

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

E.N., Appellant)	
)	
and)	Docket No. 16-1000
)	Issued: September 20, 2016
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, Miami, FL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 11, 2016 appellant filed a timely appeal of a December 1, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from June 29, 2015, the date of the most recent OWCP merit decision, to the filing of the current appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 3, 2014 appellant, then a 43-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 2014 he was cleaning the control center

¹ 5 U.S.C. §§ 8101-8193.

and went to pick up a mop bucket full of water when his back tightened up. He indicated that he strained his back and had pain running down the right side and leg. Appellant stopped work on September 4, 2014. On October 2, 2014 OWCP accepted his claim for aggravation of displacement of lumbar intervertebral disc without myelopathy.

On May 2, 2015 appellant filed a claim for a schedule award (Form CA-7).

In support on the claim, appellant submitted an April 22, 2015 report from Dr. Behnam Myers, an osteopath and Board-certified orthopedic surgeon. Dr. Behman noted appellant's history of injury and treatment and indicated that he had reached maximum medical improvement (MMI). He explained that appellant had a whole body impairment of seven percent under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*).

By letter dated May 14, 2015, OWCP explained that they were in receipt of the treatment note from Dr. Myers recommending a schedule award. Appellant was advised that it had received his claim for a schedule award; however, current medical evidence was needed. OWCP explained that although the A.M.A., *Guides* provided guidelines for estimating impairment due to disorders of the spine, a schedule award was not payable under FECA for injury to the spine.² However, while the A.M.A., *Guides* did not provide a direct method for evaluating the extremity impairments based upon sciatic nerve impairments, *The Guides Newsletters* offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.³ Appellant was advised that his physician should provide a report that complied with the A.M.A., *Guides*.

OWCP then received a copy of Dr. Myer's April 22, 2015 report and his January 30, 2015 report, which did not discuss impairment.

By decision dated June 29, 2015, OWCP denied appellant's claim for a schedule award. It found that the medical evidence on file did not support a permanent impairment to a scheduled member or function of the body.

OWCP then received several treatment notes from Dr. Myers. They included a September 25, 2015 office visit note in which he reiterated his opinion that appellant reached MMI on April 22, 2015 and that his rating of seven percent was still valid according to Table 75 of the A.M.A., *Guides*. Dr. Myers explained that appellant had electromyography (EMG) scan studies and nerve conduction studies which revealed chronic and ongoing denervation at the S1 level, his symptomatology and subjective complaints correlated well with his physical examination and current nerve conduction studies.

On November 6, 2015 appellant requested reconsideration.

By decision dated December 1, 2015, OWCP denied appellant's request for reconsideration without a review of the merits as his request neither raised substantive legal questions nor included relevant and pertinent new evidence. It determined that the evidence was

² *Pamela J. Darling*, 49 ECAB 286 (1998).

³ *L.J.*, Docket No. 10-1263 (issued March 3, 2011).

an exact duplicate of evidence already part of the file or cumulative and thus it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains 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 OWCP; 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

Appellant disagreed with the denial of his claim for a schedule award and requested reconsideration on November 6, 2015.

Appellant does not make any argument that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the OWCP. However, he did submit a new medical report, dated September 25, 2015 from Dr. Myers, who opined that appellant had seven percent whole person impairment. OWCP denied reopening appellant’s case on the merits, finding that he did not raise substantive legal questions or include relevant and pertinent new evidence. The Board agrees. While the report from Dr. Myers is new, he merely reiterated his prior opinion he proffered in an earlier report. The report of Dr. Myers is not relevant, pertinent new evidence related to the issue of whether appellant was entitled to a schedule award. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that OWCP erroneously applied or interpreted a specific point of law, or advanced

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

⁷ *D.K.*, 59 ECAB 141 (2007).

a relevant new argument not previously submitted. Therefore, OWCP properly denied his request for reconsideration.

On appeal, appellant argues that he had submitted new evidence showing that he had nerve damage from his back injury. However, as explained, the medical evidence was not relevant and pertinent new evidence and was thus insufficient to require a merit review.

Regarding his claim for 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.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 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