

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

E.B., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Chicago, IL, Employer**

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**Docket No. 11-1855
Issued: April 12, 2012**

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 August 1, 2011 appellant filed a timely appeal of a July 27, 2011 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 27, 2011 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on January 20, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant filed a claim for a right knee injury in the performance of duty on May 24, 1985 when he struck it against the side of a desk. OWCP accepted the claim for right chondromalacia patella, right lateral meniscus tear and internal derangement right knee. Appellant also sustained an injury on February 28, 1996 accepted for right finger contusion, mallet finger and bilateral knee and leg contusion. In November 1989, he received a schedule award for a 17 percent permanent impairment to the right leg.

In an undated report received by OWCP on June 16, 2008, Dr. Richard Grant, an orthopedic surgeon, found that appellant had a 34 percent right leg impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). OWCP referred appellant for a second opinion examination by Dr. Vikram Ghandi, an orthopedic surgeon. In a report dated October 7, 2008, Dr. Ghandi opined that under the fifth edition of the A.M.A., *Guides* appellant had an 18 percent right leg permanent impairment. By report dated March 27, 2009, an OWCP medical adviser, Dr. Lawrence Manning, stated that, if Dr. Ghandi's report was used, the impairment was 10 percent to the right leg under the fifth edition of the A.M.A., *Guides*. According to him, if Dr. Grant's report was considered, the right leg impairment was 28 percent. By report dated June 29, 2009, Dr. Manning opined that under the sixth edition the right leg impairment was 24 percent, referring to Dr. Grant's findings.

By decision dated July 13, 2009, OWCP issued a schedule award for an additional 24 percent permanent impairment to the right leg. The period of the award was 69.12 weeks commencing July 5, 2009.

Appellant requested a hearing before an OWCP hearing representative. By decision dated February 19, 2010, the hearing representative set aside the July 13, 2009 decision, finding the medical evidence required further development. The hearing representative noted that OWCP failed to address appellant's previous schedule award for 17 percent impairment to the right leg.

OWCP referred the case to Dr. Manning, an OWCP medical adviser, for review. In a report dated April 18, 2010, Dr. Manning opined that there should be an 18 percent additional impairment, after deducting a 6 percent impairment for loss of range of motion. In a memorandum dated June 4, 2010, OWCP requested clarification. The medical evidence was referred to another OWCP medical adviser, Dr. Craig Uejo, for an opinion as to the permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a report dated June 15, 2010, Dr. Uejo noted that he had reviewed the medical evidence and the statement of accepted facts. He discussed specific tables under the A.M.A., *Guides* and concluded that appellant had a 16 percent permanent impairment to the right leg, based on Table 16-3 with a diagnosis of knee joint arthritis. Dr. Uejo opined that this impairment should not be combined or added to the previously awarded 17 percent.

By decision dated July 19, 2010, OWCP found that appellant was not entitled to an additional schedule award.

On September 7, 2010 appellant requested reconsideration of the claim. He argued that Dr. Uejo had an incomplete and inaccurate background. Appellant noted that Dr. Uejo had stated that it would be imperative to determine which joint had the two millimeters measurement in applying the knee regional grid.

By decision dated January 20, 2011, OWCP reviewed the case on its merits and denied modification.

On July 21, 2011 appellant submitted a request for reconsideration. He again argued that Dr. Uejo's report was based on an incomplete and inaccurate background. Appellant stated that Dr. Karla Madalin, a neurologist, was not his treating physician and she did not report a normal gait. With respect to evidence, he resubmitted a June 10, 2008 report from Dr. Madalin and a March 7, 2011 report from Dr. John Wood, an orthopedic surgeon, providing results on examination and diagnostic studies.

In a decision dated July 27, 2011, OWCP determined that the application for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either "(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 evidence not previously considered by OWCP."² Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.³

ANALYSIS

Appellant filed an application for reconsideration of the January 20, 2011 OWCP decision, finding that he was not entitled to an additional schedule award beyond the 17 percent right leg permanent impairment previously awarded. The Board does not have jurisdiction over the January 20, 2011 decision. The only issue presented on appeal is whether appellant met one of the requirements of 20 C.F.R. § 10.606(b)(2) warranting a merit review of his claim by OWCP.

With respect to the first standard, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not refer to a specific point of law or establish error in application or interpretation of a specific point of law. Appellant argued that Dr. Uejo's report was of diminished probative value as it was not based on a complete and accurate background. This general argument had been raised by appellant in his September 7, 2010 application for

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

reconsideration and therefore would not constitute a new legal argument. In his July 11, 2011 letter, appellant argued that Dr. Uejo had improperly relied on a June 10, 2008 report by Dr. Madalin.⁴ Although he asserts that Dr. Madalin did not treat his right leg, her report clearly provided results on physical examination that included “gait: toe walking normal, heel walking normal, tandem normal and Romberg normal.” Dr. Uejo cited those results in his report. Appellant’s argument that this was improper has no reasonable color of validity and is not sufficient to warrant reopening the case for merit review.⁵

The final standard for reopening a case for merit review is to submit new, relevant and pertinent evidence. In this case, appellant did not submit new and relevant evidence regarding OWCP’s determination as to a permanent impairment. The report from Dr. Wood did not discuss the permanent impairment issue. The Board accordingly finds that appellant did not submit evidence sufficient to meet the requirement of 20 C.F.R. § 10.606(b)(2)(3).

Since appellant 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 submit new, relevant and pertinent evidence, the Board finds that he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). OWCP properly declined to reopen the case for a merit review.

On appeal, appellant again argues that Dr. Uejo’s opinion was not based on a proper background. The only issue before the Board was whether appellant had met the requirements of 20 C.F.R. § 10.606(b)(2). For the reasons noted above, OWCP properly denied merit review.

The Board notes that appellant may request an increased schedule award based on medical evidence showing progression of an employment-related condition resulting in an increased impairment. A claimant who submits new evidence regarding a permanent impairment after a schedule award decision is entitled to a merit decision on the issue.⁶

CONCLUSION

The Board finds that OWCP properly determined the application for reconsideration was insufficient to warrant a merit review.

⁴ In his report, Dr. Uejo identifies the June 10, 2008 report as being prepared by Dr. Valsa Mariappuram. It appears that Dr. Madalin prepared the report and it was reviewed by Dr. Mariappuram.

⁵ Where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review. *See Norman W. Hanson*, 40 ECAB 1160 (1989).

⁶ *See Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 27, 2011 is affirmed.

Issued: April 12, 2012
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