

the claim for left ankle sprain, tear of medial meniscus of the right knee, tear of the lateral meniscus of the right knee, osteoarthritis of the left lower leg and joint pain in multiple sites.

In an April 8, 2010 report, Dr. Arnold Goldman, a Board-certified radiologist, diagnosed internal derangement of the right knee and internal derangement of the left ankle. He opined that, based on range of motion, appellant sustained a 20 percent permanent impairment of the right knee and 15 percent permanent impairment of the left ankle.²

OWCP referred appellant, a statement of accepted facts and the case record to Dr. P. Leo Varialle, a Board-certified orthopedic surgeon, for a second opinion evaluation on August 10, 2010. Dr. Varialle reviewed appellant's medical records. Upon physical examination, he diagnosed a tear of the right medial meniscus, osteoarthritis of the patella femoral joint and osteochondral injury of the left talus as a result of the April 28, 2000 employment injury. According to Table 16-2 of the A.M.A., *Guides*, Dr. Varialle rated impairment at 10 percent for the left ankle.³ Using Table 16-3, he calculated an impairment rating of two percent for the right knee.⁴ Dr. Varialle noted the date of maximum medical improvement (MMI) as 2004.

On September 2, 2010 an OWCP medical adviser reviewed Dr. Varialle's August 10, 2010 report and agreed that appellant had a 10 percent permanent impairment rating for the lower left extremity and 2 percent permanent impairment for the lower right lower extremity. The medical adviser noted that he could not determine the date of maximum medical improvement from the medical records and Dr. Varialle did not provide a date other than listing the year of MMI as 2004.

In a November 16, 2010 supplemental report, Dr. Varialle stated that a tear of the medial meniscus of the right knee, osteoarthritis and left ankle osteochondral defect of the talus typically stabilize without surgery in approximately one year. Thus, appellant's date of maximum medical improvement was reached one year after her injury on April 28, 2001.

On November 29, 2010 the medical adviser reviewed Dr. Varialle's supplemental report and agreed that the date of maximum medical improvement was reached on April 28, 2001.

By decision dated February 1, 2011, OWCP granted appellant schedule awards for 2 percent permanent impairment of the right leg and 10 percent permanent impairment of the left leg. The date of MMI was noted as April 28, 2001. The awards covered a total of 34.56 weeks from March 24 to November 20, 2010.⁵

² The Board notes that Dr. Goldman did not use the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*). As a result, OWCP referred appellant for a second opinion examination.

³ A.M.A., *Guides* 502-08, Table 16-2 (2009).

⁴ *Id.* at 509-11, Table 16-3.

⁵ The Board notes that because appellant was receiving wage-loss compensation after her April 28, 2000 injury, the period for her schedule award began on March 24, 2010.

On January 26, 2012 appellant requested reconsideration of OWCP's February 1, 2011 schedule award decision. Her request for reconsideration was received on February 1, 2012. Appellant submitted new medical documents, including December 19, 2011 diagnostic reports which provided findings from a magnetic resonance imaging (MRI) scan of the right knee, an MRI scan of the left ankle and an x-ray of the left foot and ankle.

In a December 5, 2011 report, Dr. Donald J. Rose, a Board-certified orthopedic surgeon, reported that diagnostic testing of the right knee revealed tricompartmental moderately severe degenerative joint disease with loose bodies noted posteriorly. X-rays of the left ankle revealed a small anterior tibial spur.

In a January 17, 2012 report, Dr. David Weiss, a Board-certified orthopedic surgeon, reported that appellant had a work-related injury on April 28, 2000 when she slipped on stairs, causing her to fall on concrete. He provided a detailed medical history, reviewed appellant's prior diagnostic and medical reports and stated findings on physical examination. Dr. Weiss diagnosed post-traumatic internal derangement to the right knee with a lateral meniscus tear, postosteochondral fractures of the lateral tibial plateau with residual osteochondral defect to the right knee, post-traumatic chondromalacia of the patellofemoral joint to the right knee, medial collateral ligament injury to the right knee, post-traumatic osteoarthritis of the right knee, chronic post-traumatic left ankle strain and sprain with involvement of the anterior talofibular ligament, postosteochondral fracture of the lateral aspect of the talar dome of the left ankle joint and chronic plantar fasciitis to the left foot. He noted details regarding appellant's activities of daily living, provided prior and current work restrictions and described both objective and subjective findings. Dr. Weiss opined that the April 28, 2000 work-related injury was the competent factor for appellant's subjective and objective findings. Using Table 16-3, Table 16-7 and Table 16-8 of the sixth edition of the A.M.A., *Guides*, he classified the right knee medial collateral ligament injury with moderate laxity in class 2 and calculated a right lower extremity impairment of 18 percent.⁶ Dr. Weiss calculated the left osteochondral fracture of the talus within class 1 for a net adjustment of 13 percent impairment of the left lower extremity.⁷ He noted the date of maximum medical improvement as January 17, 2012.

