

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

S.M., Appellant)	
)	
and)	Docket No. 18-1047
)	Issued: February 13, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
East St. Louis, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 April 26, 2018 appellant, through counsel, filed a timely appeal from a November 17, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision, dated August 10, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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.

² 5 U.S.C. § 8101 *et seq.*

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).

FACTUAL HISTORY

On November 14, 2006 appellant, then a 37-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back that day while loading his delivery vehicle. He explained that he lifted a tray of mail and felt pain in his back, under the left shoulder blade. Appellant described his injury as a pulled muscle. On January 26, 2007 OWCP initially accepted his claim for left thoracic region back sprain. It subsequently accepted neck sprain, and on May 1, 2007, advised appellant that the acceptance of his claim had also been expanded to include herniated cervical discs at C4-5 and C5-6.³ OWCP paid him wage-loss compensation for temporary total disability on the supplemental rolls beginning January 3, 2007. Appellant returned to work August 7, 2007.

On June 15, 2015 appellant filed a claim for a schedule award (Form CA-7).

In support of his claim, appellant submitted a December 29, 2014 report, by Dr. Neil Allen, a Board-certified internist and neurologist, who found 14 percent left upper extremity permanent impairment due to mild sensory and mild motor deficits at the C7 nerve root. Dr. Allen also found there were no motor or sensory deficits affecting the upper extremities at the C5, C6, and C8 nerve roots. He based his upper extremity impairment rating on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

In a July 20, 2015 report, Dr. Michael Hellman, an orthopedic surgeon and OWCP district medical adviser, reviewed the relevant medical evidence, including Dr. Allen's December 29, 2014 report. He concurred with the finding of no upper extremity impairment at the C4-5 and C5-6 nerve root levels. As to Dr. Allen's impairment rating with respect to the C7 nerve root, Dr. Hellman noted that this condition was neither preexisting nor was it accepted by OWCP as work related. He further noted that appellant's December 18, 2006 cervical MRI scan showed no significant weakness or sensation loss in the C7 distribution. Dr. Hellman concluded that appellant had zero percent bilateral upper extremity impairment due to his accepted cervical injury. He noted a date of maximum medical improvement (MMI) of December 29, 2014.

By decision dated October 28, 2015, OWCP denied appellant's claim for a schedule award because the submitted evidence was insufficient to establish an employment-related permanent impairment. Appellant timely requested a hearing, and by decision dated September 21, 2016, an OWCP hearing representative affirmed the October 28, 2015 schedule award denial.

³ A December 18, 2006 cervical spine magnetic resonance imaging (MRI) scan revealed: (1) a large hard disc/osteophyte complex at the C3-4 level on the left with foraminal narrowing; (2) small right-sided C4-5 hard disc/osteophyte complex with mild right foraminal narrowing and small left osteophytic spur at the left foramen; and (3) hard disc/osteophyte complex at the C6-7 level on the left and mild foraminal narrowing.

⁴ A.M.A., *Guides* (6th ed. 2009). Dr. Allen referenced Proposed Table 1, page 4 of *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).

On May 15, 2017 appellant, through counsel, requested reconsideration.

In an April 30, 2017 addendum to his December 29, 2014 report, Dr. Allen related that appellant's claim was accepted for displacement of the cervical intervertebral disc without myelopathy without specific mention of a spinal level. He indicated that a December 18, 2006 cervical spine MRI scan showed disc pathology at the C3-4, C4-5, and C6-7 levels. Dr. Allen indicated that the pathology at the C6-7 level was identical to appellant's presentation of left-sided motor and sensory deficits on examination. He opined that the mechanism of injury at the C7 level was that of "repetitive lifting at and above the level of the shoulder, described by the patient at the time of the injury." Dr. Allen explained that repetitive lifting leads to fatigue of the postural muscles of the spine, which resulted in straining the muscles of the neck and upper back.

In a May 30, 2017 addendum report, Dr. Allen again opined that the disc pathology at C7 was related to appellant's employment. He noted that appellant's injuries resulted from "repetitive micro[-]trauma, sustained while in the performance of his regular duties as a letter carrier on November 14, 2006." Dr. Allen concluded that his impairment rating calculated on December 29, 2014 accurately and reasonably represented the functional loss sustained by appellant as a result of the November 14, 2006 work-related trauma. He provided his impairment rating calculations from his December 29, 2014 report.

By decision dated August 10, 2017, OWCP denied modification of the September 21, 2016 decision. It found that the new medical reports from Dr. Allen did not establish that appellant had a ratable impairment due to his November 14, 2006 employment injury.

On September 8, 2017 appellant, through counsel, requested reconsideration.

In a June 16, 2017 addendum report, Dr. Allen noted diagnoses of neck sprain, displacement of cervical intervertebral disc without myelopathy, and sprain of the back, thoracic region. He reiterated that OWCP had not specified a specific spinal level for appellant's displacement of cervical intervertebral disc without myelopathy and again related that appellant's mechanism of injury at the C7 level was "repetitive lifting at and above the level of the shoulder." Dr. Allen opined that appellant was entitled to a schedule award under *The Guides Newsletter*, (July/August 2009) edition due to functional loss resulting from his November 14, 2006 employment injury. He indicated that he was including his impairment rating calculations from his December 29, 2014 report for appellant's left upper extremity.

By decision dated November 17, 2017, OWCP denied reconsideration of the merits of appellant's claim. It determined that the additional medical reports submitted were cumulative and substantially similar to medical evidence previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵

⁵ 5 U.S.C. § 8128(a).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3). In support of his reconsideration request, appellant submitted a June 16, 2017 addendum report by Dr. Allen. Dr. Allen alleged that appellant's cervical disc pathology at C6-7 was causally related to the November 14, 2006 employment injury and explained the mechanism of injury. He opined that appellant had a permanent impairment to his left upper extremity due to his cervical injury at the C6-7 spinal level and included his impairment calculations from his December 29, 2014 report.

The Board finds that Dr. Allen merely repeated his opinion from his previous April 30 and May 30, 2017 reports that appellant sustained a permanent impairment of his left upper extremity at the C7 spinal level, which he believed was work related. Dr. Allen also duplicated his impairment calculations from his December 29, 2014 report. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹⁰ Dr. Allen did not provide any relevant and pertinent new evidence regarding appellant's left upper extremity impairment attributable to the November 14, 2006 employment injury. Accordingly, the Board finds that appellant did not provide OWCP with any evidence which has met the requirements of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of his claim.

⁶ 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).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ 20 C.F.R. § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

The Board finds that appellant has not met any of the regulatory requirements and OWCP properly declined his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).¹¹ Thus, OWCP did not abuse its discretion in refusing to reopen his claim for a review on the merits.¹²

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 November 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2019
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

¹¹ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹² When a claimant does not submit relevant evidence with respect to an increased schedule award, then OWCP may properly determine that appellant has filed an application for reconsideration of a schedule award decision. *See K.K.*, Docket No. 15-1684 (issued October 23, 2015).