

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

C.L., Appellant)	
)	
and)	Docket No. 19-1440
)	Issued: March 19, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS AFFAIRS MEDICAL CENTER,)	
Palo Alto, CA, Employer)	
)	

Appearances:
Madison Goodman, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 17, 2019 appellant, through counsel, filed a timely appeal from a January 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 23, 2018, to the filing of this

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.

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.³

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 20, 2000 appellant, then a 42-year-old chief of nutrition and food service, filed a traumatic injury claim (Form CA-1) alleging that on August 8, 2000 she stepped off a curb, tripped, and fell injuring her back, knee, and each side of her body while in the performance of duty. On December 1, 2000 OWCP accepted her claim for low back strain.

On June 16, 2015 appellant filed a second Form CA-1 alleging that on May 4, 2015 she sustained injuries to her neck, as well as her upper, mid, and lower back, in an automobile accident following an OWCP-authorized medical procedure for her prior employment-related injury.

On June 23, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability on May 4, 2015. She alleged that she was totally disabled as the result of an automobile accident following treatment for her August 8, 2000 employment injury. Appellant returned to work on September 6, 2015.

On November 3, 2015 OWCP expanded acceptance of appellant's claim to include displacement of lumbar intervertebral disc without myelopathy. On December 4, 2015 appellant elected to receive Office of Personnel Management retirement benefits.

In a report dated August 15, 2016, Dr. Mike Shah, a physiatrist Board-certified in emergency medicine, examined appellant for schedule award purposes and utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He noted her reports of constant back pain, weakness, numbness, and tingling in her legs. Dr. Shah reported limited range of motion of the lumbar spine. He determined that appellant had nine percent left lower extremity permanent impairment due to sensory and motor deficits of the L5 nerve root, five percent left lower extremity permanent impairment due to the S1 nerve root, five percent right lower extremity permanent impairment due to the S1 nerve root,

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 22, 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 additional evidence for the first time on appeal. *Id.*

⁴ A.M.A., *Guides* (6th ed. 2009).

and nine percent permanent impairment of the right lower extremity due to the L5 nerve root. Dr. Shah found that she 14 percent permanent impairment of each of her lower extremities.

On September 8, 2016 appellant filed a claim for a schedule award (Form CA-7).

Upon referral from OWCP, in a September 22, 2016 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Shah's report and found that appellant had eight percent permanent impairment of each of her lower extremities.

On March 28, 2017 Dr. Shah disagreed with Dr. Berman's impairment rating and explained that he failed to consider appellant's motor deficits.

On May 9, 2017 the DMA explained that motor deficits were inappropriate given the variety of physical findings from appellant's physicians.

By decision dated July 18, 2017, OWCP granted appellant schedule award compensation for eight percent permanent impairment of each lower extremity based upon the DMA's report. The award ran for 46.08 weeks during the period August 15, 2016 to July 3, 2017.

On August 11, 2017 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated December 4, 2017, OWCP's hearing representative found that there was an unresolved conflict of medical opinion evidence between Drs. Shah and Berman regarding the extent of appellant's permanent impairment for schedule award purposes.⁵ He remanded the case for OWCP to undertake further development by referring the case to an impartial medical examiner.

On February 12, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for an impartial medical examination by Dr. James Hood, a Board-certified orthopedic surgeon.

In his April 2, 2018 report, Dr. Hood noted that he had reviewed the SOAF, medical records, and had performed a physical examination. He reviewed appellant's December 7, 2001 magnetic resonance imaging (MRI) scan which demonstrated mild degenerative changes at L5-S1 with an annular bulge, but no disc protrusion. Dr. Hood found that appellant's ongoing MRI scans demonstrated progression of age-related degenerative changes. He also noted that she had longstanding diabetes and hypothyroidism and that both of these conditions could lead to peripheral neuropathies. Dr. Hood opined that based on the normalcy of appellant's original MRI scan, any sensory abnormalities were likely due to peripheral neuropathies. He requested additional diagnostic studies including an electromyogram and nerve conduction velocity (EMG/NCV) study of the lower extremities.

⁵ The Board notes that Dr. Shah calculated 14 percent permanent impairment based upon his physical findings while the DMA calculated 8 percent permanent impairment based upon the same physical findings.

On April 2, 2018 appellant underwent EMG/NCV testing which were normal with no clear electrodiagnostic evidence of acute or chronic peripheral nerve or muscle pathology affecting the lower extremities including lumbosacral radiculopathy, lumbosacral plexopathy, or lower extremity peripheral neuropathy. On physical examination she demonstrated absent H-reflex responses which correlated with absent bilateral ankle jerk reflexes. This finding was determined to be nonspecific and nondiagnostic.

