

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

A.A., Appellant)	
)	
and)	Docket No. 19-0939
)	Issued: August 8, 2019
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, Honolulu, HI, 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 13, 2018 appellant filed a timely appeal from a May 7, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 6, 2017, 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 to review the merits of the claim.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 7, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2 (c) (1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 October 7, 2011 appellant, then a 27-year-old-correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2011 she felt pain in her right hip, leg, and ankle when performing throws during self-defense tactics while in the performance of duty. She stopped work on October 6, 2011 and returned on October 10, 2011.

On December 8, 2011 OWCP accepted the claim for lumbar strain.

On March 6, 2015 appellant filed a schedule award claim (Form CA-7).

In a development letter dated March 30, 2015, OWCP requested that appellant's physician submit an impairment evaluation in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.³ It afforded her 30 days to submit the requested information. Appellant submitted a series of medical notes from Dr. Ira D. Zunin, Board certified in general preventive medicine.

In a June 4, 2015 decision, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted employment injury.

On October 20, 2016 appellant filed an additional claim for schedule award (Form CA-7).

In a September 29, 2016 report, Dr. Marc Suffis, Board certified in emergency medicine, discussed appellant's medical history, reviewed diagnostic testing, and provided findings on physical examination. He determined that she had 5 percent permanent impairment of the lower extremity due to L5 sensory radiculopathy, 3 percent permanent impairment due to S1 sensory radiculopathy, and 13 percent permanent impairment due to L4 radiculopathy. Dr. Suffis opined that appellant had a combined total of 19 percent lower extremity impairment.

On January 23, 2017 OWCP sent Dr. Suffis' report, a statement of accepted facts, and the case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the right lower extremity, in accordance with the sixth edition of the A.M.A., *Guides*, and the date of maximum medical improvement (MMI).

In a January 26, 2017 report, Dr. Harris, OWCP's DMA, reviewed the case file, finding that appellant reached MMI on September 29, 2016, the date of Dr. Suffis' examination. The DMA concurred with the findings in Dr. Suffis' report, but disagreed with the impairment rating.

³ A.M.A., *Guides* (6th ed. 2009).

He explained that, when utilizing the Combined Values Chart,⁴ the findings of 5 percent for L5 sensory radiculopathy, 3 percent for left S1 sensory radiculopathy, and 13 percent for L4 radiculopathy, resulted in a 20 percent impairment of the right lower extremity, and 0 percent impairment of the left lower extremity.

On March 31, 2017 OWCP expanded acceptance of the claim to include displacement of intervertebral disc, without myelopathy, and lumbar radiculopathy.

By decision dated April 6, 2017, OWCP granted appellant a schedule award for 20 percent permanent impairment of her right lower extremity.

On June 23, 2017 appellant requested reconsideration of the April 6, 2017 decision. OWCP received an addendum report from Dr. Suffis, dated June 5, 2017, wherein he related that he had made an error in his calculation and she had 20 percent permanent impairment of the right lower extremity.

By decision dated July 5, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that Dr. Suffis' June 5, 2017 report was cumulative.

In a March 20, 2018 letter, appellant again requested reconsideration. She explained that she was unable to find a physician willing to accept her case and noted that she needed to find a physician to provide an impairment rating for her left lower extremity.

By decision dated May 7, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). It noted that no additional medical evidence had been received from a physician containing a permanent impairment rating establishing greater than the 20 percent permanent impairment of the right lower extremity for which she had received a schedule award.

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.⁵ 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; advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁶

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

⁴ *Id.* at 604.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3).

for review without reopening the case for a review on the merits.⁷ 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.⁸

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).

On April 6, 2017 OWCP granted appellant a schedule award for 20 percent permanent impairment of her right lower extremity.

The Board notes that appellant did not submit any evidence showing increased permanent impairment or additional exposure, and, therefore, OWCP properly reviewed her submission as a request for reconsideration, rather than a request for an additional schedule award.⁹

In her reconsideration request of the April 6, 2017 decision, appellant indicated that she wished to have her schedule award reconsidered to include a permanent impairment of her left leg. She also explained that she was unable to find a physician willing to accept her case and noted that she needed to find a physician to provide an impairment rating.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁰

Appellant also did not provide any medical evidence in support of increased permanent impairment of her lower extremities. She failed to submit relevant and pertinent new evidence in support of her request for reconsideration.¹¹ Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹²

⁷ *Id.* at § 10.608.

⁸ 20 C.F.R. § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS).

⁹ *See F.K.*, Docket No. 17-0308 (issued December 21, 2017).

¹⁰ *T.G.*, Docket No. 18-1064 (issued April 26, 2019).

¹¹ *B.H.*, Docket No. 19-0169 (issued June 24, 2019); *see also J.B.*, Docket No. 18-1531 (issued April 11, 2019).

¹² *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

The Board accordingly finds that appellant has not met 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.

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 the May 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2019
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