

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tucson, AZ, Employer**

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**Docket No. 15-84
Issued: February 11, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On October 15, 2014 appellant timely appealed the August 7, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration. OWCP issued its last merit decision on July 31, 2013; more than 180 days prior to the filing of the present appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

ISSUE

The issue is whether OWCP properly declined to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

² Appellant submitted a recent medical report obtained subsequent to OWCP's August 7, 2014 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

Appellant, a 59-year-old letter carrier, has an accepted occupational disease claim for right knee meniscus tear, which arose on or about June 7, 2011. OWCP also authorized an August 22, 2012 right knee partial medial meniscectomy and chondroplasty.³ Dr. John A. Meaney, a Board-certified orthopedic surgeon, performed the August 22, 2012 arthroscopic procedure. He released appellant to resume full time, regular duty effective October 8, 2012.⁴ Appellant subsequently filed a claim (Form CA-7) for a schedule award. On November 8, 2012 OWCP asked Dr. Meaney to submit an impairment rating with respect to the accepted right knee condition and surgery. It further advised that the rating should be in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).

In a November 19, 2012 report, Dr. Meaney noted that appellant sustained a work-related right knee injury and had undergone arthroscopic surgery in August 2012, and since then he reached maximum medical improvement with respect to his right knee. He indicated that appellant would continue to experience occasional soreness in the knee and may need anti-inflammatories intermittently, but overall he seemed to have improved following surgery. Dr. Meaney found five percent permanent impairment based on the loss of cushioning of the cartilage in the knee. He referenced the A.M.A., *Guides* (6th ed. 2008) as the basis for appellant's impairment rating.

OWCP forwarded Dr. Meaney's November 19, 2012 impairment rating to Dr. Arthur S. Harris, a district medical adviser, who found two percent right lower extremity impairment based on appellant's August 22, 2012 partial medial meniscectomy.⁵ Dr. Harris relied on Table 16-3, Knee Regional Grid -- Lower Extremity Impairments, A.M.A., *Guides*, page 509 (6th ed. 2008). He further noted that, although Dr. Meaney found five percent impairment under the A.M.A., *Guides* (6th ed. 2008), Dr. Meaney had not provided an explanation for his impairment calculation.

On March 14, 2013 OWCP granted a schedule award for two percent impairment of the right lower extremity. The award covered a period of 5.76 weeks from November 19 through December 29, 2012.

Appellant timely requested a review of the written record.

In an April 8, 2013 report, Dr. Meaney indicated that appellant's loss of meniscal cushioning was the reason for finding five percent permanent partial impairment of the right knee. He further explained that over time appellant would develop arthritis. Dr. Meaney

³ Appellant received wage-loss compensation for temporary total disability beginning August 22, 2012.

⁴ Although appellant's right knee was "doing fine," Dr. Meaney noted there was radiographic evidence of avascular necrosis in the left femoral head, which would eventually require left hip replacement surgery. He further noted that appellant had a torn meniscus in the left knee. Appellant's left hip and left knee conditions have not been accepted under the June 7, 2011 right knee occupational disease claim.

⁵ Dr. Harris is a Board-certified orthopedic surgeon.

reiterated that it was his opinion that appellant had at least five percent permanent impairment due to the lack of cushioning in the knee secondary to the partial meniscectomy.

By decision dated June 11, 2013, the Branch of Hearings and Review set aside the March 14, 2013 schedule award, and remanded the case to OWCP for further development. The hearing representative found that Dr. Harris had not adequately explained his two percent right lower extremity impairment rating.⁶ Also, she instructed OWCP to refer Dr. Meaney's April 8, 2013 report to Dr. Harris for review.

In a June 23, 2013 report, Dr. Harris found a net adjustment of 0, which resulted in no deviation from the default (C) rating of two percent for a partial medial meniscectomy under Table 16-3, A.M.A., *Guides* 509 (6th ed. 2008).⁷ Additionally, he noted Dr. Meaney's explanation that his five percent rating had been based on loss of cushioning of the cartilage in the knee, but noted that Dr. Meaney did not identify on which regional grid he had relied and had not discussed any applicable grade modifiers. Accordingly, Dr. Harris reiterated his finding of two percent of the right lower extremity.

In a July 31, 2013 decision, OWCP found that appellant was not entitled to a greater schedule award than the two percent right lower extremity impairment he previously received. It explained that its decision was based on Dr. Harris' opinion.

Appellant requested reconsideration and submitted an August 6, 2013 report from Dr. Meaney. In his latest report, Dr. Meaney stated "[Appellant] is a patient of mine who had a partial medial meniscectomy onto (*sic*) the right knee. According to the A.M.A., *Guides*, he would receive at least five [percent] permanent partial impairment based on loss of meniscal tissues."

By decision dated November 14, 2013, OWCP denied appellant's request for reconsideration. It found Dr. Meaney's August 6, 2013 report was cumulative, and therefore, the additional evidence did not warrant merit review of the July 31, 2013 decision.

