

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

B.D., Appellant)	
)	
and)	Docket No. 16-1177
)	Issued: October 27, 2016
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Edison, NJ, Employer)	
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)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Robert D. Campbell, Esq., for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2016 appellant, through counsel, filed a timely application for review from a March 28, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from January 6, 2015, the date of the most recent merit decision of OWCP, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

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

On appeal, counsel argues that appellant submitted relevant evidence not previously considered by OWCP, and therefore he should be entitled to a merit review of his claim.

FACTUAL HISTORY

This case has previously been before the Board.³ On March 4, 2004 appellant, then a 40-year-old former mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained progressive neck, back, left leg, and hip conditions as a result of unloading trucks at work.

OWCP converted the traumatic injury claim to a claim for occupational disease. It later denied the claim for occupational disease on June 4, 2004. Following a series of requests for reconsideration, and continued affirmance of the denial of the claim by OWCP, on November 2, 2010 appellant appealed a May 6, 2010 merit decision to the Board. In a September 13, 2011 decision, the Board found that appellant had not established that he sustained an occupational disease in the performance of duty.⁴

Appellant continued to submit medical evidence to OWCP. By decision dated December 4, 2012, OWCP accepted appellant's claim for a lumbar sprain, noting that it had resolved as of October 8, 2012. On the same date, it terminated his wage-loss compensation benefits.⁵ On December 4, 2013 appellant requested reconsideration of the December 4, 2012 decision which found that his accepted condition had resolved. By decision dated September 18, 2014, OWCP denied his request for reconsideration. Appellant filed an appeal with the Board of the September 18, 2014 decision on December 10, 2014. In a May 12, 2016 decision, the Board found that OWCP had properly denied appellant's request for merit review of his claim because he had not submitted relevant evidence not previously considered by OWCP.⁶ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

In a report dated August 21, 2013, Dr. Nicholas Diamond, a Board-certified osteopath, examined appellant and noted that he had reached maximum medical improvement (MMI) as of August 21, 2013. He rendered permanent impairment ratings of nine percent for appellant's right lower extremity and nine percent for his left lower extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

³ Docket No. 11-247 (issued September 13, 2011); Docket No. 13-183 (issued December 20, 2012); Docket No. 15-400 (issued May 12, 2016).

⁴ Docket No. 11-247 (issued September 13, 2011).

⁵ In an order dismissing appeal dated December 20, 2012, Docket No. 13-183 (issued December 20, 2012), the Board found that an appeal had been inadvertently docketed in this case.

⁶ Docket No. 15-400 (issued May 12, 2016).

OWCP forwarded Dr. Diamond's report along with a statement of accepted facts (SOAF) to a district medical adviser (DMA), Dr. Henry Magliato, a Board-certified orthopedic surgeon, for review on December 17, 2013. In a report dated December 30, 2013, Dr. Magliato found that Dr. Diamond's report was not acceptable as a basis for a schedule award because his report failed to consider the effect of nonwork-related injuries sustained by appellant on July 17, 2004 and in July 2008. He requested more records of appellant's treatment before issuing a final determination.

OWCP again forwarded the case record and Dr. Diamond's report to Dr. Magliato on March 18, 2014. In a report dated April 7, 2014, Dr. Magliato concluded that most, if not all, of the findings of Drs. Weiss and Diamond were due to his nongovernmental injury of July 17, 2004, as well as other injuries sustained outside of work. Dr. Magliato explained that his back condition had "cleared up before the reinjury of July 17, 2004 while working at another job."

On July 11, 2014 OWCP determined that a conflict existed in the medical opinion evidence regarding the degree of appellant's permanent impairment. It forwarded the case record and an SOAF to Dr. Howard M. Pecker, a Board-certified orthopedist, for an impartial medical examination to determine appellant's percentage of impairment and date of MMI. In a report dated October 3, 2014, the impartial medical examiner (IME) selected in this case, determined that appellant's date of MMI was April 15, 2004 and provided a rating of permanent impairment. Utilizing the sixth edition A.M.A., *Guides*, he determined that there was zero percent permanent impairment of the upper and lower extremities. Dr. Pecker diagnosed appellant with age-appropriate degenerative disc disease of the cervical and lumbar spine.

