

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

C.A., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Tampa, FL, Employer)

Docket No. 15-1203
Issued: November 23, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 5, 2015 appellant filed a timely appeal from a December 18, 2014 merit decision and a March 11, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a schedule award; and (2) whether OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 26, 2013 appellant, then a 62-year-old nurse filed an occupational disease claim (Form CA-2) alleging that she sustained respiratory conditions due to her exposure to harmful fumes at work while renovations were being carried out.² She indicated that she first became aware of her claimed condition and its relationship to her work on August 2, 2012. OWCP accepted that appellant sustained unspecified asthma with acute exacerbation, acute bronchitis, and other respiratory abnormality. Appellant received disability compensation on the daily rolls beginning February 15, 2013. She later received disability compensation on the periodic rolls.

In an October 25, 2013 form report, Dr. Leonard Cosmo, an attending Board-certified pulmonologist, opined that appellant reached maximum medical improvement on October 25, 2013 and had a pulmonary impairment rating of 39 percent.

On October 25, 2013 appellant filed a claim for a schedule award (Form CA-7) due to her accepted work injuries.

OWCP requested that Dr. Cosmo provide an impairment rating in accordance with the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009). In a December 10, 2013 form report, Dr. Cosmo again opined that appellant reached maximum medical improvement on October 25, 2013 and had a pulmonary impairment rating of 39 percent.

On January 14, 2014 Dr. Eric Puestow, a Board-certified internist serving as an OWCP medical adviser, noted that the record did not contain a satisfactory pulmonary study on which to base a schedule award. Dr. Cosmo was asked to submit an impairment rating report based on pulmonary testing, but he did not respond to this request.

In a February 27, 2014 report, Dr. Perry R. Lloyd, a Board-certified pulmonologist serving as an OWCP referral physician, discussed appellant's factual and medical history and reported findings from a February 26, 2014 examination. He noted that he found no clinical findings to support residuals of the accepted work injuries. Dr. Lloyd noted that maximum medical improvement had been reached and that there was no data to support the existence of acute bronchitis, respiratory abnormality, or asthma with acute exacerbation. He noted that appellant stated that she did not have problems walking and could go up and down stairs readily. Thus, appellant could perform her regular work as a nurse. In an attached February 26, 2014 work restrictions form, Dr. Lloyd opined that she was capable of working as a nurse without restrictions.

² OWCP accepted that in 2011 and 2012 appellant was exposed to chemical fumes from cleaning solutions, dust particles, and construction debris from this renovation work. The air transfer system was deemed insufficient to remove these harmful substances.

On March 13, 2014 Dr. Puestow discussed Dr. Lloyd's report noting that it showed appellant ceased to have a work-related respiratory condition. He noted that calculation of a schedule award was "not appropriate in this case."³

By decision dated March 21, 2014, OWCP denied appellant's claim for a schedule award. It found that the medical evidence of record did not show a measurable respiratory impairment under the sixth edition of the A.M.A., *Guides*.

In an April 3, 2014 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the report of Dr. Lloyd, the referral physician. It afforded her 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted an April 24, 2014 report in which Dr. Cosmo noted that her abnormal pulmonary function test results consistently indicated respiratory insufficiency. Dr. Cosmo noted that this was objective evidence that residual effects of the work-related conditions continued. He noted that testing showed that appellant's asthma was not well controlled and that she had not returned to her preinjury status.

In a May 12, 2014 report, Dr. Eduardo L. Gonzalez, an attending Board-certified anesthesiologist, noted that he concurred with Dr. Cosmo's opinion on continuing work-related residuals. He discussed appellant's pulmonary function testing from April 16, 2014 and noted that the diagnosed conditions were causally related "to the event that happened during the course of employment and within the scope of compensable work factors, and that there are consequential injuries developed after the prolonged exposure to chemical fumes, construction debris, and treatment."

OWCP then determined that there was a conflict in the medical opinion evidence regarding continuing work-related residuals between Dr. Lloyd, the referral physician, and appellant's attending physicians, Dr. Cosmo and Dr. Gonzalez. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of FECA, to Dr. Stuart M. Brooks, a Board-certified pulmonologist, for an impartial medical examination and an opinion on the matter.

In an August 18, 2014 report, Dr. Brooks provided an extensive discussion of appellant's factual and medical history, including the results of various pulmonary tests. He noted that he reviewed allergy testing results, but discerned no strongly positive allergen prick skin test response to any of the numerous allergens tested. Dr. Brooks noted that appellant's pulmonary function testing from April 16, 2014 showed oxygen saturation of 99 percent while breathing and therefore did not show pulmonary dysfunction. He reported the findings of his own examination of appellant, noting that she reported breathing problems upon exertion. Dr. Brooks opined that she ceased to have residuals of her accepted work-related injuries, unspecified asthma with acute exacerbation, acute bronchitis, and other respiratory abnormality. He opined that appellant could return to her regular work as a nurse. Dr. Brooks found that there was convincing objective

³ The record contains a March 20, 2014 report stating "per [the sixth edition of the A.M.A., *Guides*] rating 39 percent from respiratory impairment due to respiratory disorders table that shows impairment classifications." However, the report is not signed and it is unclear who produced it.

medical evidence supporting the diagnosis of extrathoracic airway obstruction, a condition localized outside of her lungs and in the trachea/larynx/vocal cord areas. The condition of extrathoracic airway obstruction was not connected, in any way, to the claimed workplace exposures.

