United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 16-1371**
	)	**Issued: February 3, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, El Paso, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2016 appellant filed a timely appeal of a March 22, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated March 19, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 10, 1999 appellant, then a 54-year-old customs technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained a low back injury pushing and pulling while retrieving documents from the storage room. OWCP accepted the claim for lumbar sprain on October 4, 1999. Appellant underwent a lumbar magnetic resonance imaging (MRI) scan on October 18, 1999 which demonstrated L5-S1 grade 1, with anterolisthesis of L5 on S1, and a mild-to-moderate annular disc bulge. She underwent an open reduction, decompression laminectomy, and interbody fusion at L5-S1 on March 3, 2000. Appellant returned to light-duty work on August 28, 2000. OWCP accepted the additional conditions of aggravation of spondylosis at L5-S1 and right foot Morton's neuroma as a result of an altered gait due to her back problems.

On October 28, 2000 OWCP reduced appellant's wage-loss compensation based on her actual earnings as a modified customs technician.

Appellant filed a claim for a schedule award on February 25, 2002 and submitted medical evidence. Her attending physician, Dr. George W. Wharton, a Board-certified orthopedic surgeon, opined on February 19, 2002 that she had 20 percent permanent impairment of her spine.

In a decision dated August 27, 2003, OWCP denied appellant's claim for a schedule award, finding that she failed to establish permanent impairment to a scheduled member.

Appellant underwent electromyogram (EMG) and nerve conduction velocity (NCV) study on October 25, 2004 which demonstrated right-sided L5 radiculopathy. An additional lumbar MRI scan on November 17, 2004 demonstrated second degree spondylolisthesis at L5-S1 with minimal disc desiccation at L5-S1 and L4-5.

On July 22, 2005 appellant underwent surgical removal of retained hardware, exploration of fusion, and grafting and treatment of screw holes. She underwent an additional lumbar MRI scan on March 3, 2008 which demonstrated a mild disc bulge at L4-5. Appellant retired from the employing establishment in October 2005. Dr. Wharton provided her work restrictions on March 20, 2008. On July 9, 2008 appellant elected to receive FECA benefits effective that date.

OWCP proposed to terminate appellant's wage-loss compensation benefits in a letter dated March 28, 2011, allotting her 30 days to submit additional evidence relative to employment-related disability. Appellant did not respond within that time.

On May 31, 2011 OWCP terminated appellant's wage-loss compensation benefits, effective June 4, 2011. Appellant requested reconsideration. In a decision dated September 19, 2011, it denied modification of the May 31, 2011 termination decision.

Appellant underwent an additional lumbar spine MRI scan on May 25, 2011 which demonstrated grade 1 to 2 anterolisthesis at L4-5, bilateral laminectomies at L5 with stable grade 1 to 2 anterolisthesis. She underwent repeat NCV testing on July 5, 2011 and November 15, 2016, which demonstrated progression of L4-5 bilateral lumbar radiculopathy and chronic right L5 radiculopathy resulting in mild active motor denervation.

Dr. Charles N. Brooks, a Board-certified orthopedic surgeon, examined appellant on April 6, 2011. He found that her lumbar radiculopathy had resulted in partial use of her right lower extremity. Dr. Brooks indicated that appellant experienced severe back pain and right lower extremity pain and numbness. He applied provisions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*) and found that appellant had functional history grade modifier of 3 due pain with less than normal activity, physical examination grade modifier of 1 due to one centimeter of atrophy, and clinical studies grade modifier of 2 based on nerve root radiculopathy on EMG. On July 6, 2011 Dr. Brooks applied the appropriate A.M.A., *Guides* provisions and diagnosed degenerative disc disease and disc bulges of the lumbar spine, as well as spondylolisthesis of L5-S1 and right L5 radiculopathy. He found that appellant had moderate sensory and motor deficits of the L5 nerve root. Dr. Brooks applied the A.M.A., *Guides* and determined that she had 16 percent permanent impairment of the right lower extremity. On July 26, 2011 OWCP's medical adviser reviewed Dr. Brooks' report and agreed with his impairment rating.

