

FACTUAL HISTORY

On May 26, 2008 appellant, a 44-year-old mail clerk, filed an occupational disease claim alleging that he sustained a neck injury in the performance of duty while pulling wire cages and Gaylord boxes. OWCP accepted his claim for cervical strain. It also accepted displacement of cervical intervertebral disc without myelopathy. The discs were identified as C3-4, C5-6, and C6-7.

A magnetic resonance imaging (MRI) scan obtained on May 23, 2008 indicated that the disc herniation at C6-7 was more pronounced to the left and produced significant left-sided foraminal stenosis with probably nerve root impingement.

Appellant filed a claim for a schedule award. His attending physician, Dr. John L. Dunne, an osteopath, found no evidence of radiculopathy or involvement of the upper extremities due to cervical nerve root impairment based on his examination of appellant. He concluded that appellant had no impairment of a scheduled member due to the accepted medical conditions.

In a decision dated April 24, 2014, OWCP denied appellant's schedule award claim. An OWCP hearing representative affirmed on January 5, 2015.

On February 18, 2015 OWCP received from appellant a reconsideration request. In support thereof, appellant submitted a January 16, 2015 electrodiagnostic study of the left arm. Dr. Sami E. Moufawad, a Board-certified physiatrist and specialist in pain medicine, noted that needle electromyography of the left upper limb was compatible axonal loss in the left C6 myotome. He concluded that the findings were compatible with left C6 motor radiculopathy.

In a decision dated February 27, 2015, OWCP denied appellant's reconsideration request. It found that the evidence submitted was irrelevant or immaterial and thus had no bearing on the issue or was inconsequential to the issue. The electrodiagnostic study was just a test report, OWCP explained, and did not provide a discussion of an impairment rating. Further, the testing alone did not support that Dr. Dunne's finding of no impairment was incorrect. Accordingly, OWCP found that the evidence was not sufficient to warrant a review of the hearing representative's January 5, 2015 decision.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.³ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument

³ 5 U.S.C. § 8128(a).

not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The most recent decision on the merits of appellant's case was the hearing representative's January 5, 2015 decision affirming the denial of appellant's schedule award claim. Appellant has one calendar year from the date of that decision, or until January 5, 2016, to deliver a reconsideration request to OWCP. His February 18, 2015 reconsideration request, received by OWCP that same day, was therefore timely.

The question is whether appellant's request met at least one of the three standards for obtaining a merit review of his case. To support his request, appellant submitted a January 16, 2015 electrodiagnostic study obtained by Dr. Moufawad, the physiatrist, who concluded that the findings were compatible with left C6 motor radiculopathy. As this was new evidence not previously considered by OWCP, the more specific question is whether this evidence was relevant and pertinent.⁷

The issue raised by appellant's schedule award claim was whether he had permanent impairment to a scheduled member of the body. OWCP denied his claim because his osteopath, Dr. Dunne, found no evidence of radiculopathy or involvement of the upper extremities due to cervical nerve root impingement based on his physical examination of appellant. Thus, there was no basis for the payment of a schedule award.

Appellant submitted that evidence with his reconsideration request. There were now objective clinical test results confirming that he had a left C6 spinal nerve root radiculopathy. The evidence was not only relevant to the issue under consideration, it established a firm medical foundation for a possible rating for permanent impairment. Accordingly, the Board finds that appellant is entitled to a merit review of his case. The Board sets aside OWCP's February 27, 2015 decision and remands the case for merit review.

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608.

⁷ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

CONCLUSION

The Board finds that OWCP did not properly deny appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action.

Issued: August 4, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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