

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

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**L.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 14-387  
Issued: June 6, 2014**

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

*Case submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 6, 2013 appellant filed a timely appeal from a June 11, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), denying her request for further merit review of her claim. As the last merit decision was issued on May 30, 2012 more than 180 days before the filing of this appeal, the Board does not have jurisdiction over the merits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 3, 2002, appellant, then a 35-year-old full-time mail processor, sustained injury when her left knee popped at work. She stopped work on October 4, 2002. OWCP accepted the claim for a sprain and tear of the medial meniscus of the left knee.<sup>2</sup> Appellant underwent arthroscopy on February 12, 2003. She received wage-loss benefits.<sup>3</sup> On June 8, 2004 OWCP terminated appellant's wage-loss and medical benefits.

Appellant claimed a schedule award. On May 13, 2010 OWCP granted her a schedule award for three percent permanent impairment of the left leg. The award covered 8.64 weeks from October 1 to November 30, 2008. The award was based on the December 10, 2009 opinion of appellant's physician, Dr. Antony M. George, Board-certified in emergency medicine and an OWCP medical adviser's March 8, 2010 report.

On June 18, 2010 appellant requested a hearing, which was held on June 8, 2011. She requested acceptance of an aggravation of arthritis of the left knee. Appellant believed that she should receive an award for 40 percent impairment. In letters dated April 1 and May 25, 2011, she reiterated her request to expand her claim for an aggravation of arthritis of the left knee. In a letter dated August 8, 2011 appellant argued that she was entitled to have her arthritis and sprain rated for a schedule award and submitted additional medical evidence.

In a July 28, 2011 report, Dr. George noted that appellant had a torn medial meniscus with degenerative changes found on a magnetic resonance imaging scan. Appellant required surgery in February 2003. Dr. George opined that the injury of pushing a cart and twisting her knee caused a significant aggravation of her preexisting degenerative arthritis and she was left with residual loss of range of motion.

By decision dated September 20, 2011, a hearing representative affirmed the May 13, 2010 schedule award decision. Regarding expansion of appellant's claim, the hearing representative found that OWCP should develop the claim.

In a letter dated January 3, 2012, appellant requested reconsideration. She repeated her request for expansion of her claim and a higher schedule award. In a May 31, 2011 report, Dr. Ashok S. Patil, Board-certified in preventive medicine, diagnosed strain of the left knee and tear of the medial meniscus of the left knee.

By decision dated May 30, 2012, OWCP denied modification of the prior schedule award. While appellant argued for a higher schedule award under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (6<sup>th</sup> ed. 2009); she was applying her own lay interpretation of what she believed she was entitled to under the A.M.A., *Guides*. Regarding expansion of her claim, it found in a June 8,

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<sup>2</sup> Appellant has a preexisting condition of osteoarthritis of the left knee.

<sup>3</sup> The record reflects that, on November 4, 2002, appellant was approved for disability benefits under social security.

2004 decision, OWCP made a finding that the effects of her injury had ceased and that she no longer had any injury-related disability remaining.

On May 8, 2013 appellant requested reconsideration. She contended that her claim be accepted for permanent aggravation of patellofemoral arthritis due to the work-related injury on October 3, 2003. Appellant also requested an increase in her schedule award as her physician found 40 percent left leg impairment.

In a March 11, 2013 report, Dr. Tim Nice, a Board-certified orthopedic surgeon, noted that in 2002 appellant sustained an injury to her left knee while pushing a heavy cart which became stuck. Appellant fell to the ground with her whole body, but the left leg did not move. She related that she felt a pop and subsequently had surgery for a partial medial meniscectomy on February 12, 2003. Dr. Nice noted that following surgery, appellant continued to have pain. The other examining physicians of record had noted that she had moderately severe arthritis in her left knee but did not indicate whether she had an aggravation of a preexisting condition. Dr. Nice opined that “[c]ertainly falling on to her left knee and twisting the left leg would be an aggravation of an underlying degenerative condition. I must also comment that [appellant] had no knee issues prior to this injury on [October 2, 2002].” He indicated that appellant had worked for the employing establishment for approximately 15 years. Appellant worked long hours and did moderately heavy work. Dr. Nice reviewed her work status and her job explanation in some detail and explained that, “[d]espite weighing over 300 pounds, [appellant] was able to do her work without time off, which suggests to me that she did not have any significant joint issues until this accident. He explained that he x-rayed appellant on March 11, 2013 and found that the undersurface of the patella, revealed findings to include moderately severe degenerative changes in the left knee and findings of patellofemoral arthritis.

