent impairment of the lower extremity in accordance with the tables outlined in the July/August 2009 *The Guides Newsletter*.

On March 14, 2012 Dr. Stone's report and the case record were referred to OWCP's medical adviser, who reviewed Dr. Stone's findings and opined that appellant sustained four percent impairment of the left leg in accordance with the A.M.A., *Guides*.

In a decision dated April 6, 2012, OWCP granted appellant a schedule award for four percent permanent impairment of the left lower extremity. The period of the schedule award was from January 5 to March 25, 2012.

² A.M.A., *Guides* (6th ed. 2008).

Appellant requested reconsideration on October 14, 2012. In an undated letter, he indicated that his physician used the sixth edition of the A.M.A., *Guides* as instructed by OWCP but the decision advised that this was incorrect. Appellant indicated that the impairment evaluation provided no true indication of the weakness, numbness and tingling of his left leg caused by the constant pressure on the nerve root. He indicated that he has had three surgeries related to his work injury and was able to buy back leave in 2009 but not in 2007. Appellant noted that he has worked for the employing establishment for 30 years and planned on working another 10 years. He indicated that he did not seek medical treatment. Appellant asserted that four percent impairment of the left leg was inadequate to compensate him for the pain he lives with daily.

In an October 31, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain 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].”⁴

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.⁵

ANALYSIS

OWCP's most recent merit decision dated April 6, 2012 granted appellant a schedule award for four percent impairment of the left leg. It denied his reconsideration request, without a merit review and he appealed this decision to the Board.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

As noted, the Board does not have jurisdiction over the April 6, 2012 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

Appellant asserted in his reconsideration request that his physician used the A.M.A., *Guides* as instructed by OWCP. He indicated that the impairment evaluation provided no true indication of the weakness, numbness and tingling of his left leg caused by the constant pressure on the nerve root. Appellant noted his medical history and asserted that four percent impairment of the left lower extremity was inadequate to compensate him for his daily pain. These factual assertions were previously considered by OWCP and do not show a legal error by OWCP or a new and relevant legal argument. Furthermore, the underlying issue in this case is whether appellant sustained impairment of the left lower extremity greater than four percent impairment. That is a medical issue which must be addressed by relevant medical evidence.⁶ However, appellant did not submit any new and relevant medical evidence in support of his claim for an increased schedule award.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by it, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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