

ISSUE

The issue is whether OWCP properly denied appellant's requests for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that OWCP failed to follow proper procedures in scheduling her impartial medical examinations in 2008 and 2009 and otherwise argues the merits of her claim.

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on March 23, 2004 appellant, then a 58-year-old claims examiner, sustained torn medial cartilage or meniscus of the right knee, aggravation and acceleration of degenerative joint disease of the right knee, and contusion and sprain of the left knee when she tripped over a typewriter cord and fell onto both knees at work. It authorized right total knee replacement surgery performed on May 3, 2006. In a September 27, 2010 decision,⁴ the Board affirmed a September 17, 2009 OWCP decision. OWCP had given the special weight of the medical evidence to Dr. Lance N. Brigham, a Board-certified orthopedic surgeon and an impartial medical specialist, who found that appellant's rheumatoid and degenerative arthritis of the left knee were not a consequence of her accepted March 23, 2004 conditions. In an order dated April 8, 2011, the Board denied appellant's petition for reconsideration.⁵ The facts and circumstances surrounding the prior appeal are incorporated by reference. The relevant facts are set forth below.

Prior to appellant's consequential injury denial, on May 23, 2008 OWCP had granted appellant a schedule award for 37 percent permanent impairment of the right lower extremity. The period of the award ran from August 1, 2007 to May 10, 2008.

On June 26, 2012 OWCP granted appellant a schedule award for one percent permanent impairment of the left lower extremity based on the May 16, 2012 opinion of the medical adviser. The period of the award ran from March 26 to April 15, 2012. OWCP noted that its medical adviser discredited a March 26, 2012 report of Dr. Guy H. Earle, an attending Board-certified family practitioner, who found that appellant had 49 percent impairment of the left lower extremity. The medical adviser stated that Dr. Earle's impairment rating included left knee and ankle conditions, but a left ankle condition had not been accepted as work related. He also stated that Dr. Earle's range of motion restrictions were due to appellant's left knee replacement as a consequence of her nonwork rheumatoid arthritis condition.

On July 9, 2012 appellant requested an oral hearing before an OWCP hearing representative regarding the June 26, 2012 schedule award decision. Following a preliminary review, in a September 25, 2012 decision, an OWCP hearing representative set aside the June 26, 2012 decision and remanded the case for OWCP to amend its statement of accepted facts (SOAF) to include relevant information regarding appellant's accepted left knee conditions and knee surgeries, and to refer her to a second opinion examination to determine whether she had any residuals of her accepted left knee conditions and resultant permanent impairment under the

⁴ Docket No. 10-136 (issued September 27, 2010).

⁵ *Order Denying Petition for Reconsideration*, Docket No. 10-136 (issued April 8, 2011).

sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a January 15, 2013 decision, OWCP found that appellant was not entitled to an additional schedule award for her left lower extremity based on a December 17, 2012 second opinion of Dr. Paul S. Darby, Board-certified in occupational medicine, who found that her left muscle or tendon strain had resolved and she had no impairment to the left leg under the sixth edition of the A.M.A., *Guides*.⁶

By letter dated February 4, 2013, received by OWCP's Branch of Hearings and Review on February 7, 2013, appellant requested a review of the written record relative to the January 15, 2013 OWCP decision.

In a September 10, 2013 decision, an OWCP hearing representative affirmed the January 15, 2013 schedule award decision.⁷

On July 7, 2014 appellant requested reconsideration of the September 10, 2013 denial of her request for a schedule award for her left knee and submitted a December 4, 2013 report from Dr. Earle. She argued that the consequential condition of arthritis should be considered. Dr. Earle reviewed Dr. Darby's December 17, 2012 report and referenced his own March 26, 2012 impairment evaluation.⁸ He stated if a rating examiner confined ratings strictly to the accepted diagnoses of left knee sprain and bone contusion, then there was absolutely no objective evidence to opine impairment or lack thereof since appellant had undergone a total joint replacement. Dr. Earle further stated that the real issue was whether her left knee sprain and bone bruise led to an aggravation of her degenerative arthritis in the left knee.

Regarding causation, Dr. Earle advised that the mechanism of injury was sufficient to aggravate mild preexisting degenerative arthritis. He related that a bone bruise indicated significant impact to the joint and was objective evidence that significant trauma occurred in a knee joint that had preexisting, but only mildly symptomatic, degenerative arthritis. The time course of the injury was such that appellant remained continuously symptomatic after her fall. She had progressive deterioration of her left knee condition on serial imaging studies ultimately leading to total joint arthroplasty. Dr. Earle stated that there was a lack of good alternative

⁶ Dr. Darby's December 17, 2012 opinion was supported by an OWCP medical adviser who reviewed Dr. Darby's findings and the medical evidence of record on January 3, 2013.

⁷ By the September 10, 2013 decision, an OWCP hearing representative also finalized a February 11, 2013 preliminary determination that appellant was without fault in the creation of an overpayment of compensation in the amount of \$3,183.12 because she had received a schedule award for one percent permanent impairment of the left lower extremity, but had zero percent impairment. She also affirmed a January 15, 2013 decision denying an increased schedule award for the left lower extremity as there was no permanent impairment. In a subsequent decision dated September 13, 2013, OWCP denied waiver of recovery of the \$3,183.12 overpayment of compensation and set a repayment schedule of \$200.00 per month.