By letter dated March 23, 2012, appellant argued that her schedule award should be increased based on greater impairment.

By decision dated May 1, 2012, OWCP denied appellant's claim finding that the evidence submitted was not sufficient to warrant modification of the February 1, 2011 decision. It noted that its decision was based on whether it committed "clear evidence of error" when rendering its March 30, 2009 decision. The senior claims examiner further stated that the December 5, 2011 medical report indicated that appellant was a candidate for arthroscopic management and could be a candidate for total knee replacement in the future, but that the evidence did not possess substantive probative value such that a review would indicate that modification of the March 30, 2009 decision was warranted. The senior claims examiner further noted that the evidence of record did not establish that maximum medical improvement had been reached.

⁶ A.M.A., *Guides* 510-19.

⁷ *Id.* at 503-19, Table 16-2, Table 16-7 and Table 16-8.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by 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.⁸ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁹

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right. This section vests OWCP with discretionary authority to determine whether it will review an award for or against payment of compensation. Through regulations it has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹⁰ One such limitation is that the application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.¹¹ In those instances when a request for reconsideration is not timely filed, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP.¹²

This entails a limited review by OWCP of how the evidence appellant has submitted with his reconsideration request bears on the evidence previously of record and whether this evidence demonstrates that OWCP committed an error.¹³

ANALYSIS

The Board finds that this case is not in posture for a decision regarding whether appellant is entitled to an increased schedule award. OWCP failed to apply the correct standard of review when issuing its May 1, 2012 decision and failed to properly consider the evidence submitted in support of the increased schedule award.

OWCP issued a schedule award decision on February 1, 2011 granting appellant a 2 percent impairment of the right leg and 10 percent impairment of the left leg. Appellant requested reconsideration on January 26, 2012 and submitted additional evidence. This reconsideration request was received by OWCP on February 1, 2012. Appellant submitted a timely request for reconsideration as it was received within one year from the February 1, 2011 OWCP decision.¹⁴ While the May 1, 2012 OWCP decision stated that it was conducting a merit

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *K.H.*, 59 ECAB 495 (2008).

¹⁰ 5 U.S.C. § 8128.

¹¹ 20 C.F.R. § 10.607(a).

¹² *Id.* at § 10.607(b).

¹³ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

review and addressing appellant's additional evidence, it failed to properly review the additional evidence submitted and noted the basis for its decision as failing to establish clear evidence of error. The Board finds that OWCP failed to properly conduct a merit review of appellant's claim and incorrectly determined that appellant filed an untimely reconsideration request in its May 1, 2012 decision.

According to OWCP procedures, the one-year period for requesting reconsideration begins on the date of the original decision or a subsequent merit decision.¹⁵ In the May 1, 2012 decision, the senior claims examiner incorrectly stated that appellant must establish that there was "clear evidence of error." The most recent merit decision of record is dated February 1, 2011. The record does not contain a March 30, 2009 OWCP decision. Appellant filed an appeal of a February 1, 2011 schedule award decision and OWCP improperly cited a decision date which does not exist as a basis for its decision.

Section 10.606(b)(2) of the federal regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by OWCP; or (3) constituting relevant and pertinent evidence not previously considered by OWCP.¹⁶ Appellant's January 26, 2012 request for reconsideration was accompanied by relevant evidence not previously considered. The case will be remanded for OWCP to review the evidence under the appropriate legal standard.

As appellant's request was timely filed and accompanied by new and relevant evidence not previously considered, the Board will set aside the May 1, 2012 decision. The case is remanded for OWCP to properly consider appellant's request under the standard of review applicable to timely requests for reconsideration.¹⁷

CONCLUSION

The Board finds that this case is not in posture for a decision.

¹⁵ See Federal Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(b) (June 2002), see also *Robbin Bills*, 45 ECAB 784 (1994); 20 C.F.R. § 10.607(a).

¹⁶ *Id.* at § 10.606(b)(2).

¹⁷ See *id.* at § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2012 decision be set aside and the case remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this opinion.

Issued: February 7, 2013
Washington, DC

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

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

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