On August 11, 2011 OWCP granted appellant a schedule award for 16 percent permanent impairment of her right lower extremity.

Appellant filed a recurrence claim (Form CA-2a) on October 12, 2011. An OWCP medical adviser recommended authorizing additional back surgery on December 12, 2011. OWCP accepted the additional conditions of displacement of lumbar intervertebral disc, lesion of the right plantar nerve, and acceleration of degenerative disease at L4-5 on December 16, 2011.

OWCP entered appellant on the periodic rolls on December 28, 2011. On February 1, 2012 appellant underwent an L4-5 anterolateral interbody fusion.

Appellant underwent an additional lumbar MRI scan on September 6, 2012 which demonstrated post-fusion changes at L4-5 and L5-S1 with no evidence of nerve root impingement.

In a report dated April 6, 2013, Dr. Aleksandar Curcin, completed a second opinion report on behalf of OWCP and found that appellant's low back pain had resolved, but that she continued to experience ongoing numbness and dysesthesias in the right lower extremity from the posterior thigh down to the foot and in the left lower extremity in the big toe. He reported normal lower extremity muscle strength testing and intact sensory examination. Dr. Curcin noted that appellant's accepted conditions were ongoing and that she continued to experience residual pain in the bilateral lower extremities. He found that she had reached maximum medical improvement. Dr. Curcin opined that appellant was partially disabled from her date-of-injury position and provided work restrictions.

OWCP referred appellant for vocational rehabilitation services on June 3, 2013. On February 26, 2014 it proposed to reduce her wage-loss compensation benefits finding that the vocational rehabilitation counselor and the weight of the medical evidence established that she could perform the position of secretary.

[2] A.M.A., *Guides*, 6th ed. (2009).

By decision dated March 31, 2014, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as a secretary.

Appellant underwent an EMG on May 23, 2014 which demonstrated right peroneal neuropathy with abnormalities in the right tibialis anterior and peroneus longus. On August 27, 2014 she filed a claim for compensation (Form CA-7) requested a schedule award. Through a letter dated September 8, 2014, OWCP requested that appellant provide medical evidence in accordance with the A.M.A., *Guides*.

Dr. Eric S. Smith, a physician Board-certified in occupational medicine and appellant's attending physician, completed a report on September 30, 2014 addressing appellant's permanent impairment. He reviewed her diagnostic studies and Dr. Brooks' July 6, 2011 impairment rating, applied the A.M.A., *Guides*, and found that she had 17 percent permanent impairment of her right lower extremity due to increased functional history grade modifier as she used a cane on a regular basis.

OWCP's medical adviser reviewed the medical evidence on December 15, 2014 and found disagreement between Dr. Smith and Dr. Curcin regarding appellant's findings on examination and the extent of her permanent impairment for schedule award purposes.

OWCP referred appellant for a second opinion evaluation with Dr. William Dinenberg, a Board-certified orthopedic surgeon, on February 3, 2015. In a February 18, 2015 report, Dr. Dinenberg noted that she had two centimeters of calf atrophy and decreased sensation on the posteromedial aspect of the right calf. He noted loss of muscle strength in dorsi and plantar flexion of the right ankle. Dr. Dinenberg based appellant's impairment rating on L5 radiculopathy. He found that she had mild motor and sensory loss. Dr. Dinenberg found that appellant had functional history grade modifier of 2, clinical studies grade modifier of 0, and that the default grade C was used for both the sensory and motor deficits. He found that she had a total of six percent permanent impairment of her right lower extremity due to sensory and motor deficits in the L5 distribution on the right.

OWCP's medical adviser reviewed Dr. Dinenberg's report on March 10, 2015 and agreed with his assessment of appellant's permanent impairment for schedule award purposes.

In a decision dated March 19, 2015, OWCP denied appellant's claim for an additional schedule award finding that the weight of the medical evidence established that she had no more than 16 percent permanent impairment of her right leg for which she had received a schedule award.

Appellant requested reconsideration of the March 19, 2015 decision on March 9, 2016. She resubmitted Dr. Smith's September 30, 2014 report. On April 3, 2015 Dr. Smith reviewed Dr. Dinenberg's report and disagreed with those findings and conclusions. He opined that appellant had a higher motor strength deficit with objective findings of atrophy. Dr. Smith concluded, "I stand by my previous rating."

