

FACTUAL HISTORY

On January 12, 2010 appellant, then a 54-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on December 31, 2009, he injured his lower back while unloading tubs of mail from a postal vehicle.² OWCP accepted the claim for sciatica of the lower back. Appellant stopped work on February 2, 2010, and was granted leave buy back for the period February 5 to March 9, 2010, when he returned to modified duty. On December 27, 2010 he filed a schedule award claim (Form CA-7). OWCP denied the schedule award claim by decision dated April 6, 2011. Appellant retired effective July 1, 2013.

On January 12, 2015 appellant filed an additional traumatic injury claim (Form CA-1) alleging that, on June 11, 2013, he injured his lower back.³ In a report dated June 18, 2013, Dr. Padmaja Morisetty, a Board-certified family physician, noted that he reported injuring his lower back on June 11, 2013. She reported no tenderness or discomfort on examination of the lower back. Sensory examination was intact to light touch, and motor examination was 5/5. Dr. Morisetty diagnosed lumbosacral strain and released appellant from medical care. On June 8, 2015 OWCP accepted this claim for lumbar strain.

On February 27, 2016 appellant filed schedule award claims under File Nos. xxxxxx767 and xxxxxx197.

By letter dated March 7, 2016, under File No. xxxxxx197, OWCP informed appellant of the evidence needed to support his schedule award claim. On March 24, 2016 appellant informed OWCP that his physician was unable or unwilling to provide an impairment evaluation and requested referral for a second-opinion evaluation.

In a letter dated April 13, 2016, under File No. xxxxxx197, OWCP informed appellant that a second-opinion evaluation would be scheduled to determine whether he was eligible for a schedule award.

By decision dated April 25, 2016, OWCP denied appellant's schedule award claim under File No. xxxxxx767.

On April 29, 2016 OWCP's appointment scheduler, QTC Medical Services, informed appellant that, under File No. xxxxxx197, an appointment had been made with Dr. Prasad at 10:35 a.m. on May 6, 2016.

In a May 6, 2016 report, Dr. Prasad noted that appellant, who was now retired, had worked for 35 years as a letter carrier and indicated that in the Summer of 2013 he had twisted his back at work and underwent physical therapy, but currently was under no present care of a physician for his back and was not taking any medication. He reported that appellant had no complaints related to his back upon examination. Dr. Prasad indicated that gait was normal and appellant was able

² OWCP assigned the claim File No. xxxxxx767.

³ Appellant had initially filed a notice of recurrence (Form CA-2a) under File No. xxxxxx767, noting that a recurrence occurred on June 11, 2013. OWCP did not adjudicate the recurrence claim and appellant, instead filed a new traumatic injury claim. It assigned the new traumatic injury claim File No. xxxxxx197.

to stand on his tip toes and heels, had normal back range of motion, and no spasm or tenderness was found. Lower extremity neurological examination was normal with no weakness, and appellant had normal reflexes. Straight leg raising was normal and there was no atrophy of the muscles in the calf, thigh, or gluteal area. Dr. Prasad advised that appellant's lower back examination showed no objective clinical findings, and he had no subjective complaints. He concluded that appellant's back injury had completely resolved with no residual disability. In a supplemental report dated May 6, 2016, Dr. Prasad noted the 2009 employment injury. He reiterated that appellant's back examination on May 6, 2016 was normal, and that appellant had reached maximum medical improvement. Dr. Prasad advised that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)⁴ and *The Guides Newsletter* of July/August 2009 appellant had class 0 or zero impairment.

On May 10, 2016 OWCP administratively combined File Nos. xxxxxx767 and xxxxxx197, with the latter serving as the master file.

OWCP forwarded appellant's record to Dr. Morley Slutsky, a district medical adviser (DMA) Board-certified in occupational medicine, for review. In a July 10, 2016 report, the DMA noted his review of the record including Dr. Prasad's reports. He found that, maximum medical improvement was reached on May 6, 2016 and advised that, as Dr. Prasad found no lower extremity sensory or motor deficits one examination, there was no medical basis for a lower extremity rating using *The Guides Newsletter* of July/August 2009.⁵

By decision dated July 13, 2016, OWCP denied appellant's claim for a schedule award. It found that the weight of the medical evidence rested with the opinions of Dr. Prasad and the DMA who found no lower extremity impairment.

On March 20, 2017 appellant requested reconsideration of the July 13, 2016 decision. He maintained that he did not receive notice that the examination with Dr. Prasad was for his back, that he did not have the opportunity to submit medical evidence, that no notice was given, and that

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Although the sixth edition of the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine. *Pamela J. Darling*, 49 ECAB 286 (1998) In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant could be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine. *Thomas J. Engelhart*, 50 ECAB 319 (1999). The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures, which memorializes proposed tables outlined in a July/August 2009 *Guides Newsletter*. Federal (FECA) Procedure Manual, Part 3 -- Medical, Chapter 3.700, Exhibit 1, note 5 (January 2010). Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11 and upper extremity impairment originating in the spine through Table 15-14. A.M.A., *Guides* (6th ed. 2009) at 533 and 435.

the examination was for another of his claims adjudicated under OWCP File No. xxxxxx516.⁶ Appellant attached an appointment letter from QTC Medical Services dated April 27, 2016 that referenced File No. xxxxxx516 and advised him that an appointment was scheduled with Dr. Prasad on May 6, 2016 at 10:30 a.m.

By decision dated May 22, 2017, OWCP denied appellant's March 20, 2017 request for reconsideration of the merits of his claim. It found his argument regarding the appointment inaccurate as he had been notified of an appointment with Dr. Prasad under OWCP File No. xxxxxx197 and noted that Dr. Prasad had reviewed the entire medical record.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁷ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion 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 of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁸

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.⁹

ANALYSIS

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).

With his March 20, 2017 reconsideration request, appellant maintained that no notice of examination regarding the instant claim, OWCP File No. xxxxxx197, was given, and the examination was for another of his claims adjudicated under OWCP File No. xxxxxx516. He did not submit new medical evidence.

⁶ *Supra* note 3.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

The Board finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an increased schedule award. Appellant did not claim a new award based on a new rating of permanent impairment.¹⁰ The issue presented on appeal is whether he 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 his claim.

In his March 20, 2017 reconsideration request, 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 merely maintained that he was not properly notified that Dr. Prasad's examination on May 6, 2016 was for his back condition under File No. xxxxxx197. Appellant was properly notified of this appointment under the instant claim in correspondence dated April 13 and 29, 2016. The Board has long held that, while the 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 Thus, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹²

The underlying issue is whether appellant has submitted sufficient evidence to establish entitlement to a schedule award. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but in this case he did not submit any relevant and pertinent new evidence with his March 20, 2017 reconsideration request. Appellant did not submit any new medical evidence containing an impairment evaluation. The only evidence submitted was an appointment notice under another of his OWCP claims, also for an appointment on May 6, 2016 with Dr. Prasad. The record, however, contains a notice to appellant regarding an appointment with Dr. Prasad on May 6, 2016 under the instant claim, File No. xxxxxx197. The evidence submitted is, therefore, irrelevant and insufficient to warrant reconsideration of appellant's claim.¹³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review. Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered.¹⁴

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.

¹⁰ See *A.C.*, Docket No. 13-1810 (issued January 6, 2014).

¹¹ *E.M.*, Docket No. 09-0039 (issued March 3, 2009).

¹² See *J.B.*, Docket No. 17-0628 (issued June 28, 2017).

¹³ See *B.R.*, Docket No. 17-1213 (issued January 18, 2018).

¹⁴ *Id.*

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 May 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board