

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

F.K., Appellant

and

**DEPARTMENT OF THE ARMY, SAVANNA
ARMY DEPOT, Savanna, IL, Employer**

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**Docket No. 17-0308
Issued: December 21, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 23, 2016 appellant filed a timely appeal from an August 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated November 9, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On June 17, 1997 appellant, then a 52-year-old purchasing agent, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her legs, arms, and back when her desk

¹ 5 U.S.C. § 8101 *et seq.*

leg fell off and the desk collapsed on her. On October 9, 1997 OWCP accepted her claim for lumbosacral strain. Appellant filed a claim for recurrence of disability (Form CA-2a) on December 17, 2002 alleging additional back pain. On January 28, 2004 OWCP accepted the additional condition of cervical radiculopathy as due to her June 17, 1997 work injury. By a July 15, 2008 decision, it also accepted thoracic strain and thoracic spasm. Appellant returned to light-duty work, but later retired on July 15, 2004.²

On January 4, 2005 appellant underwent magnetic resonance imaging (MRI) scans of the cervical, thoracic, and lumbar spines which demonstrated mild spondylosis of the cervical spine involving multiple levels. Her thoracic MRI scan was normal, while her lumbar MRI scan showed spondylosis predominately at L4-5 with evidence of disc height loss and mild canal stenosis. Appellant underwent additional lumbar and thoracic MRI scans on January 4, 2008 which were “essentially normal” and “unremarkable,” respectively. She had a cervical MRI scan on May 30, 2008 which showed mild-to-moderate spondylosis with no sites of neural impingement.

Appellant underwent electrodiagnostic testing on February 10, 2009 including electromyogram and nerve conduction velocity studies which demonstrated normal electrodiagnostic study of the left upper limb. A lumbar MRI scan on April 1, 2009 demonstrated degenerative changes with no evidence of disc herniation or central spinal stenosis as well as minimal broad-based posterior disc bulging at L4-5 with no significant nerve root impingement.

On April 23, 2009 Dr. Curtis Evenson, a physician Board-certified in pain medicine, reported appellant’s history of injury and noted her lower back pain with leg and thoracic pain. He diagnosed chronic lower pain with etiology difficult to access and possibly facet pain, as well as chronic pain with psychological overtones.

In a note dated May 21, 2010, Dr. Fred G. McQueary, a Board-certified orthopedic surgeon, described appellant’s history of injury and ongoing back pain. He noted that she received epidural steroid injections in 2000 and 2001. Appellant described her condition as 80 percent lumbar spine pain and 15 percent left leg pain with 5 percent right leg pain. Dr. McQueary found that her lower extremity reflexes and muscle strength was normal. He reviewed x-rays which demonstrated lumbar degenerative disc disease. Dr. McQueary diagnosed multiple level degenerative changes in the spine with facet arthropathy. He recommended conservative treatment.

Appellant underwent MRI scans on September 27, 2011 which were read as demonstrating mild degenerative disc disease of the cervical, thoracic, and lumbar spines.

Appellant filed a claim for a schedule award (Form CA-7) on October 28, 2014. In a letter dated November 12, 2014, OWCP informed her that additional information was necessary including a detailed medical report addressing her permanent impairment for schedule award purposes.

² Appellant’s original employing establishment duty station closed on March 18, 2000. She transferred to U.S. Army Engineer District, Kansas City, Missouri, effective October 10, 1999.

On October 27, 2014 appellant underwent x-rays of her whole spine which demonstrated mild scoliotic deformity in the lumbar spine, multilevel spurring, and mild multilevel thoracolumbar spondylosis. Dr. Joel Travis Jeffries, a Board-certified orthopedic surgeon, examined her on October 27, 2014 and noted her employment injury as well as her reports of neck, midback, and low back pain with left arm pain and left leg pain. He found diminished range of motion (ROM) in the cervical spine, mild bilateral grip strength weakness, make-break weakness of left elbow extension, but intact light touch sensation. Dr. Jeffries reported that appellant's thoracolumbar spine had mild-to-moderate mid-thoracic and low lumbar tenderness with no paraspinous muscle spasm. Appellant had limited lumbar ROM. Dr. Jeffries found make-break weakness of the left lower extremity with intact sensation to light touch. He reported that the sitting root test was negative bilaterally.

In a note dated December 15, 2014, appellant's physician, Dr. Mark W. Drymalski, a Board-certified physiatrist, noted appellant history of work injury in 1997 and described her ongoing back pain. He noted that her back pain radiated to her knee a few times a month and had gone down to her foot rarely. Dr. Drymalski found that appellant's lower extremity strength was normal and that her reflexes were symmetrical.

In a letter dated January 15, 2015, OWCP informed appellant that her medical evidence did not address whether she had reached maximum medical improvement (MMI). On February 12, 2015 Dr. Drymalski determined that she had reached MMI.

On June 9, 2015 OWCP referred appellant for a second opinion examination with Dr. Michael S. Clarke, a Board-certified orthopedic surgeon. In a report dated June 29, 2015, Dr. Clarke reviewed her history of injury and performed an examination. He found that appellant had no atrophy in her left lower extremity, with equal reflexes, and normal ROM. Dr. Clarke determined that she had degenerative changes in her spine that were commensurate with her age, body habitus, and work history. He diagnosed mild lumbar, dorsal, and cervical spondylosis, and no radiculopathy.

