

FACTUAL HISTORY

On December 4, 2012 appellant, then a 62-year-old medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 30, 2012 “when she was walking to another floor with papers in her hand, had a sharp pain in her back, lost her balance, and fell to the floor” causing injury to her wrist, right hip, right knee, and lumbar spine. OWCP accepted her claim for contusion of right elbow and forearm, contusion of right knee, sprain of right hip (iliofemoral), and medial and lateral meniscus tears of the right knee, right knee osteoarthritis, right foot drop, postoperative pneumonia, and right knee hematoma. It paid appellant wage-loss compensation on the periodic rolls, effective March 9, 2014, and subsequently authorized multiple right knee surgeries, including right knee arthroscopy on February 19, 2014 and a right total knee replacement on October 15, 2014. Appellant was removed from the periodic rolls after she returned to full-time work on August 31, 2015.

The evidence of record contains reports dated November 12, 2015, March 7 and May 4, 2016, and February 3, 2017 from Dr. Rommel G. Childress, a Board-certified orthopedic surgeon. In the May 4, 2016 report, Dr. Childress opined that appellant had 75 percent permanent impairment of the right lower extremity.

By decision dated January 25, 2017, OWCP granted appellant a schedule award for 25 percent permanent impairment of the right leg, relying on a July 27, 2016 second opinion report from Dr. James Gaylon, a Board-certified orthopedic surgeon, and reports dated October 20 and December 31, 2016 from Dr. Morley Slutsky, a Board-certified occupational medicine specialist and an OWCP district medical adviser (DMA). Dr. Slutsky opined that appellant’s most impairing right knee diagnosis was her total arthroplasty with good results and her most impairing right lower extremity diagnosis was her medial plantar nerve impairment. The award ran for 72 weeks and a fraction of a day for the period July 27, 2016 to December 12, 2017.

By decision dated June 21, 2017, an OWCP hearing representative affirmed the January 25, 2017 schedule award decision.

Appellant submitted two reports dated October 9, 2017 from Dr. Childress who provided progress notes regarding her right lower extremity and requested authorization for medical bills. Dr. Childress also indicated that appellant had continued difficulty with her right lower extremity and used a dorsiflexion assist brace. He reported that appellant had “several episodes of falling, where she [had not] had [the brace] on and she ha[d] weakness in dorsiflexion power, where she ha[d] a foot drop on that side that ha[d] come back, but she had weakness and fatigue, where she ha[d] a tendency to stomp her foot.” Dr. Childress further indicated that appellant’s right knee had fair mobility from 0 to about 100 degrees and the foot drop was tending to give her difficulty. He noted that she was working and functioning, but was scheduled for retirement in January.

On April 17, 2018 appellant requested reconsideration and disagreed with the schedule award decision, arguing that it had not adequately accounted for all three of her right knee surgeries and her postsurgery foot drop condition. She stated that she had to wear an attached shoe brace to keep from falling and when she did not wear the brace she would stumble and fall, and during one of her falls she received a rotator cuff tear in her right shoulder. Appellant asserted that she would have to wear a shoe brace for the rest of her life to keep her from falling and injuring herself. She

argued that she was entitled to an increased schedule award due to her need for a shoe brace and her postoperative foot drop condition.

In support of her request for reconsideration, appellant submitted a December 1, 2017 report from Dr. Childress who indicated that x-rays and a magnetic resonance imaging (MRI) scan of her right shoulder documented a torn and retracted anterior and middle fibers of the infraspinatus and torn and retracted subscapularis tendon. Dr. Childress indicated that appellant had evidence of impingement secondary to osteoarthritis and opined that the foot drop that she had caused her to fall and that her claim should therefore be expanded to include the condition of rotator cuff tear of the right shoulder. He noted that she would probably need surgical intervention for an open procedure to repair the rotator cuff at some point in the near future. Also received was another report from Dr. Childress dated October 9, 2017. In it, he indicates that appellant had several episodes of falling when she was not wearing her dorsiflexion brace. Additionally, Dr. Childress related that she was scheduled for retirement in January 2018.

Appellant also resubmitted medical reports dated November 12, 2015, March 7 and May 4, 2016, and February 3, 2017 from Dr. Childress.

By decision dated May 21, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

³ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 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). *Id.* at Chapter 2.1602.4b.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

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).

Appellant's request for reconsideration did not show that OWCP had erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. On reconsideration she argued that her schedule award for 25 percent permanent impairment of the right leg failed to adequately account for all three of her right knee surgeries and her postsurgery foot drop condition. Appellant stated that she had to wear an attached shoe brace to keep from falling and when she did not wear the brace she would stumble and fall, and during one of her falls she sustained a rotator cuff tear in her right shoulder. She further contended that she would have to wear a shoe brace for the rest of her life as a result of her accepted right knee conditions and authorized surgeries and; therefore, she was entitled to an increased schedule award. These contentions are not legal arguments addressing the underlying issue of appellant's entitlement to an increased schedule award.⁸ As such, appellant's opinions are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.⁹ The Board notes that appellant's argument is regarding a claim that she sustained a right shoulder condition due to falling while wearing a shoe brace after her right knee surgeries. OWCP, however, has not accepted a right shoulder condition in this case.¹⁰ The Board has held that the submission of an argument which does not address the particular issue involved does not constitute a basis for reopening a case. As appellant has not established that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, she is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).¹¹

In support of her request for reconsideration, appellant further submitted reports dated October 9 and December 1, 2017 from Dr. Childress who indicated that x-rays and an MRI scan of her right shoulder documented a torn and retracted anterior and middle fibers of the infraspinatus and torn and retracted subscapularis tendon. The Board finds that Dr. Childress' reports do not constitute relevant and pertinent new evidence and are insufficient to require OWCP to reopen the claim for consideration of the merits because they fail to address the current extent of appellant's work-related permanent impairment. While Dr. Childress continues to document ongoing right lower extremity complaints, OWCP properly found that this evidence was irrelevant because it failed to address permanent impairment to appellant's right lower extremity.¹²

Appellant also resubmitted medical reports dated November 12, 2015, March 7 and May 4, 2016, and February 3, 2017 from Dr. Childress in support of her claim. The Board finds that the

⁸ The Board notes that it is appellant's burden to submit sufficient evidence to establish the extent of permanent impairment. *See Annette M. Dent*, 44 ECAB 403 (1993).

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁰ The Board notes that appellant may file a claim for a new or consequential injury.

¹¹ *D.D.*, Docket No. 18-0648 (issued October 15, 2018).

¹² *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

submission of these reports did not require reopening appellant's case for merit review because appellant submitted the same reports by Dr. Childress, which were previously reviewed by OWCP's hearing representative in his June 21, 2017 decision. As these reports repeat evidence already in the case record, they are duplicative and do not constitute relevant and pertinent new evidence. Thus, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).¹³

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim under any of the three requirements under section 10.606(b)(3). Therefore, 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 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 2019
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

¹³ *B.B.*, Docket No. 18-0782 (issued January 11, 2019).