

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

A.T., Appellant)
and) Docket No. 14-417
DEPARTMENT OF VETERANS AFFAIRS,) Issued: June 25, 2014
SALISBURY VETERANS ADMINISTRATION)
MEDICAL CENTER, Salisbury, MD, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2013 appellant, through her attorney, filed a timely appeal from a November 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days has elapsed from the most recent merit decision dated April 3, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case 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 denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel contends that the Board has jurisdiction over the merits of appellant's schedule award claim as her appeal of OWCP's November 21, 2013 decision was filed on

¹ 5 U.S.C. § 8101 *et seq.*

December 10, 2013. He further contends that appellant sustained a ratable impairment entitling her to a schedule award.

FACTUAL HISTORY

This case has previously been before the Board regarding appellant's claim for compensation for leave buyback.² The facts relevant to the current appeal are set forth.

OWCP accepted that on January 8, 2008 appellant, then a 42-year-old medical technician, sustained back and neck sprains when she slipped and fell on a wet floor at work.

On September 22, 2010 appellant filed a claim for a schedule award.

In an April 14, 2011 decision, OWCP denied appellant's claim. It found that the weight of the medical evidence rested with a March 10, 2011 report of Dr. William H. Lehman, a Board-certified orthopedic surgeon and an OWCP referral physician, who found that appellant had reached maximum medical improvement but had no impairment related to her January 8, 2008 work injury under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and July/August 2009 *The Guides Newsletter*.

By letter dated April 20, 2011, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

In an August 17, 2011 medical report, Dr. Martin D. Fritzhand, an attending Board-certified urologist, utilized the sixth edition of the A.M.A., *Guides* and July/August 2009 *The Guides Newsletter* to determine that appellant had three percent impairment of each lower extremity. He utilized Table 16-11 to rate sensory and motor deficits. Dr. Fritzhand determined that appellant had a severity 1 (mild) motor deficit involving the right lower extremity and a severity 3 (severe) sensory deficit involving both lower limbs. He advised that her impairments were most likely related to an S1 nerve root impairment. Dr. Fritzhand used Proposed Table 2 and determined that appellant had a class 1 impairment for S1 nerve root impairment. He assessed a grade zero modifier each for functional history under Table 16-6 and clinical studies under Table 16-8. Thus, C moved to A. Dr. Fritzhand determined that appellant had zero percent (no) motor impairment of the right lower extremity. He further determined that she sustained three percent sensory impairment to each lower extremity.

In an October 31, 2011 decision, an OWCP hearing representative set aside the April 14, 2011 decision, finding an unresolved conflict in medical opinion between Drs. Lehman and Fritzhand regarding the extent of appellant's lower extremity impairment. He directed OWCP to refer appellant to an impartial medical specialist for an examination and opinion on the matter.

² Docket No. 09-924 (issued December 1, 2009). In the December 1, 2009 decision, the Board affirmed OWCP decisions dated July 30, 2008 and January 15, 2009 finding that appellant had failed to establish entitlement to leave buyback for total disability from March 12 to 27, 2008 due to her January 8, 2008 employment injuries.

In a January 9, 2012 report, Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, selected as the impartial medical specialist, determined that appellant had no impairment of the right lower extremity and two percent impairment of the left lower extremity due to radiculopathy and S1 nerve root impairment under the sixth edition of the A.M.A., *Guides*. Utilizing Table 16-12, page 535, for the sciatic nerve, Dr. Elkins determined that she had a mild problem and her diagnosis of radiculopathy equaled a four percent impairment. He found that the modifiers were zero each for functional impairment, range of motion and plus one for laboratory studies, resulting in two percent impairment of the left lower extremity for radiculopathy based on sensory changes.

On February 2, 2012 Dr. James W. Dyer, an OWCP medical adviser, reviewed the medical record. He determined that Dr. Elkins' lower extremity impairment rating was not valid as the diagnosis of radiculopathy was not supported by objective evidence and he failed to properly utilize *The Guides Newsletter* to rate the peripheral nerve impairment of the sciatic nerve rather than the spinal nerve extremity impairment.

OWCP sought clarification from Dr. Elkins as to the impairment rating of appellant's legs. In a February 9, 2012 supplemental report, Dr. Elkins agreed with Dr. Dyer that he should have used the spinal nerve root extremity chart to rate appellant's impairment. Referring to *The Guides Newsletter*, he noted that the accepted level was the L5 nerve root. Dr. Elkins determined that appellant had one percent impairment of the left lower extremity.

