United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 18-1482**
	)	**Issued: March 19, 2019**
DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, OH, Employer	)	

Appearances:
Daniel B. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 23, 2018 appellant, through counsel, filed a timely appeal from a February 1, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 21, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[2]

[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] The Board notes that following the February 1, 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 13, 2008 appellant, then a 42-year-old lead firefighter, filed a traumatic injury claim (Form CA-1) alleging that he injured his right knee when his foot missed a step while carrying bunker gear into the station. On October 21, 2008 OWCP accepted right knee lateral meniscus tear. It later expanded acceptance of the claim to include right knee chondromalacia patellae.

Dr. Kevin J. Paley, a Board-certified orthopedic surgeon, performed partial lateral meniscectomy of appellant's right knee on October 28, 2008. On December 19, 2013 Dr. Paley performed right total knee replacement, and on November 5, 2015 he performed revision of right total knee secondary to chondromalacia. Appellant received wage-loss compensation on the supplemental rolls for intermittent periods of disability from December 29, 2012 through January 23, 2014.

On September 13, 2016 appellant filed a claim for a schedule award (Form CA-7).

OWCP received a July 28, 2016 report from Dr. Daniel S. Brown, Board-certified in occupational medicine, which evaluated appellant's permanent impairment. Following a physical examination, Dr. Brown diagnosed right knee osteoarthritis, status post right total knee replacement in December 2013, chronic right knee pain and dysfunction, and deep vein thrombosis (DVT) that occurred approximately three months prior to the December 2013 surgery. He advised that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[3] appellant had a fair result following his knee replacement. Dr. Brown indicated that under Table 16-3, Knee Regional Grid, for a total knee replacement, appellant had a class 3 impairment based on mild instability (under Table 16-7) and mild motion deficit (under Table 16-23) which had a default impairment of 37 percent. He noted that grade modifiers for physical examination and clinical studies were not applicable as they were used to assign the class of injury, and that, because his functional history modifier of grade 2 differed by 2 or more from both the physical examination and clinical studies modifier, it also was excluded. Dr. Brown concluded that appellant had 37 percent right lower extremity permanent impairment with February 24, 2016 the date of maximum medical improvement (MMI).

In a September 26, 2016 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), reviewed Dr. Brown's report. He agreed that appellant had a class 3 permanent impairment under Table 16-3. Dr. Katz, however, disagreed with Dr. Brown's conclusion. He indicated that, while Dr. Brown excluded the functional history grade modifier of 2 on the basis that it was 2 grades different from either the physical examination or clinical studies modifiers, it was not a proper analysis because if the grade modifiers were not applicable, the value was not determined to be zero. Dr. Katz maintained that the grade modifier for physical examination would be at least 2, based on the motion deficit found in Table 16-23,

[3] A.M.A., *Guides* (6th ed. 2009).

and for that reason the functional history grade modifier would still be valid for the purpose of calculating the net adjustment. He concluded that, under Table 16-3, appellant's permanent impairment was 34 percent rather than 37 percent, with February 24, 2016 the date of MMI.

By letter dated October 19, 2016, OWCP forwarded Dr. Katz's report to Dr. Brown for comment. No response was received. In correspondence dated November 8, 2016, counsel maintained that the Board's case *W.B.*[4] was applicable in this case and, therefore, based on Dr. Brown's assessment, appellant had 37 percent right lower extremity permanent impairment.

By decision dated November 21, 2016, OWCP granted appellant a schedule award for 34 percent permanent impairment of the right lower extremity, for a total of 97.92 weeks. The award ran from February 24 to November 12, 2016.

Dr. Paley continued to submit reports in follow-up. He advised that appellant was working full duty and planned to retire in December 2017. Dr. Paley did not provide another permanent impairment evaluation.

On November 8, 2017 appellant, through counsel, requested reconsideration. Counsel asserted that it was an error of law to afford the weight of medical evidence to OWCP's DMA regarding the percentage of appellant's right lower extremity permanent impairment. He maintained that the Board had previously held in the case of *W.B.* that Dr. Brown's analysis and interpretation of the A.M.A., *Guides* was correct.[5] Counsel continued that Dr. Brown's analysis and exclusion of the grade modifier for functional history exactly mirrored the Board's finding in *W.B.* and asserted that, as the DMA had not followed the precedent set forth in *W.B.*, it was error for OWCP to accept his permanent impairment rating. He concluded that appellant was, therefore, entitled to 37 percent permanent impairment of the right lower extremity, based on Dr. Brown's analysis which was controlling law.

By decision dated February 1, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that the evidence presented did not contain a relevant legal argument not previously considered by OWCP and that Dr. Brown had not rebutted the DMA's opinion. Thus, no medical evidence explaining or supporting why the DMA's report was inaccurate had been submitted.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[6] 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 either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument

[4] Docket No. 14-1982 (issued August 26, 2015).

[5] *Id*.

[6] 5 U.S.C. § 8128(a).

not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[7]

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.[8]

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his schedule award claim pursuant to 5 U.S.C. § 8128(a).

With the November 8, 2017 reconsideration request, counsel asserted that it was an error of law to afford the weight of medical evidence to the DMA regarding the percentage of appellant's right lower extremity permanent impairment. He maintained that, based on the Board's finding in the *W.B.* case, Dr. Brown's analysis and interpretation of the A.M.A., *Guides* was correct. Counsel continued that, as Dr. Katz had not followed the precedent of the *W.B.* decision, it was error for OWCP to accept his impairment rating. He concluded that appellant was, therefore, entitled to 37 percent permanent impairment of the right lower extremity, based on Dr. Brown's analysis, which was controlling law.

In its February 1, 2018 decision denying reconsideration of the merits of appellant's claim, OWCP indicated that appellant had not submitted a relevant legal argument not previously considered by OWCP. It noted that he had not submitted medical evidence explaining or supporting why and how the DMA's report was inaccurate, finding, "The memorandum in support of your request for reconsideration is not medical evidence. It is also not a new legal argument or errors [sic] of law not previously considered by this [o]ffice."

In its November 21, 2016 decision granting appellant a schedule award for 34 percent permanent impairment of the right lower extremity, OWCP did not discuss the legal argument presented by counsel in his November 8, 2017 reconsideration request in which he referenced the Board decision in *W.B.* and asserted that it was applicable to the instant case. It merely indicated that the percentage of impairment awarded was calculated by a DMA who applied the A.M.A., *Guides* to the medical findings provided by appellant's physician. OWCP noted that the DMA determined that appellant's physician incorrectly applied the A.M.A., *Guides*. At no point in that decision did OWCP mention the Board's analysis and legal holding in the *W.B.* decision.[9]

The Board finds that the argument submitted by counsel on reconsideration is a relevant legal argument not previously considered by OWCP as it brings into question the applicability of the precedent of the *W.B.* decision to the impairment findings in this case.[10]

[7] 20 C.F.R. § 10.606(b)(3).

[8] *Id*. at § 10.608(b).

[9] *Supra* note 4; *see also J.C.*, Docket No. 15-0534 (issued May 12, 2016).

[10] *See J.M.*, Docket No. 18-0541 (issued October 11, 2018).

As such, the case shall be remanded to OWCP to conduct a merit review. After such further development as is deemed necessary, it shall issue an appropriate merit decision.[11]

CONCLUSION

The Board finds that OWCP improperly 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 February 1, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: March 19, 2019
Washington, DC

Christopher J. Godfrey, 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

[11] *Id*.