United States Department of Labor
Employees' Compensation Appeals Board

P.K., Appellant	)	
and	)	**Docket No. 17-1743**
	)	**Issued: May 18, 2018**
DEPARTMENT OF THE AIR FORCE, HANSCOM AIR FORCE BASE, Bedford, MA, Employer	)	

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 August 8, 2017 appellant filed a timely appeal from a May 31, 2017 merit decision and a July 25, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than eight percent permanent impairment of each upper extremity, for which he previously received schedule

[1] 5 U.S.C. § 8101 *et seq.*

[2] The case record provided to the Board includes evidence received after OWCP issued its July 25, 2017 decision. Appellant also provided additional medical evidence with his appeal. The Board's review of a case is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

awards; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 29, 1993 appellant, then a 38-year-old firefighter, injured his spine when lifting weights on a universal gym while in the performance of duty. In May 1993, OWCP accepted his traumatic injury claim (Form CA-1) for vertebral subluxation complex of the cervical, thoracic, and sacral spines. On April 11, 1996 appellant injured his lower back when lifting a 35-foot extension ladder. OWCP accepted appellant's April 11, 1996 traumatic injury claim for subluxation of the lumbar spine under File No. xxxxxx134.[3]

On November 9, 2004 appellant underwent anterior discectomy and fusion surgery at C4-5 and C5-6. He stopped work on November 9, 2004 and received disability compensation on the daily rolls beginning that date.[4] On October 4, 2005 appellant underwent laminectomy at C5-6 with bilateral foraminotomies of his C5-6 nerve roots. These procedures were approved by OWCP.

In a February 22, 2006 report, Dr. Elizardo P. Carandang, a Board-certified physiatrist, reported the findings of his physical examination on that date and determined that appellant had 12 percent whole person permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (A.M.A., *Guides*).

Appellant voluntarily retired from the employing establishment effective April 30, 2006.

In October 2006, OWCP referred appellant's case to Dr. George L. Cohen, a Board-certified internist and OWCP medical adviser. It requested that Dr. Cohen review the evidence of record and provide an opinion on the extent of appellant's upper extremity permanent impairment. In an October 30, 2006 report, Dr. Cohen indicated that he had reviewed the evidence of record, including the February 22, 2006 physical examination findings of Dr. Carandang, and determined that appellant had eight percent permanent impairment of each upper extremity under the A.M.A., *Guides* (5th ed. 2001). He rated appellant for bilateral upper extremity sensory deficits/pain involving the C5 and C6 nerve roots.

In a February 5, 2007 decision, OWCP granted appellant a schedule award for eight percent permanent impairment of each upper extremity, for a total of 16 percent. The award covered a period of 49.92 weeks from July 9, 2006 through June 23, 2007.[5]

[3] OWCP administratively combined appellant's two traumatic injury claims and designated File No. xxxxxx875 as the master file.

[4] Appellant received disability compensation on the periodic rolls beginning November 28, 2004. He last received disability compensation on July 8, 2006.

[5] In August 10, 2007 and July 30, 2008 decisions, OWCP denied modification of its February 5, 2007 schedule award decision.

In a June 30, 2014 report, Dr. Edward R. Wong, a Board-certified internist, indicated that appellant reported that one month prior he was working on brake linings under a car and noticed pain which radiated from his neck to his right chin, right shoulder, right chest wall, and left forearm.[6] He reported findings of his June 30, 2014 examination and recommended that appellant be referred to a neurosurgeon.

On August 11, 2014 appellant filed a notice of recurrence (Form CA-2a) claiming that on May 31, 2014 he sustained a recurrence due to "Medical Treatment Only." He asserted that, since May 31, 2014, he had experienced a return of the symptoms from his original work-related cervical condition.

In an August 13, 2014 report, Dr. Robert G. Whitmore, a Board-certified neurosurgeon, noted that appellant reported that he had been doing well since cervical surgery in 2004 and 2005, but had recently developed numbness that radiated from his right neck into his right cheek and shoulder, and occasionally radiated from his left neck down into his left hand. He reported the findings of his August 13, 2014 examination and diagnosed cervical disc degeneration and right C4 radiculopathy.[7]

In a February 18, 2015 decision, OWCP accepted appellant's recurrence claim for additional medical treatment. It also advised appellant that his accepted conditions included brachial neuritis or radiculitis, closed dislocation of multiple cervical vertebrae, and cervical intervertebral disc displacement without myelopathy.

Appellant began to participate in periodic physical therapy sessions, which OWCP authorized.

On August 12, 2015 appellant filed a claim for an additional schedule award (Form CA-7).

In an August 14, 2015 letter, OWCP requested that Dr. Whitmore provide a rating of the permanent impairment of appellant's upper extremities under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009). It provided Dr. Whitmore with a copy of *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/ August 2009), which was to be applied to evaluate peripheral nerve impairments to the extremities resulting from spinal injuries. OWCP provided Dr. Whitmore 30 days to produce such an evaluation. In another August 14, 2015 letter, OWCP advised appellant of the need to submit medical evidence evaluating his permanent impairment under the sixth edition of the A.M.A., *Guides* and it provided him 30 days to submit such evidence.