On February 15, 2012 Dr. H.P. Hogshead, an OWCP medical adviser, reviewed the medical record. He stated that Dr. Elkins incorrectly stated that the accepted level was the L5 nerve root. Dr. Hogshead determined that appellant had no impairment under the A.M.A., *Guides*. He noted that Dr. Elkins was not a Board-certified spinal surgeon. In a supplemental report dated February 22, 2012, Dr. Hogshead stated that Dr. Elkins used the sixth edition of the A.M.A., *Guides* for peripheral nerve lower extremities impairment while OWCP recognized only the tables published in the July/August 2009 *The Guides Newsletter*. Although, Dr. Elkins later referred to *The Guides Newsletter*, he incorrectly dismissed a negative electrodiagnostic study as invalid. Dr. Hogshead stated that the study was more reliable than the clinical physical examination. He concluded that the impairment rating remained at zero percent for each lower extremity.

In a February 24, 2012 decision, OWCP denied appellant's schedule award claim. It found that Dr. Elkins' February 9, 2012 report was insufficient to establish permanent impairment as he did not properly utilize the A.M.A., *Guides*.

By letter dated February 28, 2012, appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative.

In a May 15, 2012 decision, an OWCP hearing representative set aside the February 24, 2012 decision, finding that Dr. Elkins' reports were not sufficiently rationalized to resolve the conflict in medical opinion. She directed OWCP to refer appellant for another impartial medical evaluation.

In an August 8, 2012 report, Dr. Joseph J. Estwanik, a Board-certified orthopedic surgeon selected as the impartial medical specialist, determined that appellant had no ratable impairment to either lower extremity based on the July/August 2009 *The Guides Newsletter*. Based on objective imaging findings which included computerized tomography and magnetic resonance imaging (MRI) scan testing, negative nerve conduction velocity studies, finding physical examination and review of the record she demonstrated no reproducible objective findings of radiculopathy. Dr. Estwanik found no ratable impairment of either lower extremity as a result of appellant's January 8, 2008 work injury.

In an August 10, 2012 decision, OWCP denied appellant's schedule award claim. The special weight of the medical evidence was accorded to Dr. Estwanik as the impartial referee.

On August 16, 2012 appellant's attorney requested a telephone hearing.

In an October 25, 2012 decision, an OWCP hearing representative set aside the August 10, 2012 decision as OWCP did not refer Dr. Estwanik's report to a medical adviser for review.

On November 2, 2012 a third OWCP medical adviser reviewed Dr. Estwanik's August 8, 2012 report. The medical adviser stated that Dr. Estwanik properly applied the criteria and tables of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*.

In a November 5, 2012 decision, OWCP denied appellant's schedule award claim. The special weight of the medical evidence was accorded to Dr. Estwanik.

By letter dated November 12, 2012, appellant's attorney requested a telephone hearing.

In an April 3, 2013 decision, an OWCP hearing representative affirmed the November 5, 2012 decision. The weight of the medical evidence was accorded to Dr. Estwanik as the referee specialist.

By letter dated October 18, 2013, appellant, through her attorney, requested reconsideration. Counsel contended that an accompanying report dated September 18, 2012 from Dr. Fritzhand clearly established that there were clinical signs of impairment. He contended that the requirement of a positive electromyogram (EMG) test to demonstrate impairment as required was based upon junk science. In a September 18, 2012 report, Dr. Fritzhand reviewed his August 17, 2011 report which found sensory loss in both lower extremities consistent with an S1 nerve root impairment. He stated that he rated appellant's impairment appropriately. Dr. Fritzhand reviewed Dr. Elkins' independent medical evaluation. He noted that Dr. Elkins used an L5-S1 nerve root impairment. Dr. Fritzhand further noted that Dr. Lehman and Dr. Estwanik diagnosed a nerve root impairment with sensory loss and found zero percent impairment. However, he stated that appellant clearly had diminished sensory modalities involving both lower limbs best explained as secondary to a nerve root impairment/radiculopathy. Appellant even had diminished muscle strength involving the dorsiflexors of the right ankle. Dr. Fritzhand concluded that despite negative MRI scan and EMG studies, the clinical picture most likely resulted from S1 (or L5) radiculopathy and appellant's claim should be allowed by OWCP.

In “procedural notes” dated February 15, 2011 to July 15, 2013, Dr. Robert B. Wilson, II, a Board-certified family practitioner, assessed appellant as having, among other things, lumbar sprain, myofascial pain/fibromyalgia, lumbosacral or thoracic radiculopathy and low back pain. The “procedural notes” dated February 23, 2012 to September 18, 2013 contained the printed name of James K. Watson, a physician’s assistant, and stated that appellant had lumbosacral or thoracic radiculopathy, myofascial pain/fibromyalgia and lumbar strain or sprain.

In a November 21, 2013 decision, OWCP denied appellant’s request for reconsideration without further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,³ OWCP’s 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 To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

The only decision before the Board in this appeal is OWCP’s November 21, 2013 nonmerit decision which denied appellant’s application for merit review. On appeal, appellant’s attorney contended that the Board has jurisdiction over the merits of her claim as she filed an appeal of the November 21, 2013 decision on December 10, 2013. As stated, the Board does not have jurisdiction over the merits of appellant’s claim. The last merit review in this case was conducted by OWCP on April 3, 2013. A request for reconsideration was filed on October 18, 2013. A nonmerit review was conducted by OWCP on November 21, 2013. At the time appellant’s counsel requested reconsideration on October 18, 2013, the Board no longer had jurisdiction to review the April 3, 2013 merit decision.⁷

In his request for reconsideration, counsel disagreed with OWCP’s April 3, 2013 decision finding that appellant had no ratable impairment of either lower extremity. He contended that Dr. Fritzhand’s September 18, 2012 report clearly established that there were clinical signs of

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁷ 20 C.F.R. § 501.3(e).

impairment. Counsel stated that the requirement of a positive EMG test to support impairment was based upon junk science. On appeal, he also contends that *The Guides Newsletter* constituted junk science and, as such, should not be utilized by OWCP in impairment evaluations. The Board notes, however, that the A.M.A., *Guides* have been adopted as the uniform standard applicable to all claimants for the determination of permanent impairment under FECA.⁸

OWCP has adopted the sixth edition of the A.M.A., *Guides* for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July to August 2009 *The Guides Newsletter*.⁹ The Board has recognized this adoption as proper in order to provide a uniform standard applicable to each claimant for a schedule award.¹⁰ Consequently, counsel's argument has no reasonable color of validity.¹¹ He did not establish an error on a specific point of law or advance a relevant legal argument. Counsel did not otherwise make any argument specific to appellant's claim. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹²

Appellant submitted Dr. Fritzhand's September 18, 2012 report. Dr. Fritzhand referenced his prior August 17, 2011 report and stated that he had properly determined that appellant had three percent impairment to each lower extremity due to sensory loss consistent with an S1 nerve root impairment. He advised that, despite negative MRI scan imaging and EMG studies, the clinical picture most likely resulted from S1 (or L5) radiculopathy and her claim should be allowed by OWCP. Dr. Fritzhand's September 18, 2012 report was previously of record and considered by OWCP. Further, he was on one side of the conflict in medical opinion evidence that was resolved by the report of Dr. Estwanik. It is well established that evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹³ The Board finds, therefore, that Dr. Fritzhand's report is insufficient to reopen appellant's claim for a merit review.

Dr. Wilson's "procedural notes" dated February 15, 2011 to July 15, 2013, while new, do not address the issue of permanent impairment. Thus, his notes are not relevant to the issue of whether appellant has a ratable impairment attributable to her accepted condition. The

⁸ See J.C., Docket No. 11-241 (issued September 22, 2011); M.R., Docket No. 11-84 (issued September 21, 2011).

⁹ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

¹⁰ See e.g., M.W., Docket No. 13-928 (issued August 15, 2013); P.B., Docket No. 11-1153 (issued February 13, 2012); G.N., Docket No. 10-850 (issued November 12, 2010).

¹¹ See L.H., 59 ECAB 253 (2007) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

¹² 20 C.F.R. § 10.606(b)(3).

¹³ Denis M. Dupor, 51 ECAB 482 (2000).

submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ The Board finds, therefore, that Dr. Wilson's reports are insufficient to reopen appellant's claim for a merit review.

The procedural notes which contained the printed name of Mr. Watson, a physician's assistant, are also insufficient to warrant further merit review. A physician's assistant is not a "physician" as defined under FECA.¹⁵ The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to reopen appellant's claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). She 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 submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C § 8128(a).

¹⁴ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

¹⁵ 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2014
Washington, DC

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

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

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