

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

C.K., Appellant

and

U.S. POSTAL SERVICE, MANAGEMENT
SECTION CENTER, Baltimore, MD, Employer

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**Docket No. 10-1926
Issued: July 8, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 19, 2010 appellant filed a timely appeal from a May 14, 2010 decision of the Office of Workers' Compensation Programs concerning a schedule award and a July 1, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she is entitled to a greater than one percent permanent impairment of the left upper extremity, for which she received a schedule award; and (2) whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal to the Board. On February 7, 2003 the Board issued a decision affirming an October 8, 2002 decision of OWCP, which denied appellant's claim for wage-loss compensation for the period March 2 to 12, 2002 due to the lack of competent medical evidence supporting her disability claim.² In the second appeal on March 11, 2010, the Board found an unresolved conflict in the medical opinion evidence between Dr. Robert W. Macht, an examining Board-certified surgeon and Dr. Arnold T. Berman, OWCP's medical adviser and Board-certified orthopedic surgeon, regarding the extent of appellant's left leg impairment.³ Thus, the Board set aside the March 14 and October 6, 2008 OWCP decisions affirming the schedule award issued for one percent impairment initially awarded on January 14, 2008 and remanded the case for resolution of the unresolved conflict in the medical opinion evidence. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.⁴

On March 29, 2010 OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Barry J. Waldman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical opinion evidence between Drs. Macht and Berman on the extent of her leg impairment. Dr. Waldman examined appellant on April 14, 2010. He reviewed appellant's medical record and history and described his findings on physical examination. A physical examination of the lumbar spine revealed negative straight leg raising, 90 degrees flexion, 10 degrees extension and 45 degrees bilateral bending. Dr. Waldman concluded that appellant had recovered from her accepted lumbar strain and there was no additional permanent impairment of the left lower extremity due to the accepted lumbar sprain. He reported the lower extremities showed 5/5 strength throughout, intact sensation in the nerve distributions, +2 patellar reflex and nontender hip and knees range of motion. Dr. Waldman reported that appellant might have minimal degenerative joint disease based on magnetic resonance imaging (MRI) scans and her symptoms. However, this condition was preexisting and unrelated to her January 25, 2002 employment injury. Dr. Waldman stated that using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had no more than a one percent permanent impairment for which she had previously received a schedule award.

On April 23, 2010 Dr. Craig Uejo, a Board-certified physiatrist and OWCP's medical adviser, reviewed the medical evidence from Drs. Macht and Berman. He stated that Dr. Macht failed to provide a specific reason explaining how appellant's left knee and hip range of motion were causally related to the accepted lumbar injury. Dr. Uejo agreed with Dr. Berman that no impairment rating was applicable for left hip or left knee loss of range of motion as they are not accepted conditions. He concluded that there was no verifiable radiculopathy at L5 that would

² Docket No. 03-139 (issued February 7, 2003).

³ Docket 09-1142 (issued March 11, 2010).

⁴ On May 9, 2002 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that she injured her lower back on January 26, 2002 while bending over to pull a full tray of mail. OWCP accepted the claim for a lumbar strain/sprain on September 24, 2002. Appellant resigned from the employing establishment effective June 14, 2003.

result in any ratable impairment. Using the sixth edition of the A.M.A., *Guides*, Dr. Uejo concluded that appellant had a zero percent left lower extremity impairment.

In a supplemental May 11, 2010 report, Dr. Uejo reviewed Dr. Waldman's April 14, 2010 report and concurred with his determination that there was no impairment greater than the one percent left lower extremity impairment appellant had previously been awarded.

By decision dated May 14, 2010, OWCP denied appellant's request for an additional schedule award. It noted that Dr. Waldman had resolved the conflict in the medical evidence and found Dr. Uejo's April 23, 2010 report and May 11, 2010 supplemental report established that appellant was not entitled to an increased schedule award.