On clinical examination Dr. Nice indicated that he discovered a grinding sensation when appellant extended and flexed her knee. Appellant had full extension and could flex to about 110 degrees but had tenderness and moderately severe patellofemoral crepitation. Dr. Nice explained that, despite the fact that she had arthritis and ongoing symptoms, no mention was made of an aggravation of a preexisting condition. He stated that appellant subsequently fell because her left knee buckled and she injured her right knee. Dr. Nice opined that she “had a condition that was overlooked, although everybody recognized the problem.” In an April 5, 2013 report, he reviewed the surgical note from February 12, 2003. Dr. Nice noted that an additional diagnosis should be added to appellant’s claim, opining that “within a reasonable degree of medical certainty” she not only sustained a torn medial meniscus of the left knee, but she also sustained an aggravation of the underlying severe arthritis of her left knee. In an April 12, 2013 addendum, Dr. Nice added that the aggravation was permanent.

By decision dated June 11, 2013, OWCP denied appellant’s request for reconsideration without a review of the merits on the grounds that the evidence did not support that OWCP erroneously applied or interpreted a point of law.

### LEGAL PRECEDENT

Under section 8128(a) of FECA,<sup>4</sup> OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”<sup>5</sup>

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.<sup>6</sup>

### ANALYSIS

Appellant disagreed with the denial of her claim for an increased schedule award and the denial of her request to expand her claim and requested reconsideration on May 28, 2013. The underlying issues on reconsideration were whether she was entitled to an increased schedule award and whether OWCP expanded the claim to include aggravation of arthritis of the left knee.

Regarding her claim for an increased schedule award, appellant did not provide any relevant or pertinent new medical evidence to the issue of whether she was entitled to a great impairment. Instead, she contended that her schedule award was improperly calculated by the medical adviser. Appellant stated that her review of the A.M.A., *Guides* supported that she was entitled to a greater award. The Board has held that the degree of functional impairment to a scheduled member is a medical question that can only be established by probative medical opinion.<sup>7</sup> As a lay person appellant is not competent to render a medical opinion and, therefore, her contention has no probative value on a medical issue.<sup>8</sup> The Board notes that the medical evidence submitted with her request does not offer any opinion as to whether she sustained an increase in impairment to her left leg.

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

<sup>8</sup> See *James A. Long*, 40 ECAB 538 (1989).

The Board finds that the case is not in posture regarding appellant's request to expand her claim. In its September 20, 2011 decision, the hearing representative directed OWCP to develop the record with regard to whether an aggravation of the left knee arthritis should be accepted. In its May 30, 2012 decision, OWCP relied on its prior determination of June 8, 2004 that the effects of appellant's injury had ceased and that she no longer had any injury-related disability. It noted that she should follow her appeal rights. OWCP did not develop the claim to determine whether it should be accepted for an aggravation of left knee arthritis as instructed.<sup>9</sup>

The Board notes that appellant submitted new reports from Dr. Nice, who provided an opinion on the causal relationship of her left knee arthritis to her accepted injury. In the June 11, 2013 decision, OWCP found that the reports were not sufficient to warrant further merit review. The Board finds that the reports constitute relevant and pertinent new evidence related to whether appellant's left knee arthritis was due to the accepted injury. OWCP was obligated to conduct a merit review of the claim.<sup>10</sup> Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>11</sup>

On remand, OWCP shall conduct a merit review with regard to whether appellant's claim should be accepted for aggravation of left knee arthritis as work related. After such further development as is deemed necessary, it shall issue an appropriate merit decision.

On appeal, appellant noted that there were errors in her schedule award. As noted, she did not submit relevant new medical evidence regarding any request for an increased schedule award. The Board also notes that appellant may request an increased schedule award based on evidence of a new exposure or medical evidence from a physician showing progression of her employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that OWCP improperly refused to reopen appellant's case for further review of the merits of her claim, with respect to expansion of the claim, under 5 U.S.C. § 8128(a)

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<sup>9</sup> *B.S.*, Docket No. 09-195 (issued October 9, 2009) (while a claimant bears the burden of proof that, impairment is causally connected to the original accepted injury, OWCP must not summarily deny a claim for a schedule award on the basis that there was an earlier finding that the claimant had no residuals, sufficient to terminate wage-loss compensation and medical benefits).

<sup>10</sup> *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

<sup>11</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside and remanded, in part, for further action consistent with this decision.

Issued: June 6, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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