

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

D.B., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER,
Biloxi, MI, Employer

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**Docket No. 12-747
Issued: August 29, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2012 appellant filed a timely appeal from an August 24, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As the last merit decision was issued June 3, 2011, over 180 days from the filing of the current appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

On October 28, 1988 appellant, then a 41-year-old nursing assistant, filed a traumatic injury claim alleging that on that date she sustained cervical strain, a contusion to her right cheek and tenderness of the shoulders when a patient struck her with a chair. OWCP accepted the claim for a herniated disc at C4-5 and C5-6 and a contusion of the face, scalp and neck.

¹ 5 U.S.C. § 8101 *et seq.*

By decision dated December 18, 1997, OWCP granted appellant a schedule award for a 21 percent permanent impairment of each upper extremity. The period of the award ran for 131.04 weeks from February 12, 1997 to August 18, 1999.

On March 24, 2011 appellant filed a claim for an increased schedule award. In an impairment evaluation dated March 23, 2011, Dr. Eric H. Wolfson, a Board-certified neurosurgeon, discussed her complaints of neck pain. He diagnosed cervical radiculopathy and cervicgia and advised that she had a 14 percent permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

On April 8, 2011 an OWCP medical adviser found that appellant had a 15 percent permanent impairment of the right upper extremity due to a 6 percent sensory deficit and a 9 percent motor deficit at C6. He concluded that she had no impairment beyond the 21 percent previously awarded for each extremity.

On April 12, 2011 OWCP requested that Dr. Wolfson review the medical adviser's opinion and clarify his impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.

By decision dated June 3, 2011, OWCP denied appellant's claim for an increased schedule award. It found that the medical evidence was insufficient to show that she had more than the 21 percent permanent impairment of each extremity previously awarded.

On August 15, 2011 appellant requested reconsideration. She asserted that Dr. Wolfson did not thoroughly examine her on March 23, 2011 and that his nurse told her that he did not perform impairment ratings. Appellant maintained her condition had worsened and requested an impairment rating from an orthopedic surgeon.

Appellant submitted a report dated July 26, 2011 from Dr. Diane Ross, a neurologist, who discussed her history of injury and current complaints of worsening cervical radiculopathy. Dr. Ross diagnosed cervical radiculopathy and postlaminectomy syndrome and recommended diagnostic studies.

By decision dated August 24, 2011, OWCP denied appellant's request for reconsideration on the grounds that she had not submitted evidence or raised argument sufficient to warrant reopening the case for further review of the merits under section 8128.

On appeal, appellant alleges that newly submitted medical evidence from Dr. Wolfson and electrodiagnostic studies establish an additional impairment.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² its regulations provide that 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

² *Supra* note 1. Section 8128(a) of FECA provides that "[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."

considered by OWCP.³ 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.⁴ 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.⁵

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.⁶ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁷ 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

In a decision dated June 3, 2011, OWCP denied appellant's claim for an increased schedule award. It determined that the medical evidence did not establish that she had more than the 21 percent permanent impairment of each upper extremity previously awarded. On August 15, 2011 appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the June 3, 2011 OWCP decision. 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. In her August 15, 2011 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She contended that Dr. Wolfson did not perform an adequate evaluation and that his nurse told her that he did not do impairment ratings. Appellant requested that OWCP obtain an opinion from an orthopedic surgeon. It is her burden, however, to submit medical evidence supporting the degree of permanent impairment.⁹ Appellant's argument regarding the adequacy of Dr. Wolfson's report does not constitute a relevant legal argument sufficient to warrant reopening of the case.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence with her request for reconsideration. In a report dated July 26, 2011, Dr. Ross diagnosed cervical radiculopathy and postlaminectomy syndrome. She did not, however, address the issue of the

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁷ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

⁸ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁹ *See D.H.*, 58 ECAB 358 (2007); *Annette M. Dent*, 44 ECAB 403 (1993).

extent of appellant's permanent impairment of the upper extremities. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant submitted additional medical evidence which she alleged established that she had an increased impairment. The Board, however, has no jurisdiction to review new evidence on appeal.¹¹

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen her case for further review of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁰ *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹¹ *See* 20 C.F.R. § 501.2(c).