

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

C.L., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DELIVERY CENTER, Little Rock, AR,
Employer**)

**Docket No. 12-391
Issued: August 13, 2012**

Appearances:
James Stanley, Esq., for the appellant
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 December 6, 2011 appellant, through her attorney, filed a timely appeal from a September 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and a November 14, 2011 nonmerit decision denying her request for reconsideration. 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 merits of the case.

ISSUES

The issues are: (1) whether appellant sustained an employment-related permanent impairment warranting a schedule award; and (2) whether OWCP properly denied her request for merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has been before the Board before. The facts as set forth in the Board's prior decision are hereby incorporated into this decision by reference.² The relevant facts are set forth below.

On March 18, 2005 appellant, then a 24-year-old mail handler, filed an occupational disease claim alleging that she suffered from a pain in her lower back, left hip and left leg due to her federal duties which involved bending, stooping, pushing and pulling. OWCP accepted her claim for lumbar sprain. On March 5, 2007 appellant returned to her regular work duties but on April 17, 2008 she stopped working citing the inability to perform these duties.

On March 16, 2011 appellant filed a claim for a schedule award. By letter dated March 18, 2011, OWCP requested that she submit medical information in support of her claim for a schedule award. Specifically it asked for a report that established the date of maximum medical improvement, a detailed description of the permanent impairment and a final estimate of the permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). Appellant did not submit the requested medical report.

On May 3, 2011 OWCP asked its medical adviser if appellant's accepted condition resulted in a permanent impairment to a scheduled member. The medical adviser indicated that he did not know if she had a scheduled impairment, noting that most of the relevant records were more than five years old and that he could not project an impairment to the lower extremity based on records that were so out of date.

By letter dated May 23, 2011, OWCP referred appellant to Dr. Kevin J. Collins, a Board-certified physiatrist, for a second opinion. In a June 16, 2011 report, Dr. Collins assessed appellant with lumbosacral sprain. He noted that she had palpable pain over her S1 joint but other than that, there was no evidence of radicular findings. Dr. Collins applied the A.M.A., *Guides* and found that, pursuant to Table 17-4, he would rate appellant's impairment based on class 0. Applying the grade modifiers, he would allow one due to her functional history, zero for clinical examination and zero for clinical studies. However, Dr. Collins noted that appellant does have chronic pain which has been a long-term issue for her, and that the A.M.A., *Guides* allow for a maximum of three percent impairment rating for nonspecific pain that cannot be attributed to her conditions addressed in the A.M.A., *Guides*. He opined that he would allow a two percent impairment rating for pain.

In a September 21, 2011 report, OWCP's medical adviser stated that, although Dr. Collins suggested a whole body rating based on chronic pain, this rating is not acceptable as chronic pain is specifically reported to be nonradicular. He stated that the only painful area demonstrated in the physical examination was over a sacroiliac joint which would not cause a radicular finding, either motor or sensory, affecting a lower extremity. The medical adviser indicated that, based on Dr. Collins' report, there was zero percent impairment to the right and

² Docket No. 11-1059 (issued March 27, 2012) (the Board affirmed OWCP's decision denying appellant's claim for a recurrence of disability commencing on or about April 17, 2008).

left lower extremities, and that, accordingly, the schedule awards were zero percent for right lower extremity and zero percent for left lower extremity.

By decision dated September 29, 2011, OWCP denied appellant's claim for a schedule award.

On October 6, 2011 appellant, through counsel, requested reconsideration. In support of his request, appellant resubmitted the June 16, 2011 report by Dr. Collins and OWCP's medical adviser's September 21, 2011 report.

By decision dated November 14, 2011, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶ For decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides*, will be used.⁷

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁸ FECA and the implementing regulations do not provide for a schedule award for the permanent loss of use of the back or the body as a whole.⁹ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹⁰ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹¹

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁷ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁸ *M.E.*, Docket No. 11-2088 (issued May 7, 2012).

⁹ *See Jay K. Tomokiyo* 51 ECAB 361 (2000).

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

ANALYSIS -- ISSUE 1

Appellant filed a claim for a schedule award. OWCP accepted her claim for lumbar sprain. Appellant may only be granted a schedule award for impairment to the lower extremities if such impairment is established as being caused by her accepted lumbar condition.¹²

Appellant has failed to submit any evidence by a treating physician finding impairment to the lower extremities related to the accepted lumbar sprain. The second opinion physician, Dr. Collins, indicated a two percent impairment rating for pain due to her lumbosacral sprain. However, he did not relate this pain to any specific condition or to any particular location. The medical adviser stated that the pain rated by Dr. Collins was nonradicular. He noted that the only painful area demonstrated by Dr. Collins in the physical examination was over a sacroiliac joint which would not cause a radicular finding, either motor or sensory, affecting a lower extremity. Accordingly, the medical adviser found Dr. Collins' report to be insufficient to support any impairment of appellant's lower extremities. The Board finds that his opinion constitutes the weight of the medical evidence of record on the issue of permanent impairment.

As there is no medical evidence supporting a ratable impairment of a scheduled body member causally related to the accepted condition, appellant did not meet her burden of proof to establish entitlement to a schedule award.

Appellant may request a schedule award or increased 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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹³ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁶

¹² *M.E.*, *supra* note 8.

¹³ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[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).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

In requesting reconsideration, appellant did not argue that OWCP erroneously interpreted a specific point of law nor did she advance a relevant legal argument not previously considered. She did not submit any pertinent new and relevant medical evidence with her reconsideration request. The only evidence appellant submitted on reconsideration was duplicates of the prior report by Dr. Collins and the medical adviser. The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁷ Accordingly, the Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant did not establish that she sustained an employment-related permanent impairment warranting a schedule award. The Board further finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 14 and September 29, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2012
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

¹⁷ *J.B.*, Docket No. 12-238 (issued May 23, 2012).