

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

J.C., Appellant

and

**DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD,
Philadelphia, PA, Employer**

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**Docket No. 11-1055
Issued: December 28, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 23, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated March 4, 2011, which denied his request for reconsideration. Because more than 180 days elapsed from the February 4, 2010 merit decision to the filing of this appeal on March 23, 2011, the Board lacks jurisdiction to review the merits of appellant's 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 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.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 21, 2000, the Board reversed OWCP's January 24, 1997 decision terminating appellant's compensation for his accepted conditions of lumbar and thoracic strain.² In a June 24, 2004 decision, the Board affirmed an October 21, 2002 decision of OWCP, finding that it properly reduced appellant's compensation effective November 3, 2002 on the grounds that he had the capacity to earn wages as a telephone solicitor.³ The facts and history contained in the prior appeals are incorporated by reference.

On April 8, 2009 OWCP received appellant's claim for a schedule award.

By decision dated June 30, 2009, OWCP denied a schedule award. It found that the medical evidence did not support any permanent impairment to a member of the body based on the accepted spinal conditions.

On July 10, 2009 appellant requested a hearing, which was held on November 16, 2009.

By decision dated February 4, 2010, OWCP's hearing representative affirmed the June 30, 2009 decision. She found that the medical evidence did not establish permanent impairment.

On February 1, 2011 appellant's representative requested reconsideration.

Appellant submitted a January 31, 2011 report from Dr. Sofia Lam, a Board-certified anesthesiologist, who noted that she was his treating physician and in the best position to evaluate his medical needs and physical abilities. Dr. Lam diagnosed lumbar/thoracic sprain and strain, degeneration of lumbosacral intervertebral disc, severe low back symptomatology with lumbar facet arthropathy and paravertebral spasm, lumbar radiculopathy with the main focus in the left L5 nerve root distribution and myofascial pain symptomatology. She noted that appellant had decreased range of motion of the lumbosacral spine on lateral rotation and flexion. Dr. Lam explained that facet injections were the "gold standard" in the diagnosis and treatment of facet joint pain. She opined that it was "impossible" to "forecast treatment needed into the future." Dr. Lam advised that appellant would remain in a painful state his entire lifetime. Furthermore, she noted that he was disabled and his diagnosis met "the criteria of disability based on the American Medical Association guidelines of permanent impairment." Dr. Lam opined that appellant was not a candidate for any type of gainful employment. She also provided a prescription for a magnetic resonance imaging (MRI) scan.

A January 3, 2011 MRI scan read by Dr. Howard C. Hutt, a Board-certified diagnostic radiologist, revealed degenerative changes and disc space narrowing at the L1-2 disc, L5-S1 disc, and L2-3 discs. Additionally, disc bulging was found at the L1-2, L2-3 and L4-5 discs.

² Docket No. 97-1689 (issued January 21, 2000).

³ Docket No. 03-347 (issued June 24, 2004).

By decision dated March 4, 2011, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that his request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ 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 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:

“(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.”⁵

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.⁶

ANALYSIS

OWCP denied reopening appellant's case on the merits, finding that appellant did not raise substantive legal questions or include new and relevant evidence. The underlying issue on reconsideration is whether appellant established entitlement to a schedule award. On February 4, 2010 OWCP's hearing representative affirmed the June 30, 2009 merit decision, which denied appellant's claim for a schedule award because there was no current medical evidence supporting a permanent impairment.

Appellant did not make any argument that OWCP erroneously applied or interpreted a specific point of law nor has he advanced a relevant legal argument not previously considered by it. A claimant may be entitled to a merit review by submitting new and relevant evidence. Appellant did not, however, submit new and relevant medical evidence in this case.

In support of his claim, appellant submitted a new medical report, dated January 31, 2011, from Dr. Lam, who opined that he was disabled. The Board finds that Dr. Lam's January 31, 2011 report was not relevant to the underlying issue because she did not offer any

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

⁶ *Id.*

rating of permanent impairment to a scheduled body member based on the accepted condition.⁷ Dr. Lam noted only that appellant was disabled, but did not address impairment under the A.M.A., *Guides*.⁸ Therefore, her report is not relevant. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹

The MRI scan read by Dr. Hutt is similarly not relevant as he did not address whether appellant had any permanent impairment of a scheduled member.

Accordingly, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

On appeal, appellant indicated that he had additional symptoms which were not accepted. He also requested authorization for surgery. As noted, the Board does not have jurisdiction over the merits of the claim. The Board only has jurisdiction over the March 4, 2011 decision in which OWCP denied a merit review of the claim.¹⁰ As explained, appellant did not meet one of the three criteria of 20 C.F.R. § 10.606(b) such that OWCP properly denied his request for reconsideration without conducting a merit review of the claim.

CONCLUSION

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

⁷ OWCP currently evaluates schedule awards under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (A.M.A., *Guides*). See FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ See 5 U.S.C. § 81017; 20 C.F.R. § 10.404(a).

⁹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁰ See 20 C.F.R. § 501.2(c) (the Board only has jurisdiction over final decisions of OWCP).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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