United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 20-0916**
	)	**Issued: September 14, 2021**
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, COMMUNITY PLANNING & DEVELOPMENT STATE & SMALL CITIES DIVISION, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2020 appellant filed a timely appeal from an October 16, 2019 merit decision and January 7 and March 6, 2020 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the March 6, 2020 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*.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish more than seven percent permanent impairment of the left lower extremity, for which she previously received a schedule award; and (2) whether OWCP properly denied appellant's requests for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 11, 1994 appellant, then a 27-year-old community planning and development specialist, filed a traumatic injury claim (Form CA-1) alleging that on April 6, 1994 she sustained a contusion of the left hip and ankle sprain when she fell in a hallway on a slippery floor while in the performance of duty. She stopped work on April 6, 1994 and returned to work on April 11, 1994. Appellant retired in 1998.

On July 9, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

By decision dated July 18, 2019, OWCP accepted appellant's claim for trochanteric bursitis of the left hip.

In a July 18, 2019 development letter, OWCP advised appellant that no medical evidence was submitted in support of her schedule award claim and requested that she submit a report from her attending physician which addressed whether she had reached maximum medical improvement (MMI) and, if so, to evaluate permanent impairment in accordance with the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

By decision dated August 20, 2019, OWCP expanded the acceptance of appellant's claim to include low back strain.

On August 20, 2019 OWCP referred appellant, along with a statement of accepted facts, and a series of question to a second opinion physician, Dr. Simon Finger, a Board-certified orthopedic surgeon. It asked him to determine whether she had permanent impairment of the lower extremities causally related to the accepted April 6, 1994 employment injury and the date of MMI using the sixth edition A.M.A., *Guides*.

In a report dated September 10, 2019, Dr. Finger reviewed the medical record and conducted a physical examination of appellant. He related that appellant informed him that she had undergone lumbar fusion and laminectomy subsequent to her fall on April 6, 1994 and that she had persistent pain in her back and pain over the left hip ever since. Appellant further noted that she had not worked since 1999. Physical examination of her left hip demonstrated tenderness over the left trochanteric bursa with full range of motion. Dr. Finger performed three independent measurements of hip range of motion for flexion, internal rotation, external rotation, abduction, and adduction, indicating equal range of motion bilaterally. He noted that appellant had full range

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

of motion of the left and right hip. Appellant refused to attempt a squat test. Sensation was intact and deep tendon reflexes were 2/2 at both the bilateral patella and Achilles tendons.

Dr. Finger then utilized the sixth edition of the A.M.A., *Guides* to calculate appellant's percentage of permanent impairment. He noted that ratings for the lumbar spine could only be done in relation to impairment of the peripheral nerves of the lower extremities, but that because she had no loss of sensory or motor function that could be identified or detailed on examination, no impairment could be assigned for the lower back. Based on the diagnosis of trochanteric bursitis, Dr. Finger found a class of diagnosis (CDX) of 1 with a default value of seven percent and assigned a grade modifier for functional history (GMFH) of 1 due to antalgic limp, a grade modifier for physical examination (GMPE) of zero as it was used to make the diagnosis, and a grade modifier for clinical studies (GMCS) of zero as there were no clinical studies available. Applying the grade modifiers did not result in a change in the default value, and as such, appellant's final impairment rating was calculated as seven percent for the left lower extremity. Dr. Finger stated that she had been at MMI for many years and her trochanteric bursitis had not resolved. He further noted that appellant's low back strain had not resolved, due to subjective findings of chronic low back pain and left leg pain following surgical intervention, but that there were no objective findings.

OWCP referred Dr. Finger's report to its district medical adviser (DMA) for review of his conclusions. In a report dated October 3, 2019, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical evidence of record, including Dr. Finger's report. He found that appellant did not have any neurologic deficit in the bilateral lower extremities consistent with lumbar radiculopathy, and that as such, she had zero percent lower extremity impairment for lumbar radiculopathy based on the methodology of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Editi*on (July/August 2009) (*The Guides Newsletter*). With regard to her left lower extremity permanent impairment based on chronic trochanteric bursitis, the DMA concurred with Dr. Finger that she had seven percent lower extremity impairment under the diagnosis-based impairment (DBI) rating method, referring to Table 16-4, page 512 of the A.M.A., *Guides*. He noted that, as the A.M.A., *Guides* contained appropriate DBIs for appellant's diagnosed condition, it did not meet any of the criteria to allow for impairment to be calculated under the range of motion method, referring to section 16.7, page 543 of the A.M.A., *Guides*. The DMA found that the date of MMI was September 10, 2019, the date of evaluation by Dr. Finger.

