

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

M.S., Appellant)	
)	
and)	Docket Nos. 19-1090 & 20-0408
)	
U.S. POSTAL SERVICE, POST OFFICE, Crystal Lake, IL, Employer)	Issued: April 20, 2020
)	

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, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 18, 2019 appellant, through counsel, filed a timely appeal from a March 27, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards assigned Docket No. 19-1090. However, counsel did not appeal from the corresponding January 14, 2019 merit decision which was issued within 180 days of the docketing of this appeal. Therefore, the Board has no jurisdiction to address the merits of the claim. Pursuant

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 On January 23, 2020 appellant, through counsel, filed a motion requesting that Docket Nos. 19-1090 and 20-0408 be consolidated as the appeals involved "similar issues and the same parties such that complete adjudication requires that the appeals be considered together." By order dated February 14, 2020, the Board granted appellant's motion to consolidate the appeals. *Order*, Docket Nos. 19-1090 and 20-0408 (issued February 14, 2020).

to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

On December 11, 2019 appellant, through counsel, filed a timely appeal from a November 19, 2019 decision of OWCP. The Clerk of the Appellate Boards assigned Docket No. 20-0408. Pursuant to FECA⁵ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim in its March 27, 2019 decision, pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP had the authority to issue its November 19, 2019 decision.

FACTUAL HISTORY

On August 12, 2014 appellant, then a 51-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 7, 2014 he injured his left ankle while in the performance of duty. OWCP accepted the claim for a left foot sprain.⁶

On December 9, 2014 Dr. Ann O. Trauscht, Board-certified in family practice, diagnosed a left foot sprain and found that appellant could resume his usual employment.

In a January 22, 2018 impairment evaluation, Dr. Neil Allen, a Board-certified internist and neurologist, reviewed appellant's history of an August 7, 2014 left ankle injury while at work. On examination, he found intact sensation and full strength of the lower extremities. Dr. Allen measured range of motion (ROM) for the right side, which he characterized as the affected side, three times, and measured ROM for the left side, which he indicated was the unaffected side, one time. Referencing Table 16-2 on page 501 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁷ he identified the class of diagnosis (CDX) as a Class 1 ankle sprain/strain with mild motion loss, which yielded a default value of five percent. Dr. Allen applied a grade modifier for functional history (GMFH) of zero. He advised that a grade modifier for physical examination (GMPE) was not applicable as

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the March 27, 2019 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 evidence for the first time on appeal. *Id.*

⁵ *Supra* note 3.

⁶ By decision dated July 13, 2017, OWCP denied appellant's claim for a schedule award for a bilateral shoulder condition, noting that it had only accepted a left foot sprain as employment related. Through counsel, he requested a telephonic hearing, which was held on December 18, 2017. On December 18, 2017 counsel requested that OWCP withdraw the request for a telephonic hearing. OWCP accepted the withdrawal of the hearing request on December 19, 2017.

⁷ A.M.A., *Guides* (6th ed. 2009).

it was used to identify class and that a grade modifier for clinical studies (GMCS) was not applicable as there were no studies to review. Dr. Allen found a net adjustment of one down from the default value after using the net adjustment formula, which yielded four percent permanent impairment of the left lower extremity.

On March 28, 2018 appellant filed a claim for a schedule award (Form CA-7).

On April 24, 2018 Dr. Ari Kaz, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted that Dr. Allen had only provided one ROM measurement for the left ankle, which he found to be the unaffected side. He thus found that his ROM measurements were invalid under the A.M.A., *Guides* as he had failed to measure ROM three times. The DMA indicated that the A.M.A., *Guides* did not provide an impairment rating for a foot sprain, and therefore he utilized the CDX of ankle sprain using Table 16-2 on page 502 of the A.M.A., *Guides*. He determined that appellant had no evidence of foot or ankle instability or a muscle or tendon injury, which yielded a default value of zero. The DMA found a GMFH of zero as there was no objective evidence of instability or deformity on examination and normal ROM. He further found a GMPE of zero, noting that Dr. Allen had found abnormal ROM only on the right side and that the measurements for ROM on the left side yielded no impairment. The DMA noted that there was no GMCS available and that application of the net adjustment formula yielded no change from the zero impairment rating.

By decision dated May 23, 2018, OWCP found that appellant had not met his burden of proof to establish a ratable permanent impairment of his left lower extremity for schedule award purposes.

On May 29, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on November 14, 2018. Counsel noted that Dr. Allen had referenced the right rather than the left ankle and indicated that she had requested that he submit an addendum report. She asserted that, contrary to the DMA's finding, Table 16-2 on page 501 of the A.M.A., *Guides* provided an impairment rating for a foot strain.

On November 15, 2018 appellant submitted a report from Dr. Allen which indicated that it was an addendum to his report of permanent impairment. The report noted a correction to his prior report, indicating that he had obtained three ROM measurements of the left ankle and one ROM measurement of the right ankle. In all other respects the addendum report was unchanged in substance from his January 22, 2018 impairment evaluation report.

By decision dated January 24, 2019, OWCP's hearing representative affirmed the May 23, 2018 decision.

Thereafter, appellant submitted a December 13, 2018 operative report from Dr. Joshua Alpert, a Board-certified orthopedic surgeon, regarding his right rotator cuff repair. In a report dated January 16, 2019, Dr. Alpert opined that appellant had sustained a rotator cuff tear causally related to an August 7, 2014 employment injury. Appellant also submitted a progress report from a physician assistant regarding his right shoulder rotator cuff repair.

