

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

C.P., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Lexington, KY, Employer)

**Docket No. 15-1593
Issued: April 5, 2016**

Appearances:
William Matthew Housh, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 21, 2015 appellant, through his representative, filed a timely appeal of a February 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from August 15, 2014, the date of the most recent OWCP merit decision to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested oral argument. By order dated December 29 2015, the Board exercised its discretion and denied his request, finding that appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-1593 (issued December 29, 2015).

FACTUAL HISTORY

This case has previously been before the Board.³ In a June 13, 2006 decision, the Board found that appellant did not meet his burden of proof to establish that he had more than 22 percent permanent impairment of the right upper extremity. The award was based on a nerve root impairment affecting the arm due to brachial neuritis and cervical stenosis. The Board also found that OWCP improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA. The Board remanded the case to OWCP for a decision on the merits of appellant's claim with regard to whether appellant established that he was entitled to a greater schedule award. The facts and history contained in the prior appeal are incorporated herein by reference.⁴

On May 28, 2014 appellant filed a Form CA-7 claim for a schedule award. He submitted a March 20, 2014 report from Dr. David L. Jackson, Board-certified in family medicine, indicating that appellant had 20 percent upper extremity impairment due to C7 radiculopathy. On August 12, 2014 an OWCP medical adviser opined that Dr. Jackson's findings supported only 14 percent right arm impairment. As appellant previously received a schedule award for 22 percent of the right arm for his accepted condition, he had no impairment greater than previously awarded.

In an August 15, 2014 decision, OWCP found that the medical evidence failed to support impairment greater than the 22 percent permanent impairment previously awarded to the right upper extremity on December 28, 2004.

On February 10, 2015 appellant requested reconsideration.

In support of his claim for a schedule award appellant provided reports dated November 18, 2013 and July 16, 2014 from Dr. Jackson. Dr. Jackson diagnosed chronic neck pain, chronic C7 radiculopathy, history of anterior cervical discectomy and fusion, history of cervical laminectomy, right upper extremity weakness, pain, diabetes, hyperlipidemia, and tobacco use. He advised that appellant was considered permanently disabled and unable to return to any type of functional work. Dr. Jackson also advised that the conditions stemmed from the accepted injury. Additionally, appellant provided a copy of the previously submitted August 12, 2014 report from OWCP's medical adviser.

In a November 4, 2014 letter, appellant's representative noted that OWCP's medical provider indicated that appellant was entitled to an additional impairment of 14 percent, which should be granted and paid.

³ Docket No. 05-1250 (issued June 13, 2006).

⁴ On December 15, 2013 OWCP reduced appellant's compensation benefits to reflect his ability to earn \$448.00 per week as an information clerk. Appellant requested reconsideration and OWCP denied modification on April 18 and October 30, 2014.

In a decision dated February 19, 2015, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁵ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides 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:

“(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.”⁶

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.⁷

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. He disagreed with the denial of his claim for an increased schedule award and requested reconsideration on February 10, 2015. Appellant asserts that he is entitled to an additional 14 percent impairment, in addition to the 22 percent previously received for the same condition, based on OWCP's medical adviser's August 12, 2014 report. However, this assertion has no reasonable color of validity.⁸ FECA contemplates reduction of schedule compensation for subsequent injury to the same body member.⁹ Appellant's general statements and allegations on reconsideration have not

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

⁸ See *Arlesa Gibbs*, 53 ECAB 204 (2001) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity). *M.S.*, Docket No. 11-0595 (issued January 23, 2012).

⁹ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c). See *M.S.*, *id.*

otherwise shown that OWCP erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

Submitted with his reconsideration request, appellant's representative provided reports dated November 18, 2013 and July 16, 2014 from Dr. Jackson. However, these reports did not provide any opinion on impairment which is the relevant issue in the claim. This evidence, while new, is not relevant. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ Appellant also provided a copy of OWCP's medical adviser's August 12, 2014 report. This evidence was previously considered by OWCP. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and does not constitute a basis for reopening a case for further merit review.¹¹

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

The Board notes that the representative for appellant continued to argue that appellant was entitled to a greater award. However, as explained, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹¹ *Betty A. Butler*, 56 ECAB 545 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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