Appellant submitted a July 1, 2015 report from Dr. Arthur J. Lee, a Board-certified neurosurgeon, who reported examination findings and diagnosed right C4 radiculopathy. On July 6, 2015 Dr. Lee described his application of a cervical steroid injection on that date.

[6] There is an approximate six-year gap in the medical records between July 2008 and June 2014.

[7] The findings of a July 10, 2014 magnetic resonance imaging (MRI) scan contained an impression of moderate central canal stenosis at C3-4 with enhancing edema signal.

In a September 1, 2015 report, Dr. Whitmore indicated that appellant might be a candidate for a repeat fusion or posterior operation and recommended that he undergo a computerized tomography (CT) scan.

The findings of a September 9, 2015 CT scan of appellant's cervical spine contained an impression of mild compressive C3-4 central stenosis with degenerative bilateral C4 neural foraminal stenosis, post C4-5 and C5-6 fusion surgery with no significant residual canal or neural foraminal compromise at the operated levels, and mild C6-7 degenerative disc disease without central canal or neural foraminal stenosis.

On September 14, 2015 Dr. Whitmore indicated that he had reviewed appellant's diagnostic testing and recommended that he undergo C3 through T1 laminectomy and fusion surgery with bilateral formaninotomies of the C7 nerve roots.[8]

The findings of September 17, 2015 electromyogram (EMG) testing of appellant's upper extremities revealed evidence of chronic right C5 through C7 radiculopathies without evidence of ongoing denervation.

In a December 23, 2015 decision, OWCP denied appellant's claim for schedule award compensation due to additional permanent impairment of his upper extremities.[9] It noted that the medical evidence of record supported a finding that his condition had not reached a fixed and permanent state, a requirement for payment of a schedule award. OWCP indicated that Dr. Whitmore had requested approval for further cervical surgery and advised appellant that, once an attending physician found he reached maximum medical improvement (MMI), he should submit another schedule award claim.[10]

In a January 11, 2016 report, OWCP's medical adviser found that appellant's condition did not meet the criteria for the proposed cervical surgery, noting that appellant did not have a pattern of radiculopathy explained by the diagnostic testing. On February 1, 2016 OWCP's medical adviser indicated that he had reviewed additional medical reports and now felt that appellant's condition met the criteria for the proposed cervical surgery.

OWCP authorized the requested cervical surgery and, on April 7, 2016, Dr. Whitmore performed C5 to T1 posterior lateral cervical fusion, C3-4 laminectomy, bilateral C5 and C7 foraminotomies, and right C4 foraminotomy. Appellant submitted a number of medical reports from several attending physicians, including Dr. Whitmore and Dr. Lee, which described the follow-up treatment he received for his April 7, 2016 surgery. These documents included a

[8] On September 19, 2015 OWCP received a request for approval of such surgery. On December 21, 2015 it referred appellant's case to an OWCP medical adviser for an opinion regarding whether the requested cervical surgery was necessitated by appellant's accepted medical conditions.

[9] OWCP did not explicitly acknowledge that on February 5, 2007 appellant received a schedule award for eight percent permanent impairment of each upper extremity.

[10] OWCP noted that appellant's case had been referred to an OWCP medical adviser for an opinion regarding whether the requested cervical surgery was necessitated by accepted medical conditions.

March 25, 2016 blood and urine testing report and a March 25, 2016 report of John DeJesus, an attending physician assistant.

In an August 10, 2016 report, Dr. Whitmore indicated that appellant was recovering well from his April 7, 2016 surgery and instructed him to return in three months for a follow-up appointment.

On October 28, 2016 appellant filed another claim for a schedule award (Form CA-7).

In a November 10, 2016 letter, OWCP requested that appellant submit a report evaluating his upper extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

Appellant submitted additional reports, dated in April 2016, regarding the follow-up care for his April 7, 2016 surgery. These reports were authored by Dr. Whitmore, Janelle Sherry, a nurse practitioner, and Mr. DeJesus, Tracy Cagnina, and David Melzack, physician assistants.

In a November 16, 2016 report, Dr. Whitmore indicated that appellant was recovering well from his April 7, 2016 surgery and instructed him to return in six months for a follow-up appointment.

In a February 15, 2017 letter, OWCP advised appellant that he had not submitted medical evidence to support that he was entitled to additional schedule award compensation. It provided him 15 days to submit such evidence. Appellant resubmitted several medical reports which had previously been considered by OWCP.

By May 31, 2017 decision, OWCP denied appellant's claim for schedule award compensation due to additional permanent impairment of his upper extremities.[11] It found that he did not submit medical evidence establishing work-related permanent impairment of his upper extremities under the standards of the sixth edition of the A.M.A., *Guides*. OWCP indicated that appellant was provided multiple opportunities to submit such evidence, but failed to do so.

In a letter received on June 9, 2017, appellant requested reconsideration of OWCP's May 31, 2017 decision. In support of his reconsideration request, appellant submitted a previously considered March 25, 2016 report of Mr. DeJesus and a March 25, 2016 blood and urine testing report. In a March 25, 2016 report, Dr. Karen L. Reuter, a Board-certified radiologist, reported the findings of her examination of appellant's lungs.

In a May 17, 2017 report, Dr. Whitmore reported examination findings, noting that strength and sensation were intact in appellant's upper and lower extremities. He recommended that appellant undergo electromyogram (EMG) testing.

[11] OWCP again did not acknowledge that, on February 5, 2007, appellant received a schedule award for eight percent permanent impairment of each upper extremity.

In an April 7, 2016 report, Dr. Barbara A. Landesman, an attending Board-certified neurologist, reported the findings of EMG testing obtained for appellant's upper extremities on that date. She noted that the testing showed intermittent left deltoid and right biceps EMG activity.

In a July 25, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence he submitted on reconsideration was similar to previously submitted evidence because it did not contain an impairment rating for his upper extremities.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[12] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[13] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[14]

Neither FECA nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[15] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[16] The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.[17] It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[18]

[12] 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[13] 20 C.F.R. § 10.404.

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

[15] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[16] *Supra* note 14 at *Claims*, Chapter 2.808.5c(3).

[17] The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

[18] *See supra* note 14 at Chapter 3.700, Exhibit 4.

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[19] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[20]

ANALYSIS -- ISSUE 1

OWCP accepted that on January 29, 1993 appellant sustained vertebral subluxation complex of his cervical, thoracic, and sacral spines, brachial neuritis or radiculitis, closed dislocation of multiple cervical vertebrae, and cervical intervertebral disc displacement myelopathy. In a February 5, 2007 decision, it granted him a schedule award for eight percent permanent impairment of each upper extremity. Appellant later claimed that he had increased permanent impairment of his upper extremities due to his accepted employment conditions. In decisions dated December 23, 2015 and May 31, 2017, OWCP denied appellant's claim for schedule award compensation due to additional permanent impairment of his upper extremities. In the former decision, OWCP found appellant had not yet reached MMI, and in the latter decision it found that he did not submit medical evidence establishing work-related permanent impairment of his upper extremities.

The Board finds that appellant has not met his burden of proof to establish more than eight percent permanent impairment of each upper extremity, for which he previously received schedule awards.

Appellant submitted numerous reports in support of his claim for increased schedule award compensation. Most of these reports, including reports of Dr. Whitmore and Dr. Lee, related to the follow-up treatment he received after April 7, 2016 cervical surgery. Other reports memorialized diagnostic testing that appellant underwent. However, none of these reports contained any type of impairment rating of the upper extremities. OWCP provided appellant multiple opportunities to provide medical evidence establishing work-related permanent impairment of his upper extremities under the standards of the sixth edition of the A.M.A., *Guides*, but he failed to submit such evidence as requested.[21] Therefore, appellant failed to establish his claim for increased schedule award compensation beyond the eight percent permanent impairment of each upper extremity for which he previously received compensation.

[19] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[20] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. *Supra* note 14 at Chapter 2.805.3a(1) (March 2017).

[21] Appellant submitted reports of Ms. Sherry, a nurse practitioner, and of Mr. DeJesus, Ms. Cagnina, and Ms. Melzack, physician assistants. The Board notes that these reports are of no probative value on the issue of the present case because such reports of nonphysicians do not constitute probative medical evidence under FECA. *See supra* notes 19 and 20.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.[22]

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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.[23] If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.[24] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[25]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[26] For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System (iFECS).[27] If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.[28]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[29] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[30]

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[22] 5 U.S.C. § 8128(a).

[23] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[24] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[25] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[26] *Id*. at § 10.607(a).

[27] *Supra* note 14 at Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

[28] *Id.* at Chapter 2.1602.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

[29] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[30] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of OWCP's May 31, 2017 decision on June 9, 2017.

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 the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did he advance a new and relevant legal argument not previously considered by OWCP. The underlying issue in this case was whether appellant submitted medical evidence establishing more than eight percent permanent impairment of each upper extremity, for which he previously received a schedule award. That is a medical issue which must be addressed by relevant medical evidence.[31] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case. He submitted several reports in connection with his reconsideration request which addressed the follow-up treatment he received after April 7, 2016 surgery and which memorialized diagnostic testing he underwent. However, these reports are not relevant to the issue of this case because they do not contain a probative medical opinion on the permanent impairment of his upper extremities under the standards of the sixth edition of the A.M.A., *Guides*. As noted, the Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[32]

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than eight percent permanent impairment of each upper extremity, for which he previously received schedule awards. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[31] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[32] *See supra* note 30. Some of the evidence appellant submitted on reconsideration had previously been considered by OWCP, including a March 25, 2016 report of Mr. DeJesus and a March 25, 2016 blood and urine testing report. As noted, 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 supra* note 29.

ORDER

IT IS HEREBY ORDERED THAT the July 25 and May 31, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 18, 2018
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