United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 15-105**
	)	**Issued: June 17, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Beaverton, OR, Employer	)	

Appearances:
Kevin Card, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2014 appellant, through his representative, filed a timely appeal of a September 30, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed since the most recent merit decision dated October 3, 2013 and the filing of this appeal on October 20, 2014, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 6, 2006 appellant, then a 51-year-old letter carrier, filed a Form CA-1, traumatic injury claim, alleging that on January 3, 2006 he slipped, fell on his back, and

[1] 5 U.S.C. §§ 8101-8193.

hyperextended his left knee while delivering mail. OWCP accepted appellant's claim for sprain/strain lumbar region, strain/strain of the left knee/leg unspecified. It subsequently expanded his claim to include herniated disc at L4-5. Appellant stopped work on January 5, 2006 and returned to work on January 6, 2006. He retired on February 28, 2009.[2]

Appellant was treated by Dr. Thomas Rosenbaum, a Board-certified orthopedist, from January 5, 2006 to August 9, 2007 for back and left knee injuries sustained in a slip and fall while delivering mail. Dr. Rosenbaum diagnosed acute left knee sprain with possible hyperextension, bilateral preexisting medial degenerative arthritis of the knees, and acute low back strain. He referenced a January 17, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine which revealed severe spinal stenosis at L2-3, L4-5, a combination of severe facet hypertrophy at both levels, and disc bulging with axials demonstrating severe stenosis bilaterally at L5-S1, L4-5, and L3-4. On March 30, 2006 Dr. Rosenbaum performed a decompressive lumbar laminectomy L2 inferior, L3 complete, L4 complete, L5 superior, and exploration of L4-L5 left without discectomy. He diagnosed lumbar spinal stenosis.

Appellant filed a Form CA-7 claim for a schedule award. Thereafter, in the course of developing the schedule award claim, OWCP referred appellant to several second opinion physicians and also to impartial medical examiners.

On February 9, 2012 Dr. Rosenbaum performed a decompressive thoracic laminectomy, T9 inferior, T10 complete, T11 complete, and T12 slight superior. In a report dated February 10, 2012, he diagnosed thoracic spondylosis with myelopathy, paraparesis and status post decompressive thoracic laminectomy T9-T11. Appellant was treated by Dr. Jennifer K. Lawlor, Board-certified in physical medicine and rehabilitation, on February 13 to July 24, 2012. Dr. Lawlor diagnosed thoracic spondylosis and status post decompressive laminectomy on February 9, 2012 with associated myelopathy. In reports dated May 1 to July 24, 2012, she noted that appellant was progressing and returned to work full time. On August 17, 2012 Dr. Lawlor noted that appellant reached maximum medical improvement. An electromyogram (EMG) dated October 30, 2012 revealed chronic lumbosacral radiculopathy bilaterally. In a report dated October 8, 2012, Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, diagnosed severe chronic pain syndrome, chronic low back pain, bilateral leg pain, numbness and weakness, inadequate pain control with intractable pain, depression with stress disorder, and morbid obesity with deconditioning. He opined that he could not perform an impairment rating because appellant had not reached maximum medical improvement.

In a decision dated January 30, 2013, OWCP denied appellant's claim for a schedule award, finding that he had not reached maximum medical improvement.

Appellant continued to be treated by Dr. Lawlor, who, on January 11 and April 16, 2013 noted physical findings of intact motor strength in the upper and lower extremities at 5/5 and limited range of motion of the lumbar spine. Dr. Lawlor diagnosed myelopathy with incomplete paraplegia and thoracic spondylosis. Appellant submitted reports from Dr. Purtzer dated January 27 to May 23, 2013 who noted that appellant reached maximum medical improvement.

[2] Appellant filed a separate claim for an injury sustained on August 30, 2004 which was accepted for phlebitis and thrombophlebitis, claim number xxxxxx519. This claim was consolidated with the current claim before the Board.

Dr. Purtzer noted findings of lower extremity weakness of hip flexion of 3.5/5 and weakness of the dorsiflexion and plantar flexion bilaterally of 4.5/5. He diagnosed sprain/strain of the lumbar region and left knee and leg, herniated disc at L4-5 and phlebitis and thrombophlebitis. Dr. Purtzer opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] appellant sustained a 25 percent whole person impairment for his lumbar condition, 30 percent whole person impairment for his thrombotic condition for 48 percent total whole person impairment for both conditions.

On June 6, 2013 appellant submitted a claim for a schedule award.

In an August 28, 2013 report, an OWCP medical adviser noted that Dr. Purtzer's impairment rating of January 27, 2013 was invalid. He noted that Dr. Purtzer measured 3.5/5 weakness of hip flexion and 4/5 weakness of dorsiflexion and plantar flexion. The medical adviser indicated that Dr. Lawlor treated appellant on January 22 and April 16, 2013 and made findings inconsistent with that of Dr. Purtzer, noting intact lower extremity muscle strength at 5/5. He noted that the A.M.A., *Guides*, pages 517-18 provide that if multiple previous evaluations have been documented and there is inconsistency in the rating class between the two observers or in the findings on separate occasions by the same observer the results are considered invalid.