On April 6, 2018 Dr. Hood completed an addendum and found that the results of EMG/NCV testing did not indicate a true radiculopathy, that his physical examination did not indicate significant objective signs of radiculopathy, and that the medical records did not provide significant objective signs of radiculopathy. He concluded that appellant sustained a simple strain on August 8, 2000 and that she had multiple medical problems including obesity and increasing age-related degenerative disc disease which was unrelated to the effects of the accepted employment injury. Dr. Hood found that she had no work-related permanent impairment of the lower extremities and that she had reached maximum medical improvement.

By decision dated April 23, 2018, OWCP found that appellant had no permanent impairment of the lower extremities, effectively rescinding the prior schedule award based upon the DMA's calculations of permanent impairment, based on Dr. Hood's March 22, 2018 report which was found to be entitled to the special weight of the medical opinion evidence. It found that the entire schedule award paid in the amount of \$89,173.59 constituted an overpayment of compensation.⁶

OWCP continued to receive evidence. Appellant provided a copy of her September 30, 2015 MRI scan and a March 4, 2016 report from Dr. James S. Garrison, a Board-certified physiatrist, who reviewed her electrodiagnostic studies. Dr. Garrison found that her EMG on the bilateral lower extremities was normal. He indicated that appellant's lower extremity NCV studies demonstrated possible right tarsal tunnel syndrome, and that the right tibial nerve H reflex latency was prolonged compared to the left suggestive of right S1 nerve root compression. Appellant also provided a June 16, 2018 lumbar spine MRI scan which demonstrated disc degeneration at L5-S1, developing disc degeneration at L1-2 and disc bulge at L4-5 abutting, and potentially compressing the right L4 nerve root.

In a September 21, 2018 report, Dr. Shah noted his disagreement with Dr. Hood's findings and conclusions as set forth in the referee's report. He alleged that Dr. Hood's physical examination lacked validity as he improperly deferred sensory examination and failed to provide clear motor strength testing. Dr. Shah also noted that Dr. Hood reported absent reflexes which could be a sign of radiculopathy, which would be a basis for finding permanent impairment. He further reviewed appellant's electrodiagnostic studies and found evidence of radiculopathy.

⁶ On April 27, 2018 OWCP issued a preliminary determination of overpayment. By decision dated May 31, 2018, it found that appellant had received an overpayment of compensation in the amount of \$89,173.59 for which she was without fault. The issues of rescission and overpayment are not before the Board on the present appeal.

On December 5, 2018 appellant, through counsel, requested reconsideration of the April 23, 2018 decision. Counsel asserted that Dr. Shah's August 15, 2016 report was entitled to the weight of the medical evidence.

By decision dated January 22, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ 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.⁸

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute 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 its 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

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law nor did she advance a new and relevant legal argument not previously considered. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁷ *Supra* note 2.

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(b)(3); *J.R.*, Docket No. 19-1408 (issued January 6, 2020); *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *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).

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

¹² *Id.* at § 10.608(b); *J.R.*, *H.H.*, *supra* note 9; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

However, with respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence, including the September 21, 2018 report from Dr. Shah, which is relevant and pertinent to the issue of the nature and extent of appellant's permanent impairment and her physical findings upon examination. In his report, Dr. Shah disagreed with Dr. Hood's physical examination findings and his determination that appellant had not sustained permanent impairment. In his report, he alleged that Dr. Hood's physical examination lacked validity as he deferred a sensory examination and had not provided clear motor strength testing. Dr. Shah further reviewed appellant's recent electrodiagnostic studies and found evidence of radiculopathy, which contradicts Dr. Hood's conclusions.

The Board finds that Dr. Shah's September 21, 2018 report constitutes relevant and pertinent new evidence not previously considered by OWCP on the issue of the extent of appellant's permanent impairment for schedule award purposes.¹³ This additional evidence directly addressed the basis upon which OWCP rescinded appellant's prior schedule award and formed the basis of a purported overpayment of schedule award compensation.¹⁴

Appellant's request for reconsideration met one of the standards for obtaining merit review of her case.¹⁵ Accordingly, she is entitled to a merit review on the issue of whether she has established a permanent impairment for schedule award purposes

The Board will therefore set aside OWCP's January 22, 2019 decision and remand the case for an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

¹³ The Board has held that a claimant may request a schedule award or increased schedule award at any time based on the evidence of new exposure or medical evidence showing progress of an employment-related condition resulting in a permanent impairment or increased impairment. *See C.W.*, Docket No. 18-0703 (issued December 28, 2018); *R.D.*, Docket No. 18-0579 (issued September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁴ The Board has held that, in support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she need only submit relevant and pertinent evidence not previously considered by OWCP. *B.S.*, Docket No. 19-0273 (issued December 31, 2019); *M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁵ *B.S.*; *M.C.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: March 19, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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