

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

J.S., Appellant

and

**GOVERNMENT PRINTING OFFICE,
Washington, DC, Employer**

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**Docket No. 17-0867
Issued: October 24, 2017**

Appearances:
*Wayne Johnson, Esq., for the appellant*¹
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 March 10, 2017 appellant, through counsel, filed a timely appeal from a September 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision of OWCP dated September 14, 2015, to the filing of this appeal, pursuant to the Federal Employees'

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.

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

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 asserts that appellant's claims for a recurrence of disability and schedule award were improperly denied.

FACTUAL HISTORY

OWCP accepted that on June 8, 2012 appellant, then a 44-year-old fork/clamp truck operator, sustained left ankle ligament instability when he slipped and rolled his left ankle on fluid on the floor at work. He stopped work on the date of injury and returned to regular-duty work on October 2, 2012.

On August 12, 2013 OWCP granted appellant a claim for a schedule award (Form CA-7) for 11 percent permanent impairment of the left lower extremity based on a July 10, 2013 medical opinion of an attending physician, Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon and an OWCP district medical adviser (DMA). The period of the award ran from February 18 to September 27, 2013.

In a September 10, 2013 letter postmarked September 12, 2013 and received on September 18, 2013, appellant requested a telephone hearing with an OWCP hearing representative. In an October 30, 2013 decision, OWCP denied appellant's request for a hearing because it was not timely filed within 30 days of its August 12, 2013 decision. It also exercised its discretion and determined that the issue in the case could equally well be addressed through the reconsideration process.

On November 15, 2013 appellant filed a recurrence of disability claim (Form CA-2a) commencing on October 29, 2013, which was causally related to his accepted June 8, 2012 employment-related injury. OWCP, in a January 6, 2014 decision, denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish that he was disabled due to a material worsening of his accepted work-related condition.

In an undated letter, received by OWCP on March 6, 2014, appellant requested reconsideration of the January 6, 2014 recurrence decision. He claimed that he sustained a new

² 5 U.S.C. § 8101 *et seq.*

³ Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). By order dated July 25, 2017, the Board exercised its discretion and denied the request, finding that the arguments presented on appeal could adequately be addressed based on review of the case record. *Order Denying Oral Argument*, Docket No. 17-0867 (issued July 25, 2017). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

left lower limb injury due to the accepted June 8, 2012 work injury. Appellant also requested that his claim be expanded to include the acceptance of right hip and leg, and lower back injuries.

In support of his reconsideration request, appellant submitted an occupational disease claim (Form CA-2) alleging that he sustained thoracic lumbosacral neuritis and radiculitis, displacement of intervertebral disc without myelopathy, contusion of the left foot, lumbosacral joint sprain, enthesopathy of the right hip, and post-traumatic neuritis of the left foot as a result of the June 8, 2012 employment incident. He alleged that he first became aware of these conditions and their relationship to his employment on October 28, 2013.

On April 2, 2014 appellant requested reconsideration of the August 12, 2013 schedule award decision.

In a May 15, 2014 decision, OWCP denied modification of the January 6, 2014 recurrence decision. It found that the medical evidence appellant submitted addressed his back condition which was not accepted as work related and, thus, he did not have a recurrence of disability causally related to his accepted June 8, 2012 work injury. On May 28, 2014 appellant requested reconsideration of this decision. OWCP, in a June 3, 2014 decision, denied reconsideration, finding that appellant did not raise substantive legal questions or include new and relevant evidence sufficient for further merit review.

In a June 11, 2014 decision, OWCP denied modification of the August 12, 2013 schedule award decision, finding the DMA's opinion continued to carry the weight of the medical evidence. On June 23, 2014 appellant requested reconsideration.

OWCP received additional medical evidence, which included a medical report dated July 21, 2014 and a progress note dated October 29, 2014 from Dr. Eric L. Weisbrot, a family practitioner. Dr. Weisbrot noted his history of injury which included the June 8, 2012 employment injury, but indicated that the date of injury was June 6, 2012, and a September 27, 2014 fall at home. He examined appellant and diagnosed chronic causalgia of the lower limb, chronic displacement of a lumbar intervertebral disc without myelopathy, and chronic sprain and strain of unspecified site of the left ankle. In the October 29, 2014 progress note, Dr. Weisbrot advised that appellant was unable to work from October 28, 2014 through January 14, 2015. In the July 21, 2014 report, he opined that the diagnosed conditions were causally related to the June 6, 2012 accident. Dr. Weisbrot noted that appellant had been off work since October 28, 2013 and that he could engage in activity as tolerated. On October 31, 2014 OWCP received a February 26, 2014 report from Dr. Gary Pushkin, a Board-certified orthopedic surgeon who reported that appellant had no permanent impairment of his left leg.

In a November 20, 2014 decision, OWCP denied modification of its prior schedule award decision as the evidence presented was insufficient to establish that appellant had more than 11 percent permanent impairment of the left leg. It also found that, based on Dr. Pushkin's report, further development of the medical evidence was required as that physician reported that appellant had no impairment of the left lower extremity.

