

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

D.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Omaha, NE, Employer**

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**Docket No. 11-940
Issued: October 18, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2011 appellant filed a timely appeal from a February 16, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than 180 days elapsed between the most recent merit decision dated August 27, 2010 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, then a 41-year-old laborer custodian, filed a claim for traumatic injury alleging that on February 5, 2010 he sustained amputation of his left index finger when a snow blower auger came in contact with his finger. OWCP accepted his claim for amputation of the left finger.

Records from the Immanuel Medical Center dated February 5, 2010 indicate that appellant was treated for traumatic amputation of the terminal tuft of the distal phalanx of the left middle finger.

In a medical report dated May 13, 2010, Dr. Jack A. McCarthy, a Board-certified hand surgeon, stated that appellant had reached maximum medical improvement. Pursuant to the American Medical Association, *Guides to Evaluation of Permanent Impairment* (sixth edition); he calculated that appellant had a 15 percent permanent impairment to his left long finger secondary to his amputation.

Appellant filed a claim for a schedule award on May 25, 2010.

OWCP's district medical adviser (DMA) reviewed Dr. McCarthy's report on August 22, 2010 and concurred that appellant had 15 percent impairment of the left middle finger. It awarded appellant 4.5 weeks of compensation in a decision dated August 27, 2010 for 15 percent loss of the left middle finger.

On February 8, 2011 appellant requested reconsideration of the schedule award. In support of this request, he argued that his finger was completely amputated, that he had sensitivity over the tip of his finger because he only had three to four millimeters (mm) of nail bed left, that he had potential nail problems such as infection, and that he felt like a social outcast and had problems bonding with his family because of his finger amputation. Appellant submitted no additional evidence in support of his reconsideration request.

On February 16, 2011 OWCP denied merit review on the grounds that appellant did not show that it erroneously applied or interpreted a point of law, failed to advance a point of law or fact not previously considered, and had not submitted relevant and pertinent new evidence not previously considered by OWCP.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations at 20 C.F.R. § 10.606(b) provide that a claimant may obtain review of the merits of his or her claim by:

- (1) showing that OWCP erroneously applied or interpreted a point of law;

² Section 8128 of FECA provides: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

- (2) advancing a relevant legal argument not previously considered by OWCP; or
- (3) constituting relevant and pertinent evidence not previously considered by OWCP.

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements OWCP will deny the application for review without reviewing the merits of the claim.³

ANALYSIS

In support of his February 8, 2010 request for reconsideration, appellant failed to show that OWCP erroneously applied or interpreted a point of law and he did not submit any new evidence not previously considered by OWCP.

Appellant argued that he was entitled to a greater schedule award for the amputation of his finger as he had potential nail problems, sensitivity over the tip of his finger and because he felt like an outcast with his family and friends, because of his deformity. The degree of permanent impairment appellant has sustained is a medical issue. Appellant must submit medical evidence to support an additional schedule award.⁴ His own perceptions are not a basis for a schedule award. The statement appellant submitted on February 8, 2010 did not include medical evidence; therefore, the statement has no probative value or relevance to the schedule award decision.

Regarding appellant's claim of social isolation, unlike a tort action, FECA does not allow an award for pain and suffering.⁵ His arguments in support of his request for reconsideration therefore do not constitute relevant legal arguments, not previously considered.

Appellant did not meet the requirements of 20 C.F.R. § 10.606(b), and accordingly his request to reopen his case for further reconsideration on its merits must be denied in accordance with 20 C.F.R. § 10.608(b).

CONCLUSION

The Board finds that the refusal of OWCP properly refused to reopen appellant's case for a further review on its merits pursuant to 5 U.S.C. § 8128(a).⁶

³ 20 C.F.R. § 10.608(b).

⁴ See *Annette M. Dent*, 44 ECAB 403 (1993).

⁵ See *John Soderman*, 6 ECAB 322 (1953).

⁶ A claimant retains the right to file for a schedule award or increased schedule award, at any time, based on new exposure or on medical evidence indicating progression of an employment-related condition, resulting in permanent impairment or increased impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 16, 2010 is affirmed.

Issued: October 18, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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