

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 13-789
Issued: August 5, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2013 appellant filed a timely appeal from a December 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days have elapsed between the most recent merit decision, September 29, 2011, and the filing of this appeal on February 19, 2013, the Board lacks jurisdiction to review the merits of appellant's 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 refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. In a September 30, 2003 decision, the Board affirmed an OWCP decision finding that appellant was not entitled to augmented

¹ 5 U.S.C. § 8101 *et seq.*

compensation.² In an October 5, 2007 decision, the Board affirmed the November 1, 2006 decision of OWCP, which denied authorization for the purchase of a chair.³ In a February 8, 2011 order, the Board found that OWCP's January 22, 2010 schedule award decision was not based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ The Board found that the case was not in posture for decision and remanded the case for OWCP to determine appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. The facts and history contained in the prior appeals are incorporated by reference.

The relevant facts include that OWCP accepted cervical herniated nucleus pulposus (HNP), bilateral carpal tunnel syndrome and bilateral upper extremity overuse syndrome as work related. Appellant has received schedule awards totaling 21 percent impairment to the right upper extremity and 29 percent impairment to the left upper extremity.⁵ The findings from the August 7, 2009 report from Dr. Mitchell Geiger, a Board-certified orthopedic surgeon and treating physician, are the most recent impairment ratings provided by appellant in the record. Dr. Geiger utilized the fifth edition of the A.M.A., *Guides* and determined that appellant had a 26 percent whole person impairment of the cervical spine and upper extremities.⁶

Pursuant to the Board's remand⁷ on July 6, 2011 OWCP referred appellant's file to OWCP's medical adviser for an impairment determination utilizing the sixth edition of the A.M.A., *Guides*. In a report dated July 28, 2011, OWCP's medical adviser noted the history of injury of treatment and reviewed the most recent findings provided by the treating physician, Dr. Geiger. He utilized the sixth edition of the A.M.A., *Guides* and determined that appellant had 9 percent right upper extremity impairment and 12 percent left upper extremity impairment. OWCP's medical adviser explained that the current ratings did not exceed the prior awards and that appellant was not entitled to an additional impairment due to either extremity.

By decision dated September 29, 2011, OWCP denied appellant's request for an increased schedule award.

By letter dated September 9, 2012, appellant requested reconsideration. She alleged that the decision did not consider her neck or her stomach injury. Appellant also indicated that she continued to have pain from her injuries. In support of her request, she submitted a

² Docket No. 03-1820 (issued September 30, 2003).

³ Docket No. 07-778 (issued October 5, 2007).

⁴ Docket No. 10-1136 (issued February 8, 2011).

⁵ On June 22, 2006 OWCP issued a schedule award for 14 percent permanent impairment of each arm. In a November 21, 2007 decision, it granted appellant an additional schedule award of 7 percent to the right arm and 14 percent to the left arm. It noted the total impairment to appellant was equal to 28 percent to the left upper extremity and 21 percent to the right upper extremity. By decision dated January 22, 2010, OWCP modified its January 21, 2009 decision to award an additional one percent impairment to the left upper extremity.

⁶ A.M.A., *Guides*, 5th ed. 2001.

⁷ *Supra* note 3.

September 14, 2012 report from Dr. Geiger noting her status and stating that she was permanent and stationary. Also submitted was a September 18, 2012 cervical spine magnetic resonance imaging (MRI) report from Dr. Neil I. Chafetz, Board-certified in diagnostic radiology. Neither physician addressed any degree of permanent impairment under the A.M.A., *Guides*.

By decision date December 5, 2012, OWCP denied appellant's request for reconsideration on the grounds that she did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered, or provide relevant and pertinent new evidence not previously considered by OWCP.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁸ OWCP may reopen a case for review on the merits 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 if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

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

“(ii) Advances a relevant legal argument not previously considered by [OWCP]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”⁹

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.¹⁰

ANALYSIS

Appellant disagreed with the September 29, 2011 schedule award decision and requested reconsideration on September 9, 2012. The underlying issue on reconsideration was whether appellant was entitled to receive an increased schedule award. The Board finds that appellant did not provide any relevant or pertinent new evidence regarding an increased impairment due to her accepted employment-related condition warranting a merit review

On reconsideration, appellant alleged that OWCP did not address her neck and stomach conditions. This does not show erroneous application of a point of law or advance a relevant

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b).

¹⁰ *Id.* at § 10.608(b).

legal argument not previously considered. The underlying issue is medical in nature; whether appellant submitted sufficient medical evidence to establish an increased permanent impairment. This medical question must be resolved by the submission of relevant medical evidence. Thus, these arguments are insufficient to require OWCP to reopen the claim for a merit review.

Although appellant submitted new medical evidence in support of her reconsideration request, neither the September 14, 2012 report from Dr. Geiger nor the September 18, 2012 report from Dr. Chafetz address whether appellant has permanent impairment of either arm pursuant to the procedures set forth in the sixth edition of the A.M.A., *Guides*. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the three regulatory criterion for reopening the claim for a merit review. Therefore, OWCP properly denied her request for reconsideration.

On appeal, appellant argued that her neck and stomach conditions are accepted. She enclosed a copy of the acceptance letter for severe stomach pain from another claim. However, as noted, the Board does not have jurisdiction over the merits of the claim. As explained, the underlying issue is medical in nature. She has not submitted new and relevant evidence to support her claim for an increased schedule award under the sixth edition of the A.M.A., *Guides* for her upper extremities.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

¹¹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 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