

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Junction, CO, Employer**

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**Docket No. 13-147
Issued: April 10, 2013**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 25, 2012 appellant filed a timely appeal from a September 12, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed from the last merit decision dated July 26, 2011 to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 30, 2004 appellant, then a 48-year-old city carrier, filed an occupational disease claim alleging that on July 1, 2004 he first realized that a pinched nerve in his right leg was employment related. OWCP accepted appellant's claim for lumbar intervertebral disc displacement.

In a November 17, 2009 report Dr. R. James McLaughlin, a treating Board-certified occupational medicine physician, diagnosed L4-5 listhesis with bilateral hip and lower extremity pain. He used the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), to rate appellant's impairment. Using Figure 16-12 and Table 16-24, Dr. McLaughlin found a five percent impairment of each lower extremity due to appellant's hip condition. He found that there were no grade modifiers which would change the five percent lower extremity impairment in each hip. Dr. McLaughlin rated a five percent impairment to each leg.

On April 10, 2010 appellant filed a claim for a schedule award.

In a January 7, 2011 report, OWCP's medical adviser requested clarification from Dr. McLaughlin regarding his impairment rating as he did not fully document his physical findings or provide rationale for the method used. By letter dated January 14, 2011, OWCP requested clarification from Dr. McLaughlin.

On January 28, 2011 Dr. McLaughlin responded to OWCP's request. Using Table 16-4, page 512, he found that appellant had a class 1, grade C impairment based on the mild hip motion deficits which results in a two percent lower extremity impairment. Dr. McLaughlin found a zero percent increase based on functional history of difficulty walking and working. He found that the clinical modifier was not applicable as no magnetic resonance imaging scans were performed. Dr. McLaughlin noted a two percent permanent impairment to each hip which converted to a one percent whole person impairment for each hip or a two percent whole person impairment rating.

On February 10, 2011 an OWCP medical adviser reviewed Dr. McLaughlin's January 28, 2011 impairment rating and concluded there was no ratable impairment. The medical adviser noted that appellant's accepted condition was displacement intervertebral disc which had no related applicable extremity impairment. There was no objective evidence to establish any lumbar nerve root involvement in the lower extremities or any hip dysfunction. The medical adviser stated that Dr. McLaughlin "provided no evidence of an objective medical condition impacting the claimant's hips (related to the accepted condition)."

By decision dated July 25, 2011, OWCP denied appellant's schedule award claim on the grounds that he had no permanent impairment of a scheduled member.

On July 3, 2012 appellant requested reconsideration. He contended that OWCP erred in rejecting Dr. McLaughlin's impairment rating as the physician correctly followed OWCP's instructions and the A.M.A., *Guides*. Appellant contended that he was entitled to a schedule award based on the pain and suffering as a result of his employment injury.

By decision dated September 12, 2012, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's 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 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

ANALYSIS

Appellant requested reconsideration by letter dated July 3, 2012. He contended that OWCP erred in its schedule award denial. By decision dated September 12, 2012, OWCP denied appellant's request for a merit review. The issue is whether his request met one of the three standards for obtaining a merit review of his case.

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law not previously considered. He contended that his impairment rating should be based on the rating provided by Dr. McLaughlin's report were erroneous. However appellant did not explain how OWCP's findings regarding Dr. McLaughlin's constituted error. The Board notes that OWCP explained in its July 25, 2011 decision why Dr. McLaughlin's February 3, 2011 impairment rating was insufficient to establish appellant's entitlement to a schedule award. Consequently, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has he advanced a relevant legal argument not previously considered by OWCP.

Additionally, appellant did not submit evidence with his request for reconsideration. Consequently, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).⁶

² 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

³ 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Firkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.607(a). See *SQ.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁵ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Pirelli-Ball*, 57 ECAB 598 (2006).

⁶ *Id.* at § 10.606(b)(2)(1) and (2).

The Board finds that OWCP properly determined that appellant was not entitled to further consideration of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(2), and thus OWCP properly denied his July 3, 2012 request for reconsideration.

CONCLUSION

The Board finds that, as appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2), OWCP properly refused to reopen the case for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2012 is affirmed.

Issued: April 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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