On December 23, 2013 OWCP received an additional report from Dr. Meaney dated December 13, 2013. In this latest report, Dr. Meaney stated that appellant had a hip replacement on the "left side" and an "arthroscopy and partial meniscectomy on that side as well." He further stated that for "this knee itself, [appellant] would receive a five [percent] permanent partial impairment based on the A.M.A., *Guides* for loss of meniscal tissue." Dr. Meaney noted it was "basically a very reasonable impairment rating for [appellant's] left knee." Lastly, he indicated that appellant's left hip also had impairment based on a total hip replacement.

⁶ Dr. Harris had not calculated a net adjustment in accordance with Section 16.3 and Table 16-5, Table 16-6, Table 16-7 and Table 16-8, A.M.A., *Guides* 515-22 (6th ed. 2008).

⁷ Dr. Harris explained that appellant's partial medial meniscectomy represented a Class of Diagnosis (CDX 1). He also assigned a grade modifiers for Functional History (GMFH 1), Physical Examination (GMPE 1), and Clinical Studies (GMCS 1). Net Adjustment (0) = (GMFH 1 - CDX 1) + (GMPE 1 - CDX 1) + (GMCS 1 - CDX 1). See section 16.3d, A.M.A., *Guides* 521 (6th ed. 2008).

On July 25, 2014 appellant requested reconsideration.⁸ He noted that on many occasions Dr. Meaney stated that he had five percent permanent impairment due to loss of meniscal tissue. Appellant argued that his physician had cooperated with OWCP in any way he could, and he encouraged OWCP to call Dr. Meaney if it had any further questions. Additionally, he indicated that he had done some research online and according to the A.M.A., *Guides*, he was rated at five percent.

Appellant also submitted a July 22, 2014 report from Dr. Meaney, who stated that appellant had an arthroscopy and partial meniscectomy on the right knee, and should receive a five percent permanent impairment under the A.M.A., *Guides* for loss of meniscal tissue. Dr. Meaney noted having “stated this over and over.” He further stated it was “basically a very reasonable impairment rating for [appellant’s] right knee.”

In a decision dated August 7, 2014, OWCP denied appellant’s July 25, 2014 request for reconsideration. It noted, *inter alia*, Dr. Meaney’s two most recent reports dated December 13, 2013 and July 22, 2014. The claims examiner indicated that appellant had a claim for a June 1, 2012 left hip injury that OWCP had denied (file number xxxxxx951).⁹ Dr. Meaney’s December 13, 2013 report pertained to appellant’s claimed June 1, 2012 left hip injury. With respect to the July 22, 2014 report, OWCP considered it duplicative of his April 8 and August 6, 2013 reports. Consequently, it found the latest evidence insufficient to warrant merit review of the July 31, 2013 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁰ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹¹ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹² A timely application for reconsideration, including all supporting documents, 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 not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not

⁸ OWCP received the request for reconsideration on July 29, 2014.

⁹ The record associated with claim file number xxxxxx951 is not currently available to the Board.

¹⁰ This section provides in pertinent part: “[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.” 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.607.

¹² *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System. *Id.* at Chapter 2.1602.4b.

previously considered by OWCP.¹³ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS

Appellant's latest request for reconsideration consisted of the appeal request form that accompanied the July 31, 2013 decision and a separate one-paragraph statement indicating that Dr. Meaney previously found five percent impairment due to loss of meniscal tissue. He also indicated that his own online research revealed he was entitled to five percent impairment under the A.M.A., *Guides*. The July 25, 2014 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that he is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(2).¹⁵

Appellant also failed to submit any "relevant and pertinent new evidence" with his July 25, 2014 request for reconsideration. OWCP received two additional medical reports since issuing its November 14, 2013 nonmerit decision. Dr. Meaney's December 13, 2013 report addressed appellant's left knee and left hip conditions, which have not been accepted under the current claim for a June 7, 2011 right knee injury. Consequently, the December 13, 2013 report, albeit new, is not relevant to the issue of whether appellant has greater than two percent impairment of the right lower extremity.

Regarding Dr. Meaney's July 22, 2014 finding of five percent impairment of the right knee, OWCP correctly noted that Dr. Meaney's latest assessment was not unlike his April 8 and August 6, 2013 reports. Beginning with the November 19, 2012 impairment rating, Dr. Meaney has consistently failed to explain how he arrived at a five percent impairment under the A.M.A., *Guides* (6th ed. 2008). When Dr. Harris last reviewed the record in June 2013, he correctly noted that Dr. Meaney had not identified on which regional grid he had relied on and he had not discussed any applicable grade modifiers. Dr. Meaney's July 22, 2014 report is similarly flawed. He merely reiterated that his earlier finding of five percent impairment for loss of meniscal tissue and did not further elaborate on how he had applied the A.M.A., *Guides* (6th ed. 2008). Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹⁶ Consequently, Dr. Meaney's July 22, 2014 report is insufficient to warrant further merit review. Because appellant did not provide any "relevant and pertinent new evidence" that might arguably impact the prior decision, he is not entitled to a

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ *Id.* at §§ 10.607(b), 10.608(b).

¹⁵ *Id.* at § 10.606(b)(2)(1) and (2).

¹⁶ *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

review of the merits based on the third requirement under section 10.606(b)(2).¹⁷ Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that OWCP properly denied further merit review with respect to appellant's July 25, 2014 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁷ 20 C.F.R. § 10.606(b)(2)(3).