

FACTUAL HISTORY

On January 29, 2008 appellant, then a 47-year-old heavy mobile equipment operator, sustained injury when her foot became caught on a pallet. She lunged forward while carrying a 10- to 15-pound cover plate. OWCP accepted the claim for lumbar, right shoulder, right upper arm, acromioclavicular (AC) joint, right hip and thigh sprains.

In a report dated October 6, 2008, Dr. Donald Casey, an osteopath, provided results on examination and diagnosed AC joint, hip and thigh sprains. He found that appellant could work light duty with no lifting, pushing or pulling above 10 pounds. Dr. Casey provided results on examination in a March 11, 2009 report and noted that she could work without restrictions. The record indicates that appellant underwent a functional capacity evaluation on April 8, 2009. By report dated March 31, 2010, Dr. Hugh Maddox, a Board-certified anesthesiologist, advised that she continued to complain of pain in her lumbar spine, right hip, thigh and calf. He diagnosed facet joint arthropathy of the lumbar spine and lumbar degenerative joint disease.

In a report dated July 11, 2011, Dr. David Weiss, an osteopath, reviewed the evidence of record that included notes from Dr. Casey, the functional capacity evaluation and a March 23, 2011 disability questionnaire.² He opined that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) appellant had three percent right arm impairment (Table 15-5, the shoulder regional grid) and five percent right leg impairment (Table 16-4, hip regional grid).

In a report dated August 16, 2011, an OWCP medical adviser opined that the accepted conditions had resolved. By report dated September 6, 2011, the medical adviser reviewed the reports from Dr. Casey and Dr. Maddox in the record. The medical adviser found that the impairment ratings provided by Dr. Weiss were not supported by clinical evidence.

By decision dated March 28, 2012, OWCP found that appellant was not entitled to a schedule award. It stated that it had requested but not received a response from Dr. Weiss with respect to permanent impairment.

On April 2, 2012 appellant submitted a March 26, 2012 report from Dr. Weiss, who indicated that he had reviewed the August 16 and September 6, 2011 reports from the medical adviser. Dr. Weiss discussed the results of the functional disability questionnaire appellant completed on March 23, 2011. He also noted the functional capacity evaluation of April 8, 2009. Dr. Weiss opined that it was clear from this evidence that appellant continued to have problems with her right shoulder and hip, and reiterated that appellant had three percent right arm impairment and five percent right leg permanent impairment.

On April 30, 2012 OWCP reissued the denial of a schedule award decision. It stated that it did not receive a response from Dr. Weiss.

By letter dated May 13, 2012, appellant requested reconsideration and resubmitted the March 26, 2012 report from Dr. Weiss.

² It does not appear that Dr. Weiss examined appellant.

In a decision dated June 20, 2012, OWCP found the application for reconsideration was insufficient to warrant merit review. It found the March 26, 2012 report was cumulative in nature as Dr. Weiss did not discuss the accepted conditions.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁴ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

Appellant, through her representative, submitted a May 13, 2012 application for reconsideration. The application for reconsideration included a March 26, 2012 report from Dr. Weiss. The issue is whether this report was new, relevant and pertinent evidence.

The Board notes that, although the March 26, 2012 report was initially submitted on April 2, 2012, the record indicates that OWCP did not review the report in its April 30, 2012 decision. The April 30, 2012 decision was a reissuance of the March 28, 2012 decision and specifically stated that no response from Dr. Weiss had been received. Therefore the Board finds the March 26, 2012 report is to be considered new medical evidence.

The March 26, 2012 report of Dr. Weiss provided new and relevant information with respect to his opinion as to a permanent impairment to the right arm and right leg. Dr. Weiss discussed the results of the functional disability questionnaire and the functional capacity evaluation, providing additional foundation for his opinion that appellant had three percent right arm and five percent right leg impairment. To be entitled to a merit review, it is not necessary that appellant establish his claim for a schedule award, but only to submit new and relevant evidence on the schedule award issue.⁶ As appellant submitted relevant and pertinent evidence not previously considered by OWCP, he is entitled to a merit review of this claim. The case will be remanded for a merit decision.

³ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994). In the present case, the "merits" of the claim would be the termination of compensation effective October 13, 2011.

⁶ *See A.B.*, Docket No. 13-316 (issued June 20, 2013).

CONCLUSION

The Board finds that appellant is entitled to a merit review and the case is remanded to OWCP for a merit decision with respect to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2012 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: August 15, 2013
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