

On appeal, counsel asserts that appellant could not find a physician to perform an impairment rating prior to OWCP's September 11, 2013 decision. He notes that she has recently found a physician to perform an impairment rating and requests that she be given an "opportunity to complete this exam and seek reconsideration."

FACTUAL HISTORY

OWCP accepted that on April 9, 2009 appellant, then a 64-year-old nurse, sustained a right knee contusion, right genu varum, localized osteoarthritis of the lower right leg and a lumbosacral sprain when she slipped and fell on a wet floor. Dr. Richard A. Rosa, an attending Board-certified orthopedic surgeon, treated her for degenerative joint disease of the right knee and lumbar pain beginning on June 8, 2009. On March 30, 2010 he performed a total right knee arthroplasty, authorized by OWCP. Appellant remained under medical care and participated in physical therapy through December 2011.

On February 28, 2012 appellant claimed a schedule award. In an April 10, 2012 letter, OWCP advised her of the evidence needed to establish her claim, including a report from her attending physician addressing permanent impairment of a scheduled member according to the tables and grading schemes of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*). In response, appellant submitted physical therapy notes dated May 7, 2010 to December 12, 2011 describing strength and range of motion in percentages. The notes were not signed or reviewed by a physician.

By decision dated August 20, 2012, OWCP denied appellant's schedule award claim. It found that she did not submit sufficient medical evidence to establish permanent impairment of a scheduled member of the body.

In a July 12, 2013 letter, appellant, through her attorney, requested reconsideration. Counsel asserted that appellant's inability to find a physician to perform an impairment rating should not be held against her.² Appellant submitted reports dated from April 10, 2012 to June 3, 2013 from Dr. Jason Garcia, an attending Board-certified orthopedic surgeon, who diagnosed right knee pain, bilateral lumbar radiculitis and external rotation of the right foot. Counsel also provided a January 10, 2013 lumbar magnetic resonance imaging (MRI) scan report and a copy of the March 30, 2010 operative note. Appellant also submitted physical therapy notes and prescriptions dated from May 2, 2010 to May 29, 2013.

By decision dated September 11, 2013, OWCP denied appellant's reconsideration request. It found the evidence submitted on reconsideration was either cumulative or irrelevant to the issue of permanent impairment and insufficient to warrant further merit review.

² In an April 22, 2013 letter, appellant's attorney requested that OWCP assist appellant in obtaining an impairment rating by referring her to a second opinion physician who would perform such rating.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(2) of Title 20 of the Code of Federal 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 Section 10.608(b) provides that when an application for review of the merits of a claim 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.⁵

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

ANALYSIS

OWCP accepted that appellant sustained a right knee contusion, right genu varum, localized osteoarthritis of the right lower leg and a lumbosacral sprain. Appellant claimed a schedule award on February 28, 2012. In an April 10, 2012 letter, OWCP advised her to submit an impairment rating from her physician addressing any permanent impairment utilizing the sixth edition of the A.M.A., *Guides*. Appellant submitted physical therapy notes. OWCP denied her claim in an August 20, 2012 decision as she did not submit any medical evidence establishing a permanent impairment of a scheduled member.

Appellant requested reconsideration by July 12, 2013 letter, asserting that she could not find a physician to perform an impairment rating. She also submitted medical evidence. OWCP denied reconsideration by September 11, 2013 decision, finding that appellant's request did not present new, relevant evidence or argument.

In her July 12, 2013 application for reconsideration, appellant asserted that OWCP should not penalize her for her inability to find a physician to perform an impairment rating. His argument does not show that OWCP erroneously applied or interpreted a specific point of law. It

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

acknowledges that appellant did not provide an impairment rating, the underlying issue in this case.

Appellant also submitted reports from Dr. Garcia, an attending Board-certified orthopedic surgeon. However, Dr. Garcia did not perform an impairment rating or provide any findings on physical examination that could have been used to construct such a rating. His reports are irrelevant to the schedule award claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.⁹ Similarly, the lumbar MRI scan report and physical therapy notes do not address the issue of permanent impairment and are therefore irrelevant to the claim.¹⁰ The March 30, 2010 operative record was previously considered by OWCP prior to issuance of the August 20, 2012 decision. Evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹¹ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence 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 constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel asserts that, although appellant was unable to find a physician to perform an impairment rating prior to OWCP's September 11, 2013 decision, she has now located a doctor to do so. He requests that she be given an "opportunity to complete this exam and seek reconsideration." This decision does not preclude appellant from requesting a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.¹²

CONCLUSION

The Board finds that OWCP properly denied reconsideration.

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁰ The Board notes that as the physical therapy notes were not signed or reviewed by a physician, they do not constitute medical evidence. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹¹ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹² *See Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2013 is affirmed.

Issued: August 12, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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