

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

D.B., Appellant)

and)

U.S. RAILROAD RETIREMENT BOARD,)
Chicago, IL, Employer)
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Docket No. 23-0789
Issued: October 13, 2023

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 12, 2023 appellant filed a timely appeal from a January 4, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 28, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the January 4, 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

On February 12, 1999 appellant, then a 48-year-old computer specialist, filed a traumatic injury claim (Form CA-1) alleging that on December 15, 1998 she injured her back when a box full of books fell and hit her while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx023 and accepted the conditions of lumbar strain and displacement of lumbar intervertebral disc without myelopathy.³ Appellant stopped work on November 22, 2006. She retired from federal employment on or about July 31, 2007.

By decision dated February 12, 2002, OWCP granted appellant a schedule award for 30 percent permanent impairment of the right lower extremity (right leg). The award ran for 86.4 weeks for the period November 12, 2001 through July 9, 2003 and was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

By decision dated September 16, 2005, OWCP granted appellant a schedule award for 15 percent permanent impairment of the left lower extremity. The award ran for 43.2 weeks for the period June 6, 2005 through April 4, 2006 and was based on the fifth edition of the A.M.A. *Guides*.

On October 31, 2019 appellant filed a claim for compensation (Form CA-7) for an increased schedule award.

In a December 6, 2019 report, Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, opined, under the sixth edition of the A.M.A., *Guides*,⁵ that appellant had 39 percent permanent impairment of the right lower extremity and 39 percent permanent impairment of the left lower extremity.

In a February 3, 2020 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), reviewed a statement of accepted facts (SOAF) and medical evidence. He noted several problems with Dr. Chmell's December 6, 2019 report and recommended a second opinion impairment evaluation. Dr. Katz found that the date of maximum medical improvement (MMI) was undetermined.

By decision dated April 6, 2021, OWCP denied appellant's claim for an increased schedule award.

On July 1, 2021 appellant requested reconsideration.

By decision dated July 21, 2021, OWCP denied modification of its prior decision.

Appellant requested reconsideration on September 3, 2021.

³ Under OWCP File No. xxxxxx017, OWCP accepted temporary aggravation of mild asthma and temporary aggravation of chronic back pain, resolved as of December 21, 2006. It has administratively combined the current claim with OWCP File No. xxxxxx017, with the latter serving as the master file.

⁴ A.M.A., *Guides* (5th ed 2001).

⁵ A.M.A., *Guides* (6th ed. 2009).

On October 5, 2021 OWCP referred appellant to Dr. John J. Koehler, Board-certified in occupational medicine, for a second opinion evaluation. In a report dated October 25, 2021, Dr. Koehler noted appellant's medical course and physical examination findings. He indicated that he had rated appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Koehler noted his application of the net adjustment formula, and concluded that appellant had five percent permanent impairment of the right lower extremity.

On November 15, 2021 Dr. Katz, OWCP's DMA, reviewed Dr. Koehler's October 25, 2021 report. He found that, under the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), appellant had five percent permanent impairment of the right lower extremity due to mild motor deficit from L4. Dr. Katz also noted that appellant had no sensory deficit of the right lower extremity, and no sensory or motor deficit of the left lower extremity. He related that appellant's five percent permanent impairment rating represented appellant's total current permanent impairment of the affected members, and included any prior percentage awarded. Dr. Katz concluded that since the current impairment rating did not exceed the prior, overlapping award of 30 percent permanent impairment of the right lower extremity, there was no additional award due for permanent impairment of appellant's right lower extremity.

By decision dated November 29, 2021, OWCP denied appellant's request for an increased schedule award, finding that appellant had only five percent permanent impairment of the right lower extremity and zero percent permanent impairment of the left lower extremity. It accorded the weight of the medical opinion evidence to the October 25, 2021 second opinion of Dr. Koehler, and the November 15, 2021 opinion of the DMA, Dr. Katz.

On August 2, 2022 appellant requested reconsideration and submitted additional evidence, including an April 26, 2022 nerve conduction velocity/electromyography (NCV/EMG) report, and progress reports from Dr. Chmell dated February 10 through October 27, 2022. She also resubmitted Dr. Chmell's December 6, 2019 report.

By decision dated October 28, 2022, OWCP denied modification of its November 29, 2021 decision.

On December 19, 2022 appellant requested reconsideration.

Appellant submitted a December 8, 2022 progress report wherein Dr. Chmell diagnosed several conditions, including lumbar disc herniation and aggravation of degenerative disc disease of the lumbar spine. Dr. Chmell noted appellant's physical examination findings and the results of an October 6, 2022 lumbar spine MRI scan, which demonstrated that L4-L5 disc herniation has worsened and the lumbar disc bulges were unchanged.

By decision dated January 4, 2023, OWCP denied reconsideration of the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

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.⁶

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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

ANALYSIS

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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹¹

With her request for reconsideration, appellant submitted a December 8, 2022 report from Dr. Chmell. While new, this report is irrelevant to the issue of increased impairment as it does not include any impairment findings or an impairment rating.¹² Accordingly, appellant is not entitled

⁶ 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).

⁷ 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).

⁸ *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. 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.

⁹ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *Supra* note 7.

¹² *C.C.*, Docket No. 19-1622 (issued May 28, 2020); *L.D.*, *supra* note 6.

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).

The Board accordingly finds that appellant did not meet any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

CONCLUSION

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).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2023
Washington, DC

Patricia H. Fitzgerald, 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

¹³ See *L.W.*, Docket No. 22-0141 (issued May 16, 2022); *J.B.*, Docket No. 19-1622 (issued May 28, 2020); *A.M.*, Docket No. 21-1413 (issued March 28, 2022); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).