⁸ In his March 26, 2012 report, Dr. Earle had assessed appellant as having left knee sprain/contusion with medial tibial plateau bone contusion, accelerated osteoarthritis, total joint replacement secondary to accelerated osteoarthritis, and loss of range of motion. He further assessed rheumatoid arthritis left foot and ankle producing inflammatory arthritis of the ankle and hindfoot, limited motion of the ankle and hindfoot, and significant gait abnormality. Dr. Earle determined that appellant had 49 percent impairment of the left lower extremity under the A.M.A., *Guides*.

explanations of this situation. He noted that, although appellant had a diagnosis of rheumatoid arthritis, this condition never affected her large joints and there were no pathological findings suggesting that rheumatoid arthritis was the cause of her accelerated knee arthritis necessitating joint replacement.

Dr. Earle further noted that the very rapid deterioration of her osteoarthritis that occurred after her fall was not characteristic of the natural progression of this disease. This disease usually progressed measurably over a period of years and not months as in appellant's case. Based on the above discussion, Dr. Earle advised that the accepted diagnoses of knee sprain and bone contusion caused an aggravation (permanent worsening) of her osteoarthritis leading to end-stage disease necessitating joint replacement. He opined that there was ratable impairment in the left knee as discussed in his March 26, 2012 report.

In a July 31, 2014 decision, OWCP denied merit review of appellant's claim. It found that her request to include aggravation of her underlying left knee arthritis as an accepted condition was previously decided by the Board's September 27, 2010 decision. Further OWCP found the request not pertinent to the claim for schedule award for the left lower extremity. It also found that the medical evidence submitted was not relevant to the same issue in this case.

In an August 31, 2014 letter, appellant again requested reconsideration of the schedule award aspect of the OWCP hearing representative's September 10, 2013 decision. She contended that in 2008 OWCP had not properly selected Dr. Brigham as the referee physician as it did not follow the rotational procedures under the Physicians' Directory System (PDS). Appellant stated that objective evidence should be presented to establish that the proper procedures were followed with a printout of the selection procedure. She further contended that OWCP and its medical adviser asked Dr. Brigham and second opinion physicians, leading questions regarding the causal relationship between her accepted employment injuries and her claimed consequential left knee rheumatoid arthritis and resultant surgery which prevented objective evaluation of the medical evidence. Appellant asserted that the SOAF presented inaccurate information that prejudiced any conclusions drawn by Dr. Brigham and the second opinion physicians regarding her preexisting rheumatoid arthritis.

In a September 15, 2014 decision, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. The record indicates that this decision was "vacated" by OWCP.

By decision dated September 16, 2014, OWCP treated appellant's reconsideration request as timely filed but denied merit review of her claim under 5 U.S.C. § 8128(a). It found that her arguments were not relevant to the September 10, 2013 determination of whether she was entitled to a schedule award for permanent impairment to her left lower extremity.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or

⁹ 5 U.S.C. §§ 8101-8193. 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).

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.¹⁰ 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.¹¹ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹²

ANALYSIS

On July 7 and August 31, 2014 appellant requested reconsideration of the September 10, 2013 hearing representative's decision that she was not entitled to a schedule award for impairment to her left lower extremity.¹³ The underlying issue on reconsideration is medical in nature, whether appellant had any permanent impairment to her left lower extremity causally related to her accepted March 23, 2004 employment injuries, thereby entitling her to a schedule award.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In her August 31, 2014 request for reconsideration, she contended that Dr. Brigham was not properly selected as an impartial medical specialist using the PDS as there was no printout showing his selection, that OWCP and its medical advisers asked Dr. Brigham and the second opinion physicians leading questions regarding the causal relationship between her accepted employment injury and consequential left knee rheumatoid arthritis and resultant surgery, and the SOAF presented inaccurate information that prejudiced any conclusions drawn by these physicians regarding her preexisting rheumatoid arthritis. The Board previously reviewed and affirmed OWCP's September 17, 2009 decision, finding that OWCP had properly referred appellant to Dr. Brigham to conduct the impartial medical examination, and accorded special weight to his impartial medical opinion that appellant's left knee rheumatoid and degenerative arthritis for which she underwent surgery were not causally related to the accepted March 23, 2004 employment injuries. Thus, the issue is *res judicata* and not subject to further consideration by the Board.¹⁴

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. Dr. Earle's December 4, 2013 report found that the accepted employment-related left knee sprain and bone contusion permanently aggravated appellant's

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

¹³ The Board notes that the only review of a final decision concerning an overpayment is an appeal to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision. 20 C.F.R. § 10.440(b).

¹⁴ *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). In the instant case, appellant sought reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a) and, by order dated April 8, 2011, the Board denied her petition for reconsideration. *See supra* note 6.

osteoarthritis and necessitated joint knee replacement. Further, he reiterated that she had a ratable left knee impairment as discussed in his prior March 26, 2012 report. Dr. Earle's report, while new, is cumulative and repetitive of his previous report which was rejected by OWCP in a prior decision dated June 26, 2012. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁵

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 16 and July 31, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 25, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003); *Eugene F. Butler*, 36 ECAB 393 (1984).