



## ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On June 14, 1980 appellant, then a 32-year-old nurse, sustained a traumatic injury to her right knee. OWCP accepted the claim for right knee chondromalacia and left medial meniscus tear. Appellant retired from the employing establishment in 2008.

On December 12, 2014 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted an October 14, 2014 note from Dr. Michael P. Bolognesi, a Board-certified orthopedic surgeon. Dr. Bolognesi reported that appellant had reached maximum medical improvement (MMI) for both knees.

By letter dated December 18, 2014, OWCP advised appellant that further evidence was necessary to establish her claim. It requested that Dr. Bolognesi submit an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>4</sup> (A.M.A., *Guides*). Appellant was afforded 30 days to submit the requested information. No evidence was received.

By decision dated January 26, 2015, OWCP denied appellant's claim for schedule award finding that the medical evidence failed to demonstrate any permanent impairment to a scheduled member or function of the body.

On February 2, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. A hearing was held on August 12, 2015. Appellant was not present. At the hearing, counsel indicated that an impairment rating by a treating physician would be submitted in support of the claim. Following the hearing, no evidence was received.

By decision dated October 2, 2015, OWCP's hearing representative affirmed the January 26, 2015 decision finding that the medical evidence of record was insufficient to establish a ratable impairment.

On February 9, 2016 appellant, through counsel, requested reconsideration of the October 2, 2015 decision. Counsel noted submission of a report from Keith L. Blankenship, a licensed physical therapist (PT), not previously considered, in support of appellant's claim.

In a June 26, 2015 report, PT Blankenship provided a history of appellant's bilateral knee condition for an impairment evaluation of her left knee joint and right patellofemoral joint in accordance with the sixth edition of the A.M.A., *Guides*.<sup>5</sup> Using the Knee Regional Grid,<sup>6</sup>

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<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 509, Table 16-3.

PT Blankenship provided a diagnosis category and class rating for each knee. He described his conclusions relative to the grade modifiers for functional history, physical examination, and clinical studies. Using the net adjustment formula, PT Blankenship determined that appellant sustained two percent left lower extremity permanent impairment and three percent permanent right lower extremity impairment. Located below PT Blankenship's signature was a signature line for Dr. Thomas Vail, a Board-certified orthopedic surgeon. The report was not signed by Dr. Vail.

By decision dated March 8, 2016, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence. It noted that the impairment rating provided was not signed by a physician.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), 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>7</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### **ANALYSIS**

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In the February 5, 2016 application for reconsideration, counsel did not establish that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument.

Counsel alleged that submission of a report from PT Blankenship established appellant's claim for a schedule award. Entitlement to a schedule award is a medical issue which must be addressed by relevant medical evidence.<sup>9</sup> In this case, appellant failed to submit relevant and pertinent new evidence establishing permanent impairment to a scheduled member or function of the body.<sup>10</sup>

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<sup>7</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>8</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>9</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>10</sup> *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

While appellant submitted a new report from PT Blankenship dated June 26, 2015, this report is not pertinent new and relevant medical evidence. Although PT Blankenship provided detailed findings and explained his impairment rating for the left and right lower extremity, it is not relevant to the issue of permanent impairment as a report from a physical therapist does not constitute medical evidence for purposes of a schedule award.<sup>11</sup> Specifically, PT Blankenship's report is insufficient to warrant further merit review as it was not signed by a physician.<sup>12</sup> Registered nurses, physical therapists, and physician assistants, are not considered physicians as defined under FECA, and therefore their opinions are of no probative value.<sup>13</sup>

While the report contained a signature line for Dr. Vail, there is no indication that he created or reviewed the report as he failed to co-sign the document. Appellant failed to provide a detailed report from a physician to explain and support permanent impairment to a scheduled member such that she would be entitled to a schedule award.<sup>14</sup> The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup>

In this case, appellant failed to submit any relevant and pertinent new evidence addressing permanent impairment to a scheduled member such that she would be entitled to a schedule award.<sup>16</sup>

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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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.

### **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>11</sup> *C.B.*, Docket No. 13-1734 (issued November 4, 2013). *See also C.C.*, Docket No. 14-0884 (issued September 4, 2014).

<sup>12</sup> *See C.G.*, Docket No. 13-1519 (September 25, 2014).

<sup>13</sup> 5 U.S.C. § 8102(2) of FECA 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. *See also Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>16</sup> *See E.M.*, Docket No. 16-0471 (issued May 16, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2016  
Washington, DC

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

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

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