

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

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**E.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Atlanta, GA, Employer**

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**Docket No. 11-1116  
Issued: December 19, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 5, 2011 appellant filed a timely appeal from a March 15, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied merit review. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the merits of the case, because more than 180 days elapsed from the most recent merit decision of May 26, 2010 to the filing of this appeal.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See 20 C.F.R. § 501.3(e) (2008).

## **FACTUAL HISTORY**

This case was previously before the Board. In a decision dated September 2, 2009, the Board set aside a July 14, 2008 OWCP decision and remanded the case for further review.<sup>3</sup> The Board determined that OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. The case was remanded for a merit review followed by other development deemed necessary and to issue an appropriate merit decision. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>4</sup>

On July 2, 2004 appellant filed a claim for a schedule award. He submitted an August 23, 2004 report from Dr. Ralph D'Auria, a Board-certified orthopedic surgeon, who found that appellant had a 38 percent permanent impairment of the lower extremities pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> An OWCP medical adviser reviewed Dr. D'Auria's findings and opined that appellant had no impairment of either lower extremity. In an April 29, 2005 decision, OWCP denied appellant's claim for a schedule award. Upon remand by the Board, on October 9, 2009 OWCP performed a merit review of his claim as instructed. OWCP denied modification of its prior decision which denied appellant's claim for a schedule award.

On April 7, 2010 appellant requested reconsideration and submitted additional medical evidence. A September 24, 2009 electromyogram revealed no compressive or inflammatory lumbar radiculopathy. Appellant submitted reports from Dr. Mark W. Freeman, an osteopath, dated November 30, 2009, who treated appellant for lumbar pain resulting from a work-related injury on July 29, 2002. Dr. Freeman diagnosed upper and middle trunk extremity nerve impingement and a femoral obturator nerve impingement. Appellant submitted an impairment rating from Dr. Freeman dated February 16, 2010, who opined that appellant had nine percent combined lower extremity impairment pursuant to the sixth edition of the A.M.A., *Guides*.<sup>6</sup>

In a decision dated May 26, 2010, OWCP denied modification of the prior decision as there was insufficient medical evidence to establish that appellant had any impairment, under the A.M.A., *Guides*, causally related to his accepted lumbar sprain.

In a telephone log dated January 24, 2011, appellant contacted OWCP about filing a reconsideration request regarding his schedule award claim. On February 2, 2011 he contacted OWCP about the reconsideration request and about the need to "have the condition updated." In correspondence dated February 2, 2011, OWCP informed appellant that if he disagreed with the May 26, 2010 decision he must exercise his appeal rights attached to that decision. It also gave him instruction to follow if he felt that he had additional conditions due to his work injury.

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<sup>3</sup> On July 29, 2002 appellant, then a 37-year-old mail processor, injured his back at work when his chair collapsed. He stopped work on that day. OWCP accepted appellant's claim for lumbosacral sprain and strain and paid compensation benefits.

<sup>4</sup> Docket No. 08-2194 (issued September 2, 2009).

<sup>5</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

On February 24, 2011 appellant filed an appeal request form requesting reconsideration of the May 26, 2010 decision.

In a March 15, 2011 decision, OWCP denied appellant's reconsideration request on the grounds that his request was insufficient to warrant a review of its prior decision.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>7</sup> 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 provide 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:

“(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>8</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>9</sup>

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>10</sup>

### **ANALYSIS**

OWCP denied appellant's claim for a schedule award on May 26, 2010 finding that the medical evidence did not establish that he had a ratable impairment due to his accepted low back condition. In a March 15, 2011 decision, it denied his reconsideration request, without a merit review of the claim. 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.

On February 24, 2011 appellant submitted an appeal request form in which he requested reconsideration. He did not state the nature of his disagreement with the May 26, 2010 decision

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> See *Daniel Deparini*, 44 ECAB 657 (1993).

or submit any supporting evidence. The Board finds that appellant did not allege nor demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument 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)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant failed to submit any additional evidence with his reconsideration request. The Board therefore finds that OWCP properly determined that he is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his February 24, 2011 request for reconsideration.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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