In a decision dated October 3, 2013, OWCP denied appellant's claim for a schedule award.

In a letter dated June 25, 2014, appellant, through his representative, requested reconsideration. He asserted that the medical adviser ignored the requirements for review of an impairment rating as set forth in the OWCP procedure manual and failed to provide a date of maximum medical improvement or a detailed rationale refuting the percentage of impairment specified. Appellant further contends that the medical adviser provided an incomplete analysis of the impairment determination. He asserted that the medical adviser improperly compared the reports from his neurologist and Dr. Purtzer's impairment rating and improperly rendered Dr. Purtzer's report invalid.

Appellant submitted an April 5, 2010 report from Dr. Rosenbaum who noted that appellant had weakness in the hips, atrophy in the calves, pain all over his body, and progressive numbness on his left side. He also submitted an October 22, 2013 report from Dr. Lawlor who noted that appellant sustained neurologic losses which were difficult to demonstrate. Dr. Lawlor noted an abnormal EMG and opined that appellant had persistent weakness for a sustained activity and motor function which was difficult to demonstrate with a single manual motor test. She noted that it was hard to distinguish weakness between 4/5 and 5/5 and noted a subjective component on the part of the examiner and an incorporation of manual motor testing and the patient's history of fatigue. Dr. Lawlor noted isolating a single component of the physical examination would not be sufficient to identify true impairment. In reports dated January 21 and July 22, 2014, she noted that appellant was working full time. Dr. Lawlor diagnosed myelopathy, thoracic spondylosis, incomplete paraplegia, right shoulder labral tear and right shoulder biceps tear. Appellant continued full-time work. She submitted a toxicology report

[3] A.M.A., *Guides* (6th ed. 2008).

from Dr. Lawlor dated January 21, 2014. Also submitted was an authorization dated October 29, 2013, a request for a copy of appellant's case files, and a notice of representative address change dated July 31, 2014.

In a September 30, 2014 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the (Office); or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[6]

ANALYSIS

OWCP denied appellant's claim for a schedule award, finding that appellant failed to establish that he sustained permanent impairment to a scheduled member due to his accepted work injury. Thereafter, it denied his reconsideration request without a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), which requires OWCP to reopen a case for merit review. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In his June 25, 2014 reconsideration request, he asserted that the medical adviser ignored the requirements for review of an impairment rating as set forth in the OWCP procedure manual because he did not identify a date of maximum medical improvement and did not provide a detailed rationale. Appellant further contended that the medical adviser provided

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at § 10.608(b).

incomplete analysis of the impairment determination and improperly discounted the report of appellant's treating physician. These assertions do not show a legal error by OWCP or a new and relevant legal argument.

The issue in this appeal, therefore, is whether appellant submitted medical evidence establishing that he sustained permanent impairment to a scheduled member causally related to his accepted employment injury. That is a medical question which must be addressed by relevant new medical evidence.[7] A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in support of his claim.

Appellant submitted an October 22, 2013 report from Dr. Lawlor who noted that appellant sustained neurologic losses that were difficult to demonstrate. Dr. Lawlor noted an abnormal EMG and opined that appellant had persistent weakness for a sustained activity and motor function and that a weakness of this type was difficult to demonstrate with a single manual motor test. She noted difficulty in distinguishing weakness between 4/5 and 5/5 and noted true strength needed to incorporate manual motor testing and the patient's history of fatigue. Dr. Lawlor offered the opinion that a more thorough and diverse array of testing was required. Isolating a single component of the physical examination would not be sufficient to identify true impairment. Although Dr. Lawlor suggests possible difficulties in assessing impairment, she did not specifically state whether appellant sustained permanent impairment to a scheduled member causally related to his employment injury. Other reports from Dr. Lawlor, dated January 21 and July 22, 2014, diagnosed myelopathy, thoracic spondylosis, incomplete paraplegia, a right shoulder labral tear, and a right shoulder biceps tear. Appellant also submitted a toxicology report from Dr. Lawlor dated January 21, 2014. These reports, while new, are not relevant because they offer no answer to whether appellant sustained permanent impairment to a scheduled member from his accepted work injury. The Board has held that the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.[8] Thus, these reports are insufficient to require OWCP to reopen the claim for a merit review.

Appellant submitted an April 5, 2010 report from Dr. Rosenbaum who noted that appellant had weakness from his hips down, atrophy in the calves, pain all over his body, and progressive numbness on his left side. As noted above, while this report is new, it also fails to specifically address the issue of whether appellant sustained permanent impairment to a scheduled member due to his work injury.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[8] *Johnnie B. Causey*, 57 ECAB 359 (2006).

On appeal appellant's representative asserts that sufficient evidence was submitted to establish appellant's claim for a schedule award and that OWCP improperly denied his reconsideration request. As explained, the Board does not have jurisdiction to review the merits of the claim. Appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

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

ORDER

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

Issued: June 17, 2015
Washington, DC

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

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

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