

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a); and (2) whether it properly denied her request for an oral hearing.

FACTUAL HISTORY

On September 14, 2005 appellant, then a 45-year-old associate advocate, filed a traumatic injury claim alleging that she sustained an injury to both her knees, left elbow and three fingers on her right hand when she slipped on a pine cone by the steps at work. OWCP accepted appellant's claim for bilateral knee strain. Appellant received disability compensation for the periods November 1, 2005 to January 7, 2006 and November 6 to 25, 2006.

On July 16, 2008 appellant filed a claimed for a schedule award.

On October 29, 2008 OWCP advised appellant that schedule awards for permanent partial impairment to a body member are not given under FECA for sprains/strains, which was the only medical condition accepted by OWCP. It requested she provide a physician's opinion, with stated medical rationale, establishing a causal relationship between the diagnosed condition and the accepted work injury.

In a December 4, 2008 report, Dr. Anuj Gupta, a Board-certified orthopedic surgeon, noted appellant's complaints of anterior knee pain and diagnosed bilateral knee arthritis. Upon examination, he observed mild swelling within both joints and maximum tenderness over the lateral facet of both patellofemoral compartments. Appellant did not have any tenderness medially or laterally and showed no instability. Dr. Gupta explained that the primary cause for her pain was chronic arthritis of both knee joints and significant loss of the patellofemoral cartilage. He noted that appellant was at maximum medical improvement. Dr. Gupta utilized Table 17-31 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) and determined that appellant had 4 percent whole person impairment rating and 10 percent impairment rating for the lower extremity. He further explained that because her work injury was an exacerbation of a preexisting condition only 50 percent of the impairment rating was apportioned to the work-related injury. Therefore, Dr. Gupta concluded that appellant had 2 percent whole person impairment rating and 5 percent impairment for the lower extremity for each knee, resulting in a total impairment rating of 10 percent impairment for the lower extremities.

On September 10, 2009 OWCP requested additional medical evidence from appellant's treating physician regarding his impairment determination based on the sixth edition of the A.M.A., *Guides*. No response was received.

In a decision dated November 16, 2009, OWCP denied appellant's claim for a schedule award on the grounds of insufficient evidence establishing that she sustained a permanent impairment due to her accepted work injury. The decision noted that she did not submit a report from her treating physician which assessed her alleged permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*.

On November 5, 2010 appellant, through her representative, submitted a request for reconsideration. In an October 21, 2010 report, Dr. Gupta noted her complaints of continued bilateral knee pain. Based on Table 16-3 of the A.M.A., *Guides*, sixth edition he stated that appellant had class one osteoarthritis of both knee joints with a lower extremity impairment rating of approximately 10 percent on either side, resulting in a total impairment rating of 20 percent for the lower extremities. Because it was a preexisting condition, Dr. Gupta determined that 50 percent of the impairment rating was attributable to the work-related injury. Thus, appellant had a total lower extremities impairment rating of 10 percent.

Appellant also resubmitted the November 28, 2005 attending physician's report by Dr. Michael Landers, a general practitioner and Dr. Gupta's December 22, 2005 report.

By decision dated November 23, 2010, OWCP denied appellant's request for reconsideration. It found that the medical evidence provided was either duplicative or immaterial as the diagnosed condition was unrelated to the accepted work injury. Thus, appellant was not entitled to further merit review.

On November 30, 2010 appellant appealed the November 23, 2010 denial decision and requested a telephone hearing. She resubmitted Dr. Gupta's October 21, 2010 medical report and workers' compensation form.

By decision dated December 22, 2010, OWCP advised appellant that she was not entitled to an oral hearing on the same issue because she had previously requested reconsideration. The Board exercised its discretion in considering her request and determined that her case could equally be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.³ OWCP's regulations provide that OWCP may review an award for or against compensation at anytime on its own motion or upon application. The employee shall exercise her right through a request to the district Office.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (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 A request for reconsideration must also be submitted within one year of the date of the

³ 5 U.S.C. § 8128(a); *see also*; *W.C.*, 59 ECAB 372 (2008); *D.L.*, Docket No. 09-1549 (issued February 23, 2010).

⁴ 20 C.F.R. § 10.605; *see also* *R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁵ *Id.* at § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

OWCP decision for which review is sought.⁶ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸

ANALYSIS

On November 16, 2009 OWCP denied appellant's schedule award claim. Appellant requested reconsideration. By decision dated November 23, 2010, OWCP denied her reconsideration request finding that the evidence received was either duplicative or immaterial to her claim. The Board finds that the case is not in posture for decision.

In support of her request for reconsideration, appellant submitted duplicative medical evidence, including Dr. Landers' November 28, 2005 attending physician's report and Dr. Gupta's December 22, 2005 report, which was previously on the record. She also submitted an October 21, 2010 report from Dr. Gupta, which was not previously considered by OWCP. Dr. Gupta addressed the issue of appellant's permanent impairment based on the A.M.A., *Guides*, sixth edition and determined that appellant had a bilateral lower extremity impairment rating of 10 percent. As this evidence is new to the record and relevant to the issue of the extent of appellant's permanent impairment, it is sufficient to warrant further review of the merits.⁹ The case will be remanded for OWCP to review this evidence. After such further development of the claim as it deems necessary, it shall issue an appropriate schedule award decision on the extent of impairment to appellant's lower extremities.

CONCLUSION

The Board finds that OWCP improperly denied appellant's November 5, 2010 request for reconsideration.¹⁰

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *M.E.*, 50 ECAB 694 (2007).

⁹ *See R.M.*, Docket No. 09-1231 (issued July 27, 2010).

¹⁰ In light of the Board's disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: September 26, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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