

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

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<b>R.M., Appellant</b> )	)	
<b>and</b> )	)	<b>Docket No. 23-0748</b>
<b>U.S. POSTAL SERVICE, VEHICLE</b> )	)	<b>Issued: October 30, 2023</b>
<b>MAINTENANCE FACILITY, St. Petersburg, FL,</b> )	)	
<b>Employer</b> )	)	
_____ )	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 1, 2023 appellant filed a timely appeal from an April 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated March 25, 2022 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

**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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the April 13, 2023 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.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 1, 1994 appellant, then a 52-year-old lead automotive mechanic, filed a traumatic injury claim (Form CA-1) alleging that on September 8, 1994 he injured his lower back when he was removing oil filters while in the performance of duty. He returned to work with restrictions and then retired from federal service in 2012. OWCP accepted the claim for lumbar strain and aggravation of lumbar degenerative disc disease.

By decision dated November 13, 2006, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity (right leg) and 0 percent permanent impairment of the left leg. The award ran for 28.8 weeks from August 29, 2006 through March 18, 2007.

On January 3, 2008 appellant filed a claim for compensation (Form CA-7) for an increased schedule award. In support of his claim, he submitted a December 27, 2007 report by his attending physician Dr. Rickey P. Lockett, a Board-certified physiatrist and pain medicine specialist, who evaluated appellant's permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>4</sup> On physical examination, Dr. Lockett documented tenderness and muscle guarding of the thoracic and lumbar paraspinal musculature with exquisite tenderness over the left sacroiliac joint and tenderness into the left sciatic notch with pain radiating down his legs into the proximal calf. He opined that appellant had 27 percent permanent impairment of his right lower extremity and 27 percent permanent impairment of his left lower extremity due to sensory and motor impairment.

By decision dated February 5, 2008, OWCP granted appellant an increased schedule award for an additional 17 percent permanent impairment of the right lower extremity (right leg), 27 percent less the prior award for 10 percent permanent impairment of the right lower extremity, and for 27 percent permanent impairment of the left lower extremity (left leg). The award ran for 126.72 weeks from December 27, 2007 through June 1, 2010. OWCP based its schedule award decision on the December 27, 2007 report of Dr. Lockett.

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<sup>3</sup> Docket No. 10-2317 (issued July 8, 2011).

<sup>4</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

On June 1, 2010, September 26, 2011, May 10, 2018, and March 5, 2019 appellant filed additional CA-7 forms for an increased schedule award, which OWCP denied by decisions dated August 17, 2010,<sup>5</sup> January 31, 2012,<sup>6</sup> August 2, 2018, and July 18, 2019, respectively.

On January 19, 2022 OWCP referred appellant to Dr. Omar David Hussamy, a Board-certified orthopedic surgeon, for a second opinion to evaluate appellant's work-related condition and any resulting permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment* (July/August 2009) (*The Guides Newsletter*), a supplemental publication of the A.M.A., *Guides*.<sup>7</sup>

In a February 4, 2022 report, Dr. Hussamy diagnosed lumbar strain with aggravation of lumbar degenerative disc disease. He noted subjective complaints of low back pain with radiation into both lower extremities associated with numbness and tingling. Dr. Hussamy also documented reduced range of motion (ROM) measurements in the lumbar spine. He indicated that appellant's subjective complaints corresponded with objective physical examination findings of moderate sensory deficits bilaterally in the L4, L5, and S1 dermatomal distributions of the lower extremities. Dr. Hussamy utilized the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter* and found an eight percent permanent impairment of the right lower extremity and an eight percent permanent impairment of the left lower extremity, which he indicated was based upon three percent impairment for each L4 dermatome, three percent impairment for each L5 dermatome, and two percent impairment for each S1 dermatome. He opined that appellant reached maximum medical improvement (MMI) on February 4, 2022.