Dr. Smith completed a report dated May 28, 2015 and reviewed new electrodiagnostic studies dated April 28, 2015, which he found were unchanged. On July 20, 2015 he continued to diagnose clinical right L5 radiculopathy with decrease sensation in the right L5 distribution and

calf atrophy, weakness of ankle dorsiflexion. Dr. Smith opined that appellant continued to be disabled. Appellant underwent an additional MRI scan on September 8, 2015 which demonstrated no change from her 2012 study. On September 14, 2015 Dr. Smith diagnosed severe chronic low back pain with right radiculopathy and recommended a spinal cord stimulator. He completed a note on November 13, 2015 and found severe chronic low back pain with leg atrophy. In a note dated January 8, 2016, Dr. Smith diagnosed chronic severe low back pain with residuals following spine surgeries as well as meniscal tear in the right knee. He examined appellant on February 18, 2016 regarding her request for reconsideration and opined that she was totally disabled. On March 4, 2016 Dr. Smith found that she had significant low back pain with radicular symptomatology and atrophy of her lower extremities.

Dr. Barry Landau, a Board-certified neurosurgeon, examined appellant on November 4, 2015 due to gradually increasing right leg pain. He found that her motor strength was normal in all upper and lower extremity muscle groups with intact sensation. Dr. Landau also reported that appellant's gait pattern was normal. He noted that her September 8, 2015 MRI scan showed no change from 2012. Dr. Landau diagnosed residual right leg pain and recommended pool exercise therapy or a dorsal column spinal cord stimulator.

By decision dated March 22, 2016, OWCP denied appellant's request for reconsideration of the merits finding that she failed to submit new evidence or argument in support of her claim for an additional schedule award. It found that the additional reports from Drs. Smith and Landau were cumulative, repetitive, and substantially similar to evidence previously considered.

LEGAL PRECEDENT

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.[3] Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does 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.[4] 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.[5]

[3] 20 C.F.R. § 10.606(b)(3).

[4] *Id.* at § 10.608.

[5] *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 on the merits pursuant to 5 U.S.C. § 8128(a).

OWCP issued a merit decision on March 19, 2015 denying appellant's claim for an additional schedule award finding that the weight of the medical evidence established that she had no more than 16 percent permanent impairment of her right lower extremity for which she had received a schedule award. It based its decision on medical evidence, including review of Dr. Smith's September 30, 2014 report finding that she had 17 percent permanent impairment of her right lower extremity.

In support of her request for reconsideration, appellant resubmitted Dr. Smith's September 30, 2014 report as well as a note dated April 3, 2015 in which he opined that he continued to support the September 30, 2014 impairment rating. These notes do not constitute relevant and pertinent new evidence as OWCP had previously considered the September 30, 2014 report prior to reaching the March 19, 2015 schedule award determination.[6] Appellant also submitted a series of treatment notes from Dr. Smith dated May 28, 2015 through March 4, 2016. These notes did not specifically address her impairment for schedule award purposes, instead focusing on her total disability for work.[7] Therefore, these notes are not relevant and pertinent new evidence addressing the issue for which appellant's claim was denied and are insufficient to require OWCP to reopen her claim for consideration of the merits of an increased schedule award. Appellant also submitted a report dated November 4, 2015 from Dr. Landau addressing her condition. Dr. Landau noted that her September 8, 2015 MRI scan showed no change from 2012. This report, however, did not address the central issue of whether appellant had more than 16 percent permanent impairment of her right leg for which she had received a schedule award. Dr. Landau did not address her permanent impairment and indicated that there was no change in her injury-related condition which could result in an additional schedule award.[8]

Appellant did not comply with the requirements of section 10.606(b)(3) and her request for reconsideration was not sufficient to require OWCP to reopen her claim for reconsideration of the merits.

CONCLUSION

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

[6] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case. *See M.H.*, Docket No. 16-1382 (issued December 5, 2016); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[7] *See D.G.*, Docket No. 16-1009 (issued October 24, 1986); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

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

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2017
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