On March 8, 2019 appellant, through counsel, requested reconsideration based on the January 16, 2019 report from Dr. Alpert.

By decision dated March 27, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim under section 8128(a).

On April 18, 2019 appellant, through counsel, timely appealed the March 27, 2019 OWCP decision to the Board, which assigned Docket No. 19-1090. On October 24, 2019 appellant, through counsel, filed a request for reconsideration with OWCP from the January 14, 2019 OWCP hearing representative's decision. The hearing representative had affirmed OWCP's May 23, 2018 merit decision finding that appellant had not met his burden of proof to establish a ratable permanent impairment of his left lower extremity for schedule award purposes. In support of the reconsideration request, he submitted an October 2, 2019 report by Dr. Allen.

By decision dated December 11, 2019, OWCP denied modification of the January 14, 2019 OWCP hearing representative's decision.

LEGAL PRECEDENT -- ISSUE 1

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 compensation at any time on his own motion or on application.⁸

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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ 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.¹²

⁸ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁹ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁰ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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. *Supra* note 6 at 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). Chapter 2.1602.4b.

¹¹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim in its March 27, 2019 decision, pursuant to 5 U.S.C. § 8128(a).

By decision dated January 24, 2019, OWCP denied appellant's claim for a schedule award for a permanent impairment of the left lower extremity. On March 8, 2019 appellant timely requested reconsideration. The underlying issue on reconsideration is whether the medical evidence demonstrates a ratable permanent impairment. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹³

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Consequently, he is 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).¹⁴

The Board further finds that appellant has not provided relevant and pertinent new evidence not previously considered to the issue of whether he is entitled to a schedule award of the left lower extremity. Appellant submitted an operative report regarding his December 13, 2018 rotator cuff repair, a surgical follow-up report dated December 17, 2018, and a January 16, 2019 report from Dr. Alpert attributing appellant's rotator cuff tear to his August 7, 2014 employment injury. The issue, however, is whether he sustained a permanent impairment of the left lower extremity, not his upper extremity, causally related to his August 7, 2014 employment injury. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹⁶

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.¹⁷

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹³ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

¹⁴ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁵ *R.C.*, Docket No. 17-1294 (issued December 20, 2018).

¹⁶ *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

¹⁷ *See L.A.*, Docket No. 18-1226 (issue December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

LEGAL PRECEDENT -- ISSUE 2

The Board's *Rules of Procedure*, at section 501.2(c)(3), provides:

"*The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in a case on appeal. Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction.*"¹⁸ (Emphasis in the original.)

Similarly, section 10.626 of OWCP's regulations provides in pertinent part:

"While a case is on appeal to the ECAB, *OWCP has no jurisdiction over the claim with respect to issues which directly relate to the issue or issues on appeal. The OWCP continues to administer the claim and retains jurisdiction over issues unrelated to the issue or issues on appeal and issues which arise after the appeal as a result of ongoing administration of the case....*"¹⁹ (Emphasis in the original.)

ANALYSIS -- ISSUE 2

As was noted above, on December 11, 2019 appellant, through counsel, filed a timely appeal from OWCP's November 19, 2019 decision denying modification of its January 14, 2019 merit decision regarding a denial of a schedule award for claimed left lower extremity permanent impairment. However, OWCP denied appellant's request for reconsideration of the merits of the schedule award denial on March 27, 2019. The Board assumed jurisdiction over the denial of the reconsideration request of the underlying schedule award issue on April 18, 2019. As the Board already had jurisdiction over the nonmerit denial of the schedule award issue as of April 18, 2019, OWCP had no jurisdiction to issue its November 19, 2019 merit decision on the schedule award as this is an issue "which directly relate[s] to the issue on appeal,"²⁰ and changes the status of the case on the appeal.²¹ Consequently, the Board finds that the November 19, 2019 decision is null and void.

Pursuant to 5 U.S.C. § 8149 and 20 C.F.R. §§ 501.2(c) and 501.3(a), the Board's jurisdiction is limited to the review of final adverse decisions of OWCP issued under FECA. As the November 19, 2019 decision is null and void, the appeal assigned Docket No. 20-0408 does not contain a final adverse decision over which the Board may properly take jurisdiction. Therefore, the Board finds that the appeal docketed as No. 20-0408 is dismissed.

¹⁸ 20 C.F.R. §§ 501.2(c)(3). *See also J.W.*, Docket No. 19-1688 (issued March 18, 2020); *George Simpson*, Docket No. 93-0452 (issued February 18, 1994); *Arlonia B. Taylor*, 44 ECAB 591 (1993) (Member, Groom concurring in part and dissenting in part); *Douglas E. Billings*, 41 ECAB 880 (1990).

¹⁹ 20 C.F.R. § 10.626.

²⁰ *See id.*; *see also supra* note 18.

²¹ *See Douglas E. Billings, supra* note 18.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim in its March 27, 2019 decision, pursuant to 5 U.S.C. § 8128(a). The Board further finds that OWCP did not have the authority to issue its November 19, 2019 decision and therefore the appeal in Docket No. 20-0408 is dismissed.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

IT IS FURTHER ORDERED THAT Docket No. 20-0408 is dismissed as the November 19, 2019 decision of the Office of Workers' Compensation Programs is null and void.

Issued: April 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board