By decision dated October 16, 2019, OWCP granted appellant a schedule award for seven percent impairment of the left lower extremity, relying on reports from Drs. Finger and Harris. The award covered 20.16 weeks for the period September 10, 2019 through January 29, 2020.

On November 26, 2019 appellant requested reconsideration of OWCP's October 16, 2019 decision. In an attached letter dated November 21, 2019, she argued that OWCP should reconsider Dr. Finger's report regarding nerve damage to her legs as a result of lumbar radiculopathy. Appellant stated that she was unable to cooperate with parts of Dr. Finger's examination due to pain resulting from sciatic nerve damage radiating from her back through her lower extremities. She noted that she was attempting to locate medical reports indicating that she suffered from lumbar radiculopathy.

By decision dated January 7, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

OWCP received a report signed by a nurse practitioner dated January 8, 2020.

In a report dated November 17, 1994, Dr. Gregory M. Ford, an orthopedic surgeon, noted that a magnetic resonance imaging (MRI) scan of appellant's lumbar spine demonstrated some degenerative disc disease at the L5-S1 level. On physical examination, he observed a normal neurologic examination in both lower extremities with normal spine motion. Dr. Ford diagnosed possible lumbar radiculopathy and left hip contusion.

On December 27, 1994 Dr. Ford diagnosed contusion of the left hip and trochanteric bursitis of the left hip. On physical examination, he observed mild tenderness along the sciatic notch area and a normal neurologic examination in both lower extremities.

Dr. Ford, in a January 9, 1995 report, diagnosed status post contusion of the left hip and trochanteric bursitis of the left hip. He noted that approximately 75 percent of her pain had been relieved with a prior injection.

In a report dated February 13, 1995, Dr. Ford diagnosed contusion and bursitis of the left hip. He observed normal neurologic and vascular evaluation in both lower extremities.

In a letter dated February 23, 1995, Dr. Cheryl L. Henson-Everson, a family medicine specialist, noted that she had treated appellant as a result of a fall at work in April 1994. Appellant complained of left hip pain causing difficulty while ambulating. She underwent an MRI scan of the lumbosacral spine, which demonstrated moderate severe disc dysfunction at L5-S1.

In a statement dated February 13, 2020, appellant stated that she had been diagnosed with nerve damage and that this diagnosis had led to a discectomy. She alleged that a physician had written a statement to OWCP indicating that appellant's medical problems were the result of her April 6, 1994 work injury. Appellant stated that she would submit medical evidence when she obtained it, as well as documentation from a supervisor stating that she was removed from her position and entered disability retirement due to illness and inability to walk and move about the office.

On February 25, 2020 appellant again requested reconsideration of OWCP's October 16, 2019 decision.

By decision dated March 6, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[4] and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants through its implementing regulations, OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[8]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organizations International Classification of Functioning, Disability and Health.[9] In evaluating lower extremity impairments, the sixth edition requires identifying the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX). Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[11]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[12] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[13] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id*. Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[9] A.M.A., *Guides* (6th ed., 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health: A Contemporary Model of Disablement.

[10] *Id*. at 494-531.

[11] *See M.P.*, Docket No. 18-1298 (issued April 12, 2019); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see B.W.*, Docket No. 18-1415 (issued March 8, 2019); *J.M.*, Docket No. 18-0856 (issued November 27, 2018); *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

[13] *Id*. at § 8107(c); *id*. at § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish more than seven percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

Appellant did not submit any evidence from a physician, providing a rating of permanent impairment under the sixth edition A.M.A., *Guides*, in support of her schedule award claim. OWCP referred her to a second opinion physician in order to determine her permanent functional loss of use of the lower extremities and the date of MMI using the sixth edition A.M.A., *Guides*. In a September 10, 2019 report, Dr. Finger examined appellant and utilizing the sixth edition A.M.A., *Guides* he noted that ratings for the lumbar spine could only be made in relation to impairment of the peripheral nerves of the lower extremities, but that because appellant had no loss of sensory or motor function that could be identified or detailed on examination, no impairment could be assigned for permanent impairment of the lower extremities due to her accepted lumbar condition.

Based on the diagnosis of trochanteric bursitis, Dr. Finger found a CDX 1 default value of seven percent and assigned a GMFH of 1 due to antalgic limp, no GMPE as it was used to make the diagnosis, and no GMCS as there were no clinical studies available. Applying the grade modifiers did not result in a change in the default value, and therefore appellant's final impairment rating was calculated as seven percent for the left lower extremity. Dr. Finger indicated that she had been at MMI for many years.

