

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

C.M., Appellant)	
)	
and)	Docket No. 13-579
)	Issued: January 2, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Cedar Rapids, IA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 14, 2013 appellant filed a timely appeal of a July 18, 2012 decision of the Office of Workers' Compensation Programs, denying his application for reconsideration without merit review of the claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 18, 2012 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on November 11, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

¹ See *Order Granting Petition for Recon.* (issued November 6, 2013). The Board found that appellant's appeal was filed by January 14, 2013, making it timely with respect to the July 18, 2012 OWCP decision.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 1, 2008 appellant, then a 46-year-old letter carrier, filed an occupational claim (Form CA-2) alleging that he sustained a right foot condition causally related to walking in his federal employment. OWCP accepted the claim for right ankle and tarsus enthesopathy, and crossover hammertoe of the right second toe. Appellant underwent right ankle surgery on January 7, 2009 and February 17, 2010.

Appellant submitted a claim for compensation (Form CA-7) indicating that he was claiming a schedule award. OWCP referred appellant to Dr. Farid Manshadi, a Board-certified physiatrist, for evaluation. In a report dated May 31, 2011, Dr. Manshadi provided a history and results on examination. With respect to a permanent impairment, he opined that appellant had a two percent right leg impairment under the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (sixth edition) due to loss of range of motion in the third toe. Dr. Manshadi also indicated that appellant had a 16 percent right leg impairment based on application of the ankle regional grid under the A.M.A., *Guides*.

In a report dated June 19, 2011, OWCP's medical adviser stated that appellant had received a schedule award for a five percent right leg impairment from a prior claim. The medical adviser indicated that the file should be made available for review.

By report dated June 23, 2011, OWCP's medical adviser stated that the prior award was for a right knee condition. The medical adviser opined that Dr. Manshadi had found an 18 percent right leg impairment. As to permanent impairment, the medical adviser combined the 18 percent with the 5 percent from the prior award for a 22 percent impairment, then subtracted 5 percent for a 17 percent leg impairment. In a report dated July 10, 2011, the medical adviser stated that he was mistaken and that Dr. Manshadi had found a 16 percent right leg impairment. The medical adviser opined that appellant had a 15 percent right leg impairment after combining and then subtracting the 5 percent from the prior award.

By decision dated July 25, 2011, OWCP issued a schedule award for a 15 percent right leg impairment. By decision dated November 10, 2011, an OWCP hearing representative affirmed the July 25, 2011 decision.

Appellant requested reconsideration and submitted an April 17, 2012 report from Dr. Manshadi, who stated that the total right leg impairment was 18 percent.

By decision dated July 18, 2012, OWCP found that the application for reconsideration was insufficient to warrant a merit review of the claim. It found that Dr. Manshadi reiterated his opinion for the second and third toes from his prior report. In addition, OWCP found that a third toe condition had not been accepted as employment related.

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

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").

submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) 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

In the present case, appellant submitted on reconsideration an April 17, 2012 report from Dr. Manshadi with respect to a right leg permanent impairment. Dr. Manshadi had been selected as a second opinion physician and had previously submitted a May 31, 2011 report. In the April 17, 2012 report, Dr. Manshadi stated that appellant had an 18 percent right leg impairment based on his prior examination.

OWCP found that Dr. Manshadi’s April 17, 2012 report was repetitive as he had previously discussed a 16 percent impairment based on the regional grid and a 2 percent impairment based on loss of motion for the third toe. But Dr. Manshadi had not specifically opined that the impairment for the right leg was 18 percent in his prior report. And clearly there was some confusion with respect to Dr. Manshadi’s findings, as the medical adviser had initially stated that the impairment was 18 percent and then found, without clear explanation, that the impairment from Dr. Manshadi’s evaluation was 16 percent.

The brief statement in the July 18, 2012 decision that OWCP had not accepted a third toe injury does not render the April 17, 2012 report irrelevant or cumulative. The issue of causal relationship between an impairment and the employment injury is a medical issue that must be resolved by the medical evidence. Moreover, the issue presented is not whether Dr. Manshadi’s report was sufficient to establish a greater impairment, but only whether it was new, relevant and pertinent evidence to the schedule award issue.

The Board finds that Dr. Manshadi’s April 17, 2012 report was new and relevant evidence. Pursuant to 20 C.F.R. § 10.606(b)(2)(iii), appellant was entitled to a review of the merits of the claim. On return of the case record OWCP should issue a proper decision on the merits of the schedule award claim.⁶

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁶ A proper decision must clarify the impairment calculation with respect to the prior award. The Board has held that a current impairment is reduced by a prior schedule award if: (1) the impairments are to the same member or function, and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment. *T.S.*, Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c). The prior award was apparently based on a right knee impairment, and no explanation was provided as to why the current impairment to the right foot and ankle duplicated the prior impairment. *See P.H.*, Docket No. 12-418 (issued July 10, 2012). If there is no duplication then there is no basis for considering the prior award in determining the current impairment.

CONCLUSION

The Board finds that appellant's application for reconsideration was sufficient to warrant a merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 2, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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