

FACTUAL HISTORY

On September 20, 2010 appellant, then a 32-year-old health technician, filed a traumatic injury claim for a back injury, when she slid/fell off a bench and landed on her back. She previously had spinal surgery under another claim. On September 19, 2011 OWCP accepted the claim for back contusion and paid appropriate benefits. Appellant did not undergo any surgery or other invasive treatment for this injury. She also did not lose any time from work due to this injury.

On September 15, 2011 appellant filed a claim for a schedule award. By decision dated December 5, 2011, OWCP denied the schedule award claim as there was no medical evidence supporting an impairment of the upper or lower extremities caused by injury to a spinal nerve as required by FECA under the sixth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). By decision dated December 19, 2011, OWCP reissued the December 5, 2011 decision.

On January 26, 2012 appellant requested reconsideration. In an October 21, 2011 report, Dr. Howard Sharf, a Board-certified orthopedic surgeon, stated that appellant was at maximum medical improvement in June 2011 as she felt she could live with her current symptoms and not because her condition was felt to be fully treated. He opined that, based on the A.M.A., *Guides*, appellant had 13 percent whole person impairment for herniated disc that required surgery. Dr. Sharf stated that appellant did not appear to have any significant lower extremity pain or dysfunction but had ongoing axial back pain. Appellant's current magnetic resonance imaging (MRI) scan showed significant abnormalities at the previously operated disc. Dr. Sharf stated that the recent good results from her epidural steroid injections confirmed that this was likely her pain generator. He opined that in all likelihood this would be an ongoing and worsening condition which would likely require additional surgery. Although appellant had no significant problems with the lower extremities at that time, he opined that the progression of this problem was likely to include that as well. He further stated that it appeared from the change in the MRI scan that the injury of September 20, 2010 caused a permanent worsening of the underlying condition and would likely lead to the need for further treatment.

In a February 9, 2012 report, an OWCP medical adviser noted that, while Dr. Sharf found 13 percent whole person impairment, schedule awards were not payable for whole person impairment and there was no ratable impairment to her legs due to her employment injury under the A.M.A., *Guides*.

By decision dated March 16, 2012, OWCP denied modification of the December 19, 2011 decision.

On September 17, 2012 appellant requested reconsideration. In support of her request, she submitted duplicative evidence previously of record along with new evidence. This included a September 17, 2012 letter wherein appellant outlined her medical treatment and indicated that she had severe pain; physical therapy notes dated October 1, 3 and 5, 2012 and September 24, 2012; Florida Workers' Compensation Uniform medical treatment forms dated January 14, 2011, March 2, 2012 and September 10 and 12, 2012, which note lumbar radiculopathy; April 23 and September 10, 2012 reports from Charles McCluskey, a physician's assistant; August 9, 2009 hospital discharge instructions; July 22, 2004 and April 16, 2008 lumbar MRI scan reports; a January 20, 2011 film of lumbar spine; a copy of April 6, 2011 and February 23, 2012 follow up

visit and patient information sheets; and copies of OWCP's March 16, 2012 decision with handwritten annotations.

In a March 3, 2011 treatment note and operative report, Dr. Glenn Fuoco, an osteopath and Board-certified physiatrist, noted a causal epidural steroid injection was given. In an April 14, 2009 report, Dr. Michael J. Smith, a Board-certified orthopedic surgeon, noted examination findings and that appellant was referred to Dr. Sharf for a spinal surgery consultation.

In an April 26, 2012 letter, Dr. Sharf opined that appellant had lumbar disc pain, lumbar radiculitis secondary to recurrent herniated nucleus pulposus. He opined that the accepted injury-related conditions were medically present and limit her capabilities and was permanent in nature. Dr. Sharf opined that the injury was not an aggravation of a preexisting condition. He opined that appellant was capable of working with restrictions.

By decision dated October 18, 2012, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was cumulative and repetitious.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,³ 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.⁴ 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.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

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

³ Under section 8128 of FECA, the 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).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

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).

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.⁹

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 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant's statements relate to the factual circumstances of her claim and her beliefs regarding her disability. The underlying issue in this case is whether she established any measurable impairment of a scheduled body member due to her work injury. That is a medical issue which must be addressed by relevant medical evidence.¹⁰ Therefore, appellant's statement and opinions do not constitute a basis for reopening the claim.

Appellant resubmitted numerous documents that were previously of record and considered when the March 16, 2012 merit decision was issued. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

Appellant also submitted copies of diagnostic testing, physical therapy notes and treatment notes from a physician's assistant. The diagnostic tests are diagnostic in nature and therefore do not purport to address whether she established any ratable impairment due to her work injury. The reports from the physician's assistant are of no probative value as a physician's assistant is not a physician under FECA.¹² Similarly, the physical therapy notes do not constitute medical evidence as they were not prepared by a physician.¹³ As such, this evidence does not constitute a basis for reopening the claim.

The medical evidence submitted, which includes Florida Workers' Compensation Uniform medical treatment forms and treatment notes from Dr. Smith and Dr. Fuoco and a letter from Dr. Sharf, is not relevant to the issue of schedule award entitlement as there is no medical opinion in either reports which pertains to schedule award entitlement for appellant's accepted condition. Dr. Sharf opined that appellant's lumbar disc pain and lumbar radiculitis was secondary to recurrent herniated nucleus pulposus, but he provided no opinion as to whether the September 20, 2010 work injury resulted in a ratable impairment of a scheduled body member.¹⁴

⁹ The Board notes that on appeal appellant discussed the same evidence submitted on reconsideration.

¹⁰ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ See *J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

¹² 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

¹³ Physical therapists are not physicians under FECA. See 5 U.S.C. § 8101(2).

¹⁴ See 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404 (lists the scheduled body members under FECA and OWCP's regulations).

Thus, appellant did not submit any pertinent new and relevant medical evidence addressing the underlying issue in this case.

The Board 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.

CONCLUSION

The Board finds that appellant failed to establish that she has a ratable impairment of the lower extremities due to her employment-related lumbar condition.¹⁵ OWCP properly denied appellant's request to reopen her claim for further review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ Appellant may request a schedule award or increased schedule 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.