



## **FACTUAL HISTORY**

This case was previously before the Board.<sup>3</sup> In the most recent appeal, the Board, by decision dated November 15, 2012, set aside OWCP's October 13, 2011 decision denying appellant's claim for a schedule award and remanded the case for OWCP to further develop the medical evidence and obtain a more current second opinion examination to determine whether appellant was entitled to a schedule award for his accepted lumbar conditions.<sup>4</sup> The facts of the case, as set forth in the prior decision, are incorporated by reference.

OWCP referred appellant to Dr. Fernando Rojas, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 1, 2013 report, Dr. Rojas determined that appellant had reached maximum medical improvement on May 7, 2007 and had zero percent permanent impairment of the lower extremities due to his accepted lumbar conditions, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, sixth edition.

On March 13, 2013 an OWCP medical adviser reviewed the medical evidence and concluded that appellant had no peripheral nerve impairment and was not entitled to a schedule award.

By decision dated April 4, 2013, OWCP denied appellant's schedule award claim on the basis that the medical evidence did not establish a ratable impairment of a scheduled member.

On May 3, 2013 appellant requested reconsideration and submitted a functional capacity evaluation conducted by a physical therapist at the Forensic Capacity Evaluation Center on May 2, 2013 to determine his ability to work. He also submitted a permanent impairment worksheet also prepared on May 2, 2013 by a physician whose signature is illegible.

By decision dated May 20, 2013, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered. It noted that appellant had claims for lumbar conditions under File Nos. xxxxxx424 (sustained on June 26, 1989), xxxxxx749 (sustained on May 14, 1990), xxxxxx518 (sustained on September 15, 1990), xxxxxx626 (sustained on April 1, 2004), xxxxxx168 (sustained on April 15, 2004), and xxxxxx669 (sustained on July 20, 2004).<sup>5</sup>

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<sup>3</sup> The Board dismissed an appeal on December 21, 2011, docketed as No. 11-1390, at appellant's request. *Order Dismissing Appeal*, Docket No. 11-1390 (issued December 21, 2011).

<sup>4</sup> Docket No. 12-998 (issued November 15, 2012). OWCP accepted that appellant, a correctional officer, sustained a contusion to the back and lumbosacral strain on June 26, 1989. Appellant filed a claim for a schedule award on July 17, 2006.

<sup>5</sup> Appellant previously received a schedule award for seven percent permanent impairment to the right upper extremity and seven percent permanent impairment to the left upper extremity under File No. xxxxxx168. He also had a claim accepted for right thumb fracture under File No. xxxxxx068 (sustained on February 5, 2002).

On January 28, 2014 appellant requested reconsideration for a second time and submitted narrative statements dated September 30, 2013 and January 8, 2014 disagreeing with Dr. Rojas' second opinion evaluation and indicating that he had medical conditions accepted by Medicare and the Veterans Administration. He also submitted an undated report from Dr. Jorge Garcia-Negron, a Board-certified physiatrist, who opined that appellant's bilateral knee conditions were related to his military service.

By decision dated July 30, 2014, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>7</sup>

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>11</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup>

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<sup>6</sup> 5 U.S.C. § 8101 *et seq.* 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).

<sup>7</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Id.* at § 10.608(b).

<sup>11</sup> See *A.L.*, *supra* note 8. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>12</sup> *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

## ANALYSIS

In support of his January 28, 2014 reconsideration request, appellant submitted narrative statements dated September 30, 2013 and January 8, 2014 disagreeing with Dr. Rojas' second opinion evaluation and indicating that he had medical conditions accepted by Medicare and the Veterans Administration. The Board finds that submission of these narrative statements did not require reopening appellant's case for merit review as they did not advance a relevant legal argument not previously considered by OWCP and did not provide an impairment rating for schedule award purposes, which was the issue before OWCP. Thus, they do not constitute relevant and pertinent new evidence and are not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted an undated report from Dr. Garcia-Negron who opined that his bilateral knee conditions were related to his military service. The Board finds that submission of this report does not require reopening the case for merit review as it failed to address the issue of appellant's permanent impairment due to his employment-related lumbar conditions, which was the issue before OWCP. Therefore, the report does not constitute relevant and pertinent new evidence and is not sufficient to require OWCP to reopen the claim for consideration of the merits.

The functional capacity evaluation prepared by the physical therapist does not constitute competent medical evidence as physical therapists are not considered physicians under FECA.<sup>13</sup>

Additionally, the permanent impairment worksheet contained an illegible signature by the space designated for a physician. As the author of this document cannot be identified as a physician, it does not constitute competent medical evidence and is insufficient to reopen the case for further merit review.<sup>14</sup>

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did he submit any relevant and pertinent new evidence not previously considered. The Board finds that appellant did not meet any of the necessary requirements and is not entitled to further merit review.<sup>15</sup>

## CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>13</sup> *Allen C. Hendley*, 53 ECAB 551 (2002); *see also* 5 U.S.C. § 8101(2), which provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law."

<sup>14</sup> *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>15</sup> *See L.H.*, 59 ECAB 253 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2015  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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