On October 17, 2014 OWCP forwarded Dr. Pecker's report and the case record to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon and a DMA for review. Dr. Merola determined that Dr. Pecker had addressed the discrepancy between the reports of Drs. Diamond and Magliato, specifically indicating that examination revealed no evidence of traumatic injury to the lumbar or cervical spine and no evidence of radiculopathy.

By decision dated January 6, 2015, OWCP denied appellant's claim for a schedule award. It noted that the weight of medical evidence indicated that he had zero percent permanent impairment of the upper and lower extremities.

On December 29, 2015 appellant, through counsel, requested reconsideration of OWCP's January 6, 2015 decision. Counsel provided his opinion regarding the weight that should be given to the medical evidence of record. With the request for reconsideration, appellant attached a letter from Dr. Diamond dated March 23, 2015. Dr. Diamond disputed the findings of Dr. Pecker's report dated October 3, 2014, noting that Dr. Pecker did not indicate which specific muscles were tested. Dr. Diamond also summarized findings from reports previously of record and noted that he "[stood] by [his] impairment rating" of August 21, 2013.

In a December 9, 2014 report, Dr. Garen E. Gajian, a Board-certified anesthesiologist, examined appellant and diagnosed him with cervicgia; cervical spondylosis with myelopathy; displacement of the cervical intervertebral disc without myelopathy; lumbago; displacement of the lumbar intervertebral disc without myelopathy; and lumbosacral spondylosis without myelopathy.

By decision dated March 28, 2016, OWCP denied appellant's request for reconsideration of its decision dated January 6, 2015. It found that appellant had not submitted relevant evidence not previously considered in support of his request for reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), 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.⁷ Section 10.608(b) of OWCP's 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.⁸

ANALYSIS

OWCP issued a January 6, 2015 decision finding that appellant had not established a ratable impairment eligible for a schedule award under FECA. On December 29, 2015 appellant, through counsel, requested reconsideration of this decision. Counsel reargued the weight that should be given to the medical evidence of record. With his request, appellant submitted a letter from Dr. Diamond dated October 3, 2014 and a report from Dr. Gajian dated December 9, 2014.

As noted above, the Board does not have jurisdiction over the merits of the January 6, 2015 decision. 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 his claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant has submitted sufficient evidence to establish a ratable impairment related to appellant's accepted injury. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case. While Dr. Diamond's letter dated October 3, 2014 disputes one aspect of Dr. Pecker's impairment rating of zero, the letter itself does not contain an impairment rating, an explanation of how Dr. Diamond arrived at that rating, or a detailed explanation of why Dr. Pecker's rating of zero was incorrect according to the A.M.A., *Guides*. Dr. Diamond merely notes that he is reasserting his impairment rating rendered on August 21, 2013.

Similarly, Dr. Gajian's report does not contain an impairment rating for appellant's conditions or a discussion of how an impairment rating was calculated according to the A.M.A., *Guides*. These documents, while not previously considered by OWCP, are irrelevant to the underlying issue of whether appellant has a ratable impairment, because they did not contain a discussion of his impairment rating according to the A.M.A., *Guides*, or a detailed explanation of

⁷ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

⁸ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

why Dr. Pecker's impairment rating was incorrect. As such, they are insufficient to warrant reconsideration of appellant's claim.

On appeal, by letter dated September 15, 2016, counsel argued that OWCP's SOAF was deficient because it omitted reference to a lumbar spine MRI scan study. As the Board has previously explained, it does not have jurisdiction over the merits of the claim. The Board's jurisdiction is limited to review of appellant's request for reconsideration by OWCP received on December 29, 2015 and OWCP's March 28, 2016 decision denying merit review.

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 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 denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 28, 2016 is affirmed.

Issued: October 27, 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