OWCP, in January 16 and March 10, 2015 decisions, denied modification of its prior recurrence decisions as the medical evidence was insufficient to establish that appellant sustained a recurrence of disability on October 29, 2013 or a back condition causally related to his accepted left ankle condition.

On January 22, 2015 OWCP notified appellant that a second opinion medical examination had been scheduled in his claim.

After further development of the medical evidence on the extent of appellant's left leg impairment, OWCP, in a March 19, 2015 letter, informed appellant that it had rescinded its November 20, 2014 decision. It issued a decision on March 19, 2015, finding that the medical evidence was sufficient to establish that appellant had no more than 11 percent permanent impairment of the left lower extremity based on the second opinion report of Dr. Robert A. Smith, a Board-certified orthopedic surgeon and an OWCP referral physician.

In a June 26, 2015 letter received on June 30, 2015, appellant requested reconsideration of the March 19, 2015 schedule award decision. In a June 28, 2015 letter also received on June 30, 2015, he requested reconsideration of the March 10, 2015 recurrence decision.

OWCP, in a September 14, 2015 decision, denied modification of its March 10, 2015 recurrence decision. It again found that the medical evidence submitted by appellant was insufficient to establish that he sustained a back condition causally related to the accepted June 8, 2012 employment injury.

In a separate September 14, 2015 decision, OWCP denied modification of its March 19, 2015 schedule award decision. It found that the medical evidence submitted by appellant was insufficient to outweigh the opinions of the DMA and Dr. Smith.

On February 11, 2016 appellant requested reconsideration, a review of the written record, before an OWCP hearing representative, a decision with appeal rights concerning his occupational disease claim filed on October 28, 2013, and an amended schedule award. He contended that he sustained additional injuries for which he filed the October 28, 2013 Form CA-2 and which resulted in greater permanent impairment and not a recurrence of disability as adjudicated by OWCP.

In a May 11, 2016 decision, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that it was not clear which September 14, 2015 decision he was appealing.

OWCP received a May 19, 2016 progress note in which Dr. Weisbrot examined appellant and again diagnosed chronic causalgia of the lower limb, chronic displacement of a lumbar intervertebral disc without myelopathy, and chronic sprain and strain of unspecified site of the left ankle.

In a June 13, 2016 letter received on June 14, 2016, appellant requested reconsideration of the May 11, 2016 decision. He again requested a formal decision regarding his October 28, 2013 Form CA-2 claim. Appellant asserted that OWCP either had abused its discretion by continuously denying his claim as a recurrence claim or erred in not assigning a file number to

his Form CA-2 claim. He contended that the medical evidence of record was sufficient to establish his claim. OWCP also received duplicate copies of Dr. Weisbrot's July 21, 2014 report and October 29, 2014 progress note.

By decision dated September 12, 2016, OWCP denied further merit review of appellant's claim. It found that his request for reconsideration neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁴ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

OWCP issued an August 12, 2013 merit decision granting appellant a schedule award for 11 percent permanent impairment of the left lower extremity due to his accepted June 8, 2012 employment-related left ankle ligament instability condition. In a January 6, 2014 decision, it denied his claim for a recurrence of disability commencing on October 29, 2013 due to the accepted work injury. Subsequently, OWCP issued a series of decisions, denying modification of both decisions. It rescinded its November 20, 2014 decision, denying modification of its schedule award decision for further development of the medical evidence. In a March 19, 2015 decision, OWCP found that the weight of the medical evidence established that appellant had no more than 11 percent permanent impairment of the left leg. By decision dated September 14, 2015, it denied modification of this decision. In a separate decision also dated September 14, 2015, OWCP denied modification of its recurrence decision. On May 11, 2016 it denied appellant's request for a merit review of his claim as it was not clear which September 14, 2015 decision he was appealing. On June 14, 2016 appellant requested reconsideration. OWCP declined his request for reconsideration in a September 12, 2016 nonmerit decision.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

The Board does not have jurisdiction over OWCP's merit decisions and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issues on reconsideration are medical in nature, whether appellant met his burden of proof to establish that he had more than 11 percent permanent impairment of the left lower extremity, for which he previously received a schedule award, and whether he sustained a recurrence of disability commencing October 29, 2013 due to his accepted work condition.

The Board finds that in his June 14, 2016 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. He reiterated his contention that OWCP should adjudicate his October 28, 2013 Form CA-2 claim as he sustained a new injury due to the accepted June 8, 2012 employment injury and not a recurrence of disability. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Therefore, appellant's contentions are insufficient to warrant further merit review of his claim.

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. Appellant resubmitted copies of Dr. Weisbrot's July 21, 2014 report and October 29, 2014 progress note. As noted, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁹ The Board finds, therefore, that the evidence submitted by appellant is insufficient to reopen his claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁰

On appeal counsel argues the merits of appellant's claim and asserts that his claims for a recurrence of disability and schedule award were improperly denied. The Board, as noted above, only has jurisdiction over OWCP's September 12, 2016 nonmerit decision which denied appellant's request for reconsideration and, therefore, is precluded from conducting a merit review.

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

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *Id.*

¹⁰ *See A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

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 September 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2017
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