On March 10, 2022 OWCP referred appellant's case, including a statement of accepted facts (SOAF), to Dr. Michael M. Katz, a Board-certified orthopedic surgeon and district medical adviser (DMA), to obtain an impairment rating. In a March 15, 2022 report, Dr. Katz reviewed the medical record and SOAF, including the February 4, 2022 report of Dr. Hussamy. Referring to Proposed Table 2: Spinal Nerve Impairment, Lower Extremity Impairment of *The Guides Newsletter*, he noted that the class of diagnosis (CDX) for spinal nerve condition, was a Class 1 impairment. Dr. Katz concurred with Dr. Hussamy's default values for moderate sensory deficits at L4, L5, and S1 and assigned a grade modifier for functional history (GMFH) of two and a grade modifier for clinical studies (GMCS) of zero. He applied the net adjustment formula to appellant's bilateral L4, L5, and S1 conditions and concurred with Dr. Hussamy's calculation of eight percent permanent impairment of the left lower extremity and eight percent permanent impairment of the right lower extremity. Dr. Katz opined that this determination was supported by the records reviewed and consistent with the methodology of the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He further opined that the A.M.A., *Guides* did not allow for an alternative

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<sup>5</sup> On September 15, 2010 appellant appealed the August 17, 2010 decision to the Board. By decision dated July 8, 2011, the Board affirmed OWCP's August 17, 2010 decision. *Supra* note 3.

<sup>6</sup> On February 14, 2012 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated May 18, 2012, an OWCP hearing representative affirmed OWCP's January 31, 2012 decision. On June 28, 2013 appellant requested reconsideration and submitted additional evidence. By decision dated July 12, 2013, OWCP denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

impairment rating based on ROM for the relevant diagnoses. Dr. Katz agreed that the date of MMI was February 4, 2022.

On March 17, 2022 OWCP requested clarification from the DMA. In a March 17, 2022 addendum report, Dr. Katz noted that, as appellant had previously received schedule awards for 27 percent permanent impairment of each of the right and left lower extremities, there was no additional net award due for either extremity.

On March 17, 2022 appellant filed a Form CA-7 for an increased schedule award.

By decision dated March 25, 2022, OWCP denied appellant's claim for an increased schedule award.

OWCP continued to receive evidence. In medical reports dated April 21 through October 6, 2022, Dr. Lockett prescribed pain medication for appellant's lower back and leg pain.

A September 22, 2022 bone survey revealed no apparent lytic osseous lesions.

In a report of electromyography and nerve conduction velocity (EMG/NCV) study dated June 23, 2022, Dr. Allan Weiss, a Board-certified neurologist, noted diffuse abnormal findings consistent with a mixed axonal and demyelinating sensorimotor polyneuropathy and possible lumbosacral radiculopathy. In a follow-up report dated October 18, 2022, he noted neurological examination findings and diagnosed lumbosacral radiculopathy and peripheral neuropathy.

In a letter dated December 1, 2022, Dr. Adam J. Praver, a Board-certified family medicine specialist, indicated that appellant had nerve pain in his legs due to his September 8, 1994 employment injury.

In a note dated December 1, 2022, Dr. Weiss opined that appellant had neuropathic symptoms including pain, paresthesia, and dysesthesia which were due to lumbosacral spine disease associated with his known history of lumbar disc disease.

OWCP also received hematology laboratory work and a report of Dr. Ahmad Shaker, a Board-certified hematologist and medical oncologist, for medical treatment.

On March 6, 2023 appellant requested reconsideration of OWCP's March 24, 2022 decision.

By decision dated April 13, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>8</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>8</sup> 5 U.S.C. § 8128(a).

limitations in exercising its authority.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

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

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>13</sup>

In support of his request for reconsideration, appellant also did not submit any pertinent new and relevant medical evidence. The underlying issue on reconsideration is whether appellant has met his burden of proof to establish greater than 27 percent permanent impairment of the right lower extremity and greater than 27 percent permanent impairment of the left lower extremity for which he previously received schedule award compensation. The EMG/NCV, bone survey, and medical reports of Drs. Lockett, Weiss, Praver, and Shaker, although new, do not provide an impairment rating and are, therefore, not relevant to the underlying issue on reconsideration.<sup>14</sup> Thus, appellant is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>15</sup>

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<sup>9</sup> 20 C.F.R. § 10.607.

<sup>10</sup> *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 (September 2020). 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.

<sup>11</sup> *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>12</sup> *Id.* at § 10.608.

<sup>13</sup> *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>14</sup> *N.K.*, Docket No. 23-0435 (issued September 28, 2023); *R.G.*, Docket No. 21-1098 (issued March 28, 2022); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>15</sup> *Id.*

The Board, therefore, 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 OWCP properly 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 April 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 30, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board