

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newburgh, NY, Employer**

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**Docket No. 12-203
Issued: July 3, 2012**

Appearances:
Thomas S. Harkins, Esq., for the appellant
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 November 14, 2011 appellant, through her attorney, filed a timely appeal from a June 1, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied merit review. Because more than 180 days elapsed since the most recent merit decision dated June 3, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim 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 for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 19, 2007 appellant, then a 40-year-old custodial maintenance worker, filed a claim alleging that she twisted her right foot on December 17, 2007 while chopping ice and shoveling steps at work. OWCP accepted her claim for contusion of the right foot, stress fracture of the right tibia or fibula, right tibialis tendinitis and closed fracture of the right metatarsal bones. Appellant stopped work on December 17, 2007 and returned on December 19, 2007.

Appellant was treated by Dr. Robert C. Parajon, a podiatrist from January 4 to September 25, 2008, for a right tibial fracture sustained at work. Dr. Parajon noted a history of injury and diagnosed contusion of the right foot, fracture of the tibial sesamoid of the right foot and capsulitis of the right foot. On October 24, 2008 he performed an excision of the tibial sesamoid of the right foot. In reports dated April 30 and May 21, 2009, Dr. Parajon treated appellant in follow-up for painful sesamoiditis and capsulitis of the first metatarsal of the right foot. He recommended physical therapy. In a July 10, 2009 report, Dr. Parajon noted that appellant presented status post excision of the tibial sesamoid of the right foot. He listed findings of intact pulses, neurological deficit in the first metatarsophalangeal joint and full range of motion. Dr. Parajon noted that appellant reached maximum medical improvement. He advised that she had some residual pain in the area and a little loss of motion consistent with a 15 percent disability of the right foot.

On July 21, 2009 appellant filed a claim for a schedule award. On July 28, 2009 OWCP requested that she submit a detailed report from her treating physician which provided an impairment evaluation pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).²

In an August 17, 2009 worksheet, Dr. Parajon noted a decreased range of motion of the first metatarsal, decreased strength, pain, sensory and motor deficits. He did not rate impairment.

On February 8, 2010 appellant was referred for a second opinion to Dr. Edward Kirby, a Board-certified orthopedic surgeon. In a April 7, 2010 report, Dr. Kirby noted that appellant reached maximum medical improvement in October 2009. He opined that pursuant to the A.M.A., *Guides* she had two percent impairment of the right lower extremity.

In a May 18, 2010 report, OWCP's medical adviser reviewed the medical evidence and agreed that appellant reached maximum medical improvement in October 2009. Under the A.M.A., *Guides*, he concurred with Dr. Kirby's opinion that appellant sustained a two percent impairment of the right lower extremity.

In a June 3, 2010 decision, OWCP granted appellant a schedule award for two percent impairment of the right leg. The period of the award was from October 24 to December 3, 2009.

On May 17, 2011 appellant through her attorney requested reconsideration and presented medical evidence and legal arguments. In a May 30, 2011 brief, she asserted that she was

² A.M.A., *Guides* (6th ed. 2008).

entitled to a schedule award greater than two percent as granted by OWCP on June 3, 2010. Appellant submitted a duplicate copy of Dr. Parajon's July 9, 2009 report which found 15 percent impairment of the right leg. She asserted that his report provided an adequate description of her impairment of sufficient detail so that the claims examiner and others reviewing the report would be able to visualize the impairment. Appellant contended that because Dr. Parajon was her attending physician, he was in a better position to make judgments with respect to the percentage of permanent impairment.

By decision dated June 1, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,³ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

OWCP's most recent merit decision dated June 3, 2010 granted appellant a schedule award for two percent permanent impairment of the right leg based on second opinion report and OWCP's medical adviser. It denied her reconsideration request, without a merit review and she appealed this decision to the Board.

The Board does not have jurisdiction over the June 3, 2010 OWCP decision. The issue 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 request for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

not identify a specific point of law or show that it was erroneously applied or interpreted. She did not advance a new and relevant legal argument. Appellant asserted that she was entitled to a schedule award greater than two percent impairment of the right lower extremity granted by OWCP on June 3, 2010. She contends that Dr. Parajon's July 9, 2009 report provided an adequate description of the impairment in sufficient detail so that the claims examiner and others reviewing the report would be able to visualize the impairment. Appellant also argued that because he was the attending physician he was in a better position to make judgments with respect to a schedule award and his extensive treatment of her and evaluation with respect to the percentage of impairment. These assertions do not show a legal error by OWCP or a new and relevant legal argument as OWCP had previously considered Dr. Parajon's opinion. The underlying issue in this case was whether appellant had greater impairment than the two percent impairment of the lower extremity granted by OWCP. That is a medical issue which must be addressed by relevant medical evidence.⁶ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Regarding Dr. Parajon's July 9, 2009 report submitted by appellant on reconsideration, this is not relevant because it is duplicative as the report was previously before OWCP when it issued its June 3, 2010 decision. As noted by OWCP, this report had been found insufficient because he had never prepared an evaluation under the A.M.A., *Guides*. Therefore, this report is insufficient to require OWCP to reopen the claim for a merit review.⁷

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 by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that she was entitled to a schedule award for greater than the two percent impairment of the right lower extremity granted by OWCP and that her treating physician, Dr. Parajon, in his July 9, 2009 report, establishes greater impairment. The Board notes, however, that it only has jurisdiction over whether OWCP properly denied a merit review of the claim. As explained, appellant did not submit any evidence or argument in support of her reconsideration request that warrants reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ See *James W. Scott*, 55 ECAB 606 (2004) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 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