On September 17, 2014 OWCP requested that Dr. Brooks provide a supplemental report clarifying whether appellant could work on a full-time basis in her regular job as a nurse. In an October 3, 2014 report, Dr. Brooks clarified that she could work on a full-time basis in her regular job as a nurse as appellant did not currently have any work restrictions due to the accepted work injuries.⁴

By decision dated September 22, 2014, OWCP affirmed its March 21, 2014 decision denying appellant's claim for a schedule award. It discussed the opinion of Dr. Brooks, the impartial medical specialist, finding that she ceased to have residuals of a work-related respiratory condition, and noted that the medical evidence did not show that she had any permanent impairment.

In an October 21, 2014 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 21, 2014 based on the August 18 and October 3, 2014 reports of Dr. Brooks, the impartial medical specialist. It found that the weight of the medical evidence regarding continuing work-related residuals rested with the well-rationalized opinion of Dr. Brooks.⁵

Appellant subsequently submitted medical treatment notes from August 2014.

By decision dated December 18, 2014, OWCP affirmed its September 22, 2014 decision denying appellant's claim for a schedule award. It again discussed the opinion of Dr. Brooks finding that she ceased to have residuals of a work-related respiratory condition, and noted that she had not met her burden of proof to establish permanent impairment for a schedule award.

In a letter received on February 17, 2015, appellant requested reconsideration of OWCP's December 18, 2014 decision. She submitted May 8, 2014 and January 2, 2015 treatment reports of Dr. Cosmo.

By decision dated March 11, 2015, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that she filed a timely request for reconsideration of its December 18, 2014 decision on February 17, 2015, but found that she did not submit new and relevant argument or evidence requiring reopening of her claim. OWCP indicated that appellant submitted May 8, 2014 and January 2, 2015 treatment reports of Dr. Cosmo, but that these reports did not contain any permanent impairment rating. Therefore,

⁴ Dr. Brooks noted that appellant might need some restrictions during the first two weeks she returned to work. However, these would not be due to her accepted work-related injuries, but rather due to the fact that she had not worked for a considerable period of time.

⁵ It is noted that the matter of OWCP's termination of appellant's wage-loss compensation and medical benefits effective October 21, 2014 is not currently before the Board.

they were not relevant to the issue of the December 18, 2014 decision, *i.e.*, appellant's claim for schedule award compensation.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.⁶ The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

The schedule award provision of FECA⁸ and its implementing regulations⁹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members, or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹¹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹² In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the

⁶ See *Bobbie F. Cowart*, 55 ECAB 476 (2004).

⁷ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹¹ 5 U.S.C. § 8123(a).

¹² *William C. Bush*, 40 ECAB 1064, 1975 (1989).

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained unspecified asthma with acute exacerbation, acute bronchitis, and other respiratory abnormality due to exposure to harmful substances in the workplace. Appellant filed a claim for a schedule award due to her accepted work injuries, but OWCP denied her claim because the medical evidence did not establish the existence of permanent impairment for a schedule award.

The Board finds that appellant did not meet her burden of proof to establish a schedule award compensation.

Appellant submitted October 25 and December 10, 2013 form reports in which Dr. Cosmo, an attending Board-certified pulmonologist, opined that she reached maximum medical improvement on October 25, 2013 and had a pulmonary impairment rating of 39 percent. However, Dr. Cosmo did not explain how she had a work-related condition that caused disability under the standards of the sixth edition of the A.M.A., *Guides*.¹⁴ Appellant did not submit any other medical evidence addressing permanent impairment.

In addition, the record contains medical evidence suggesting that appellant did not have permanent impairment. In August 18 and October 3, 2014 reports, Dr. Brooks, a Board-certified pulmonologist serving as an impartial medical specialist, found that she ceased to have residuals of her accepted work conditions, unspecified asthma with acute exacerbation, acute bronchitis, and other respiratory abnormality.¹⁵

On appeal, appellant argued that she continued to have residuals of her accepted work injuries and claimed a schedule award. However, she did not explain how the medical evidence of record supported this argument. For these reasons, appellant did not meet her burden of proof to establish a schedule award.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹³ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁴ *See supra* note 10.

¹⁵ OWCP found that there was a conflict in the medical opinion evidence on this matter between Dr. Lloyd, a Board-certified pulmonologist serving as an OWCP referral physician, and appellant's attending physicians, Dr. Cosmo and Dr. Gonzalez, a Board-certified anesthesiologist. *See supra* notes 11 through 13.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁶ OWCP's 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.¹⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.¹⁸ 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.¹⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record²⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²¹ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²²

ANALYSIS -- ISSUE 2

In her timely February 17, 2015 application for reconsideration of OWCP's December 18, 2014 decision, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. The underlying issue in this case is a medical issue which must be addressed by relevant medical evidence.²³

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any in this case. Appellant submitted May 8, 2014 and January 2, 2015 treatment reports of Dr. Cosmo, but these reports do not contain any permanent impairment rating. Therefore, they are not relevant to the issue of the December 18, 2014 decision, *i.e.*, her entitlement to schedule award compensation. The Board has held that submission of previously submitted evidence which does not address the particular issue involved

¹⁶ Under section 8128 of FECA, "[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).

¹⁷ 20 C.F.R. § 10.606(b)(3).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

²⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

²¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²² *John F. Critz*, 44 ECAB 788, 794 (1993).

²³ *Supra* note 6.

does not constitute a basis for reopening a case does not require reopening of a claim for merit review.²⁴

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a schedule award. The Board further finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2015 and December 18, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 23, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁴ See *supra* note 21.