

FACTUAL HISTORY

On October 15, 1997 appellant, then a 26-year-old firefighter, injured his right knee while hiking on a hillside. OWCP accepted the claim for right plica syndrome, right knee sprain and right patella chondromalacia. It authorized right knee arthroscopies which were performed on March 3, 1998, February 9, 1999, September 6, 2000 and January 26, 2010.

On January 7, 2011 appellant filed a claim for a schedule award.

On October 5, 2011 OWCP referred appellant for a second opinion evaluation to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, who was asked to determine whether appellant had any permanent impairment due to his accepted injury.

In a report dated October 17, 2011, Dr. Swartz, reviewed the statement of accepted facts and the medical evidence of record. He noted the accepted employment conditions of right knee strain, right patella chondromalacia and right plica syndrome. The physical examination revealed that appellant squatted well with both knees, walked without a limp, had good gait, no right knee instability mild right knee anter-medial tenderness, pain with McMurray's test maneuver and reverse McMurray's maneuver and no pain with patellofemoral compression. The range motion was -15/120 degrees. Dr. Swartz stated x-rays were required in order to provide an impairment rating. OWCP authorized the diagnostic testing.

In a November 29, 2011 supplemental report, Dr. Swartz stated that appellant would not qualify for an impairment rating for knee arthritis under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the cartilage interval was too small. Appellant had flexion contracture up to 15 degrees, which represented a 20 percent impairment pursuant to Table 16-23 at page 549 of the A.M.A., *Guides*.² Dr. Swartz indicated that 120 degrees of flexion did not qualify for an impairment rating under this table. Using Table 16-6, functional history adjustment, he found that appellant remained in class 2 as the grade modifier was zero.³ Dr. Swartz found that appellant had a 20 percent right lower extremity impairment based on loss of range of motion, a class 2 moderate impairment under Table 16-25 at page 550 of the A.M.A., *Guides*.

In a January 20, 2012 report, Dr. Leonard A. Simpson, a medical adviser, concurred with Dr. Swartz's impairment rating of 20 percent to the right lower extremity. He noted that Dr. Swartz recommended a stand alone range of motion impairment rating. Dr. Simpson related that 15 degrees flexion contracture was considered moderate under Table 16-23 or 20 percent lower extremity impairment. Under Table 16-25 a moderate impairment was a class 2. Using Table 16-17, page 545 for functional history adjustment, he found a grade modifier of zero and no increase in the impairment rating. Thus, Dr. Simpson found a total 20 percent lower extremity permanent impairment with October 17, 2011 as the date of maximum medical improvement.

² A.M.A., *Guides* 549 (6th ed.).

³ *Id.* at 516, Table 16-6.

By decision dated January 29, 2013, OWCP granted appellant a schedule award for a 20 percent impairment of the right lower extremity. The award covered a period of 57.60 weeks and ran from October 17, 2011 to November 23, 2012.

In a letter dated October 22, 2013, appellant requested reconsideration. He contended that Dr. Swartz's evaluation was inaccurate and did not provide accurate range of motion findings for his right knee.

By decision dated February 5, 2014, OWCP denied reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁵ 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.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

On January 29, 2013 OWCP issued a decision granting appellant a schedule award for a 20 percent impairment of his right lower extremity. Appellant requested reconsideration of this decision on October 22, 2013. The issue presented is whether he met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not contend that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant also did not submit pertinent new and relevant evidence. He contended that Dr. Swartz's opinion was inaccurate as to the physical findings and impairment rating. Appellant, however, provided no evidence to establish that the physical findings or rating made by Dr. Swartz were incorrect. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but he did not submit any evidence in support of his request.

⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that 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 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Thus, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2014 is affirmed.

Issued: September 12, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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