In accordance with its procedures, OWCP referred the evidence of record to a DMA, Dr. Harris, who reviewed the findings of Dr. Finger and determined that appellant had seven percent permanent impairment of the left lower extremity based upon Dr. Finger's objective findings. Dr. Harris further determined that her date of MMI was September 10, 2019, the date of evaluation by Dr. Finger. He concurred with Dr. Finger as to appellant's diagnosis upon which the impairment was based of chronic trochanteric bursitis, which was a CDX 1 diagnosis, and of his application of the A.M.A., *Guides* to arrive at a seven percent permanent impairment of the left lower extremity. Dr. Harris noted that, as she did not have any neurologic deficit in the bilateral lower extremities consistent with lumbar radiculopathy, she had zero percent lower extremity impairment for lumbar radiculopathy based on the methodology of *The Guides Newsletter*.

The Board finds that Dr. Harris properly explained how he arrived at his rating of permanent impairment by listing specific tables and pages in the A.M.A., *Guides* and *The Guides Newsletter*. The Board also finds that he properly interpreted and applied the standards of the sixth edition of the A.M.A., *Guides* to conclude that appellant qualified for seven percent permanent

[14] *Supra* note 7 at Chapter 3.700, Exhibit 4 (January 2010).

impairment of the left lower extremity. The opinions of Drs. Harris and Finger therefore represent the weight of the medical evidence and supports that she does not have a greater left lower extremity impairment than the seven percent previously awarded.

The Board finds that there is no current medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than seven percent permanent impairment of the left lower extremity. Accordingly, appellant has not established entitlement to a schedule award greater than that previously awarded.[15]

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

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[16] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[17] 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.[18] A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.[19] When a timely request 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.[20]

ANALYSIS -- ISSUE 2

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).

[15] *See M.P.*, *supra* note 11.

[16] 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).

[17] 20 C.F.R. § 10.607.

[18] *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. *Supra* note 7 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). *Id*. at Chapter 2.1602.4b.

[19] *Id*. at § 10.606(b)(3).

[20] *Id*. at § 10.608(a), (b).

Preliminarily, the Board finds that OWCP did not receive additional evidence of permanent impairment with appellant's requests for reconsideration received on November 26, 2019 and February 25, 2020. The Board will therefore consider this a proper reconsideration request as opposed to a claim for an increased schedule award.[21]

In her November 26, 2019 and February 25, 2020 requests for reconsideration, appellant did not argue that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, she was 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).[22]

In support of her November 26, 2019 reconsideration request, appellant submitted a November 21, 2019 statement, contending that Dr. Finger's report failed to evaluate nerve damage to her bilateral legs resulting from lumbar radiculopathy. She also submitted a statement in support of her February 25, 2020 reconsideration request, indicating that she had been diagnosed with nerve damage and that this diagnosis had led to a discectomy. A lay opinion, however, is not relevant medical evidence sufficient to warrant a higher rating of permanent impairment. It is appellant's burden to submit sufficient medical evidence to establish the extent of permanent impairment.[23] As these statements are irrelevant to the underlying issue of permanent impairment, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3) based upon her statements.

In support of her February 25, 2020 reconsideration request, appellant submitted additional medical evidence including reports from 1994 and 1995 from Dr. Ford that included an assessment of "possible lumbar radiculopathy," a letter from Dr. Henson-Everson from 1995 that noted moderate severe disc dysfunction at L5-S1 and a report from a nurse practitioner dated January 8, 2020. This medical evidence did not address a schedule award impairment rating. Although evidence submitted on reconsideration need not carry appellant's burden entirely to warrant reopening the claim for merit review, the new evidence must at least be relevant and pertinent to the issue(s) relevant to the contested decision of OWCP.[24] The underlying issue in this case is the degree of permanent impairment of appellant's lower extremities due to her employment injury. The Board finds that the new evidence submitted was not relevant and pertinent as it did not contain new evidence addressing the current extent of her employment-related permanent impairment.[25] Thus, appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

[21] *See C.S.*, Docket No. 19-0851 (issued November 18, 2019); *P.D.*, Docket No. 18-0962 (issued September 18, 2019).

[22] *See C.S.*, *id.*; *J.B.*, Docket No. 17-0628 (issued June 28, 2017).

[23] *See J.K.*, Docket Nos. 19-1420 and 19-1422 (issued August 12, 2020); *Annette M. Dent*, 44 ECAB 403 (1993).

[24] *See M.J.*, Docket No. 19-1979 (issued August 12, 2020); *R.R.*, Docket No. 18-1562 (issued February 22, 2019).

[25] *See L.S.*, Docket No. 19-0592 (issued September 6, 2019).

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than seven percent permanent impairment of the left lower extremity, for which she previously received a schedule award. The Board further finds that OWCP properly denied her requests for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 6 and January 7, 2020 and October 16, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 14, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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