

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

J.F., Appellant

and

**NATIONAL INSTITUTES OF HEALTH,
BENEFITS & PAYROLL LIAISON BRANCH,
Bethesda, MD, Employer**

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**Docket No. 12-1158
Issued: October 9, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 2, 2012 appellant filed a timely appeal from the March 30, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration of her schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. Since more than 180 days elapsed from the last merit decision of September 8, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's January 20, 2012 reconsideration request under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 21, 2007 appellant, a 47-year-old grants technical assistant, sustained a traumatic injury in the performance of duty when she fell down a flight of stairs. OWCP accepted her claim for several medical conditions.²

Dr. Douglas C. Frankel, an internist specializing in emergency medicine, examined appellant on December 22, 2010. He determined that she had a 22 percent impairment of her lumbar spine, a 5 percent impairment of her thoracic spine, an 8 percent impairment of her cervical spine, a 5 percent impairment to her sacrum, a 5 percent impairment to her left hand and wrist, a 5 percent impairment to her right hand and wrist, an 8 percent³ impairment to the left shoulder and a 5 percent impairment to the left hip “as related to the left lower extremity.”

Dr. Christopher R. Brigham, an OWCP medical adviser, Board-certified in occupational medicine, reviewed Dr. Frankel’s findings. He determined that appellant had a 12 percent left upper extremity impairment, a 1 percent right upper extremity impairment, a 1 percent right lower extremity impairment and an 11 percent left lower extremity impairment.

On September 8, 2011 OWCP issued a schedule award for 12 percent left hand impairment, 1 percent right leg impairment and 11 percent left leg impairment.

On January 20, 2012 appellant requested reconsideration. She disagreed with Dr. Brigham’s calculations and questioned how an independent evaluator could examine her and provide ratings from 5 to 22 percent while Dr. Brigham, who did not examine her, revised the ratings from 0 to 9 percent for the same body members. Appellant questioned the issue with Dr. Brigham’s finding and indicated that she was submitting additional medical evidence to support sensory and motor deficits of the spinal nerves, including evidence from Lester Zuckerman, M.D., Joseph Y. Lin, M.D., Physical Therapist Pauline Ochoa, and Dr. Frankel. She argued that supporting documentation from Dr. Frankel would further explain her impairment. Appellant added that she continued to undergo regular epidural nerve root injections to reduce referred pain as a result of radiculopathy.

Appellant submitted additional medical evidence. On September 19, 2011 Dr. Frankel discussed Dr. Brigham’s report. He observed that Dr. Brigham noted abnormal objective/neurologic findings yet stated that there were no objective findings, ratable impairment or motor deficits. Although Dr. Brigham clearly noted multiple diagnoses of neuritis or radiculopathy and dysfunction of extremities directly related to the work injury, he disregarded appellant’s medical records of direct examinations and personal histories correlating directly with her continued daily pain and daily dysfunction.

² Sprain of back, thoracic region; sprain of back, lumbar region; contusion of wrist and hand; contusion of knee and lower leg, bilateral; Schmorl’s node, lumbar region; lumbago; myalgia and myositis not otherwise specified; displacement of lumbar intervertebral disc without myelopathy; spasm of muscle; intervertebral disc disorder with myelopathy, lumbar region; thoracic or lumbosacral neuritis or radiculitis not otherwise specified; sprain of sacrum; sprain of shoulder and upper arm, unspecified site, left.

³ The report indicated 83 percent, a typographical error later corrected.

OWCP received additional medical reports and treatment notes from appellant's physicians and physical therapist including a January 6, 2012 nerve conduction study and needle examination, findings from which most were consistent with an acute, ongoing bilateral L5 and S1 nerve root irritation of mild to moderate severity.

In a March 30, 2012 decision, OWCP denied appellant's reconsideration request. It found that her letter did not raise and substantive legal questions or include new and relevant evidence and was therefore insufficient to warrant further review of the merits. OWCP acknowledged receipt of an appeal request form, but noted that the decision at issue was a schedule award and appellant did not include any new impairment ratings.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁴ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain 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 new evidence not previously considered by OWCP.⁵

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

Appellant submitted her January 20, 2012 reconsideration request within one year of OWCP's September 8, 2011 schedule award. Her request is therefore timely. The question for determination is whether her request met at least one of the three standards for obtaining a merit review of her case.

Appellant submitted the September 19, 2011 report of the attending internist, Dr. Frankel, who discussed the impairment review performed by Dr. Brigham, an OWCP medical adviser upon whose opinion OWCP based appellant's schedule award. Dr. Frankel found fault with

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* § 10.607(a).

⁷ *Id.* § 10.608.

Dr. Brigham's review and explained why. His report thus constitutes relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that appellant has met one of the three standards for obtaining a merit review of her case. The Board will set aside OWCP's March 30, 2012 decision denying appellant's reconsideration request and will remand the case for further merit review. OWCP should consider all the relevant medical evidence submitted since the September 8, 2011 schedule award decision and make appropriate findings.

CONCLUSION

The Board finds that OWCP abused its discretion in denying appellant's January 20, 2012 reconsideration request. Appellant is entitled to a merit review of her case.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: October 9, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board