OWCP's medical adviser reviewed Dr. Clarke's report on September 23, 2015 and found that there was no evidence of permanent impairment to either appellant's upper or lower extremities as a result of her accepted employment injury.³

By decision dated November 9, 2015, OWCP denied appellant's claim for a schedule award finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member.

Following the November 9, 2015 decision, appellant submitted additional medical evidence. In a note dated October 31, 2015, Dr. Jeffrey Kerr, an osteopath, examined her due to chronic pain in the back and neck radiating into her legs and arm. He diagnosed acute

³ No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations. *W.D.*, Docket No. 10-0274 (issued September 3, 2010); *William Edwin Muir*, 27 ECAB 579 (1976). Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of whole person or the back or spine, as FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19). No claimant is entitled to a schedule award for the spine, but only to resulting impairments to the upper or lower extremities. *Rozella L. Skinner*, 37 ECAB 398 (1986).

exacerbation of chronic low back pain. On December 17, 2015 Dr. Jeffries found muscle spasms in appellant's back and diagnosed acute exacerbation of chronic low back pain.

Dr. Ossama Al-Assafeen, a Board-certified internist, examined appellant on February 3, 2016 and diagnosed acute exacerbation of chronic low back pain with sciatica.

Appellant had additional spine x-rays on April 22, 2016 which showed degenerative findings. Dr. Drymalski examined her on April 22, 2016 and noted that she reported worsening numbness in both feet, worse on the left. He found absent bilateral Achilles tendon reflexes. Dr. Drymalski diagnosed chronic neck and back pain from a work injury.

On May 25, 2016 Dr. Al-Assafeen again diagnosed acute exacerbation of chronic low back pain and noted that appellant's increased back pain began when she bent to tie her shoe.

Appellant requested reconsideration on July 8, 2016 and alleged that Dr. Clarke did not have time for a complete and intensive examination as he was planning to retire. She submitted a series of medical records from Cathy Gray, a family nurse practitioner, as well as multiple medical records addressing her various conditions from 1998 through 2015. Appellant submitted a duplicate copy of Dr. Al-Assafeen's May 25, 2016 report. She also submitted September 26, 2015 and June 1, 2016 chest x-rays.

By decision dated August 3, 2016, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁶ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁷

⁴ *Supra* note 1.

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608.

⁷ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

OWCP issued a November 9, 2015 merit decision denying appellant's claim for a schedule award. Appellant timely requested reconsideration on July 8, 2016. When the underlying compensation issue is a schedule award, an initial question is whether the claimant has submitted an application for reconsideration or has requested an increased schedule award. Even if appellant has requested reconsideration, if there is new and relevant evidence with respect to increased permanent impairment, then a claimant may be entitled to a merit decision on the issue,⁸ but when a claimant does not submit any relevant evidence with respect to increased impairment, then OWCP may properly determine that he or she has filed a request for reconsideration of a schedule award decision.⁹ In this case, she did not submit any relevant evidence with respect to increased permanent impairment and; therefore, OWCP properly reviewed her submission as a request for reconsideration.

As noted above, to require merit review, the request for reconsideration must set forth arguments or evidence that shows 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 by OWCP.¹⁰

The Board finds that appellant has not submitted argument or evidence that OWCP erroneously applied or interpreted a specific point of law. Appellant instead generally argued that Dr. Clarke, the second opinion physician, failed to conduct a complete examination. 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.¹¹ Because appellant did not provide any support for his allegation regarding the deficiencies of Dr. Clarke's examination, the Board finds that these arguments do not have a reasonable color of validity.¹² Appellant's argument is therefore insufficient to require OWCP to reopen her schedule award claim for consideration of the merits.

Appellant also provided additional medical evidence in support of her request for reconsideration. The Board finds that this evidence is irrelevant to the specific issue for which OWCP denied her claim and therefore insufficient to require OWCP to reopen her claim for consideration of the merits. The medical evidence submitted by appellant either predated her date of MMI as determined by her physician, addressed another part of her body, or was not

⁸ See *Linda T. Brown*, 51 ECAB 115 (1999).

⁹ See *J.M.*, Docket No. 15-1634 (issued September 16, 2016); *W.J.*, Docket No. 12-1746 (issued February 5, 2013).

¹⁰ *Supra* note 5.

¹¹ *M.E.*, Docket No. 07-1189 (issued September 20, 2007).

¹² See *O.W.*, Docket No. 09-0427 (issued November 19, 2009); *Jennifer A. Guillary*, 57 ECAB 485 (2006).

signed by a physician. Healthcare providers such as nurse practitioners and physical therapists are not considered physicians under FECA and their reports and opinions do not constitute competent medical evidence sufficient to establish a medical condition, disability, or causal relationship.¹³

As appellant did not submit relevant and pertinent new evidence or a relevant legal argument, OWCP properly declined to reopen her claim for review of the merits of her claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT that August 3, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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

¹³ 5 U.S.C. § 8101(2); *see also* *G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).