In a June 2, 2010 letter, appellant contended that Dr. Waldman's report failed to resolve the conflict in the medical opinion evidence and, thus, an unresolved conflict continues to exist. In a second letter dated June 2, 2010, she requested reconsideration. Appellant contended that Dr. Waldman was not an appropriate physician to act as an impartial medical adviser since he had been placed on probation for one year by the Maryland Physician Board.

By decision dated July 1, 2010, OWCP denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁸

Section 8123(a) of FECA⁹ provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁰ When the case is referred to an

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 43 (2003); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹¹

ANALYSIS -- ISSUE 1

On prior appeal, the Board found that an unresolved conflict existed between appellant's physician, Dr. Macht and Dr. Berman, the OWCP medical adviser regarding the extent and degree of appellant's left lower extremity impairment. The Board remanded the case to OWCP for referral to an impartial medial examiner for resolution of the conflict pursuant to 5 U.S.C. § 8123(a)

On remand OWCP referred appellant to Dr. Waldman for an impartial medical examination. On April 14, 2010 Dr. Waldman provided findings on physical examination and determined that appellant's accepted lumbar strain had resolved and she had no more than a one percent left lower extremity. He reviewed appellant's history of injury and medical reports and concluded that she had preexisting minimal degenerative joint disease, which was not work related.

Dr. Uejo reviewed the reports by Drs. Berman, Macht and Waldman to find that appellant had no more than the one percent impairment of the left lower extremity for which she received a schedule award.

It is appellant's burden to establish that any additional impairment is a result of the accepted employment injury.¹² The Board finds that Dr. Waldman's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. OWCP properly relied upon his report in finding that appellant was not entitled to an additional impairment of her left lower extremity. Dr. Waldman examined appellant, reviewed her medical records and reported accurate medical and employment histories. He found no basis on which to attribute any greater impairment than the one percent appellant had previously received as her accepted lumbar strain had resolved. There is no probative medical evidence of record establishing that appellant has more than one percent impairment of the left lower extremity.

The Board finds that the medical evidence does not establish that appellant was entitled to more than a one percent impairment of the lower extremity for which she has received a schedule award.

¹¹ *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002); *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

¹² See *Rose V. Ford*, 55 ECAB 449 (2004) (an increased schedule award may be granted if the evidence establishes that appellant sustained an increased impairment at a later date causally related to an employment injury); see also *Thomas P. Lavin*, 57 ECAB 353 (2006) (where the claimant did not demonstrate any permanent impairment caused by the accepted occupational exposure, the claim was not ripe for consideration of any preexisting impairment).

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹³ OWCP's regulations provide that 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.¹⁴ To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁶

ANALYSIS -- ISSUE 2

Appellant did not contend that OWCP erroneously applied or interpreted a specific point of law. She also did not submit relevant and pertinent new evidence not previously considered. Appellant contended that Dr. Waldman was unqualified to serve as an impartial medical adviser because he had been placed on probation for one year by the Maryland Physician Board. The Board finds, however, that there is no evidence that Dr. Waldman is not a licensed physician qualified to examine appellant and provide an opinion regarding her permanent impairment for schedule award purposes at the time of the April 14, 2010 examination. Appellant has provided no evidence of a suspended license or any disciplinary action that would have precluded Dr. Waldman from examining appellant and rendering a decision. Consequently, the argument is insufficient to warrant reopening her case for merit review.¹⁷

The Board finds that OWCP properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(2), and thus OWCP properly denied her June 2, 2010 requests for reconsideration.

¹³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that [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.

¹⁴ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

¹⁵ 20 C.F.R. § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

¹⁶ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

¹⁷ *M.E.*, 58 ECAB 694 (2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

CONCLUSION

The Board finds that the probative evidence does not establish more than a one percent left lower extremity impairment. The Board further finds that, as appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2), OWCP properly refused to reopen the case for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and May 14, 2010 are affirmed.

Issued: July 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board