United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 17-0346**
	)	**Issued: July 24, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 5, 2016 appellant filed a timely appeal from a June 27, 2016 merit decision and a November 10, 2016 nonmerit decision 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 over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish more than an additional 12 percent permanent impairment of his right lower extremity, for a total of 23 percent permanent impairment, for which he previously received schedule awards; and (2) whether OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record provided to the Board includes evidence received after OWCP issued its November 10, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

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

FACTUAL HISTORY

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

OWCP accepted that appellant, a 52-year-old mail handler, sustained synovitis of the left knee, torn lateral meniscus of the left knee, chondromalacia of the left patella, loose body in the knee, torn medial meniscus of the right knee, and chondromalacia of the right patella. In a May 13, 2010 decision, it granted him a schedule award for 10 percent permanent impairment of the right lower extremity. It later granted a schedule award for an additional one percent permanent impairment of the right lower extremity by decision dated January 12, 2011.

On September 9, 2014 appellant filed a claim for an additional schedule award (Form CA-7) based on partial loss of use of his right lower extremity

OWCP determined that a conflict in the medical opinion evidence existed and referred appellant for an impartial medical evaluation. In a July 29, 2015 report, impartial medical examiner Dr. Thomas A. Bender, a Board-certified orthopedic surgeon, opined that appellant had 31 percent permanent impairment of the right lower extremity and that the date of maximum medical improvement (MMI) was July 17, 2014. He found that appellant symmetrically bore weight on both lower extremities. Appellant had an excellent alignment in terms of the hips to the ankles. There was no exaggerated varus or valgus at the levels of the knees. There was no postsurgical malalignment. In terms of the hips bilaterally, appellant had compromise of mobility. He flexed to 90 degrees. Appellant could externally rotate 30 degrees on the right and 20 degrees on the left. He could internally rotate just to neutral with some difficulty. Appellant appeared to have an examination consistent with mild-to-moderate arthritis to the hips bilaterally. In terms of range of motion (ROM) of the right knee, he had full extension to 115 degrees of knee flexion. There was no evidence of instability of the collateral ligaments to the right knee. There was no medial joint line McMurray sign. Appellant was subjectively tender on palpation along the medial aspect of the right knee. The left knee had full extension to 110 degrees of knee flexion. Appellant had a negative cruciate excursion. There was a slightly increased varus-to-valgus toggle at 30 and 60 degrees of knee flexion on the left side. There was no evidence of patellofemoral instability in either knee. Dr. Bender opined that appellant had only a "fair result" from his surgery and, therefore, opined that he had a class 3 diagnosis for impairment rating purposes which equated to 31 percent permanent impairment of the right lower extremity.

In an August 12, 2015 report, Dr. Daniel D. Zimmerman, OWCP's district medical adviser (DMA), provided an impairment rating of 23 percent permanent impairment of the right lower extremity based on the sixth edition of the American Medical Association, *Guides to the*

[3] Docket No. 15-1858 (issued March 4, 2016).

Evaluation of Permanent Impairment (A.M.A., *Guides*).[4] He reviewed the medical evidence of record and determined that appellant had reached MMI as of July 29, 2015, the date of Dr. Bender's examination. Dr. Zimmerman disagreed with Dr. Bender's impairment rating because he had no explanation as to how the grade modifier tables and adjustment formula were used. He also disagreed with Dr. Bender's assignment of a class 3 diagnosis because appellant's ROM measurements reported were not consistent with a mild motion deficit and the positioning of the surgical hardware was not abnormal. Dr. Zimmerman assigned a class 2 diagnosis for "good result (good position, stable, functional)" postsurgery. He assigned a grade modifier of 2 for Functional History (GMFH) due to appellant's single gait, a grade modifier of 1 for Physical Examination (GMPE) due to palpating pain, and noted that a grade modifier for Clinical Studies (GMCS) was not applicable in this case. Using the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Zimmerman calculated that appellant had a net adjustment of (2-2) + (1-2) + (n/a) = -1, which equated to a class 2, grade B impairment equaling 23 percent permanent impairment of the right lower extremity.

By decision dated September 9, 2015, OWCP granted appellant a schedule award for an additional 12 percent permanent impairment of the right lower extremity for a total of 23 percent.

Appellant subsequently appealed to the Board. By its March 4, 2016 decision, the Board set aside OWCP's September 9, 2015 decision, finding that the case was not in posture for decision as OWCP had not properly resolved the conflict in the medical evidence. The Board remanded the case to seek clarification from its impartial medical specialist, Dr. Bender, as to why he found that appellant's total knee replacement had only a fair result equating to a class 3 impairment and a reasoned medical opinion as to the extent of appellant's permanent impairment.

Appellant submitted a January 25, 2016 report from Dr. Barton R. Branam, a Board-certified orthopedic surgeon, who diagnosed painful right patellofemoral knee replacement and left knee replacement, one month postoperative.

In an April 13, 2016 letter, OWCP requested an addendum report from Dr. Bender.

In an April 29, 2016 report, Dr. Bender reiterated his prior examination findings from July 14, 2015 and indicated that appellant had less than optimal ROM. Appellant had 110 degrees of knee flexion on the left side and the mobility of his right knee was functional. Dr. Bender found that appellant had ligament instability in the left leg and the right knee was entirely stable, but the left knee had collateral ligament instability from 30 to 60 degrees with knee flexion. He advised that this was "a very critical finding in terms of function and ambulatory confidence in the left knee." Dr. Bender asserted that, based upon his review, his determination of the right knee was now changed and he believed that appellant had a "good" result of the right knee and assigned a class 2 diagnosis, equaling 23 percent permanent impairment of the right lower extremity.

By decision dated June 27, 2016, OWCP issued a *de novo* decision granting appellant a schedule award for an additional 12 percent permanent impairment of his right lower extremity,

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

for a total of 23 percent.[5] The award ran for 34.56 weeks for the period July 29, 2015 to March 26, 2016.

On July 7, 2016 appellant filed a claim for an additional schedule award (Form CA-7).

On July 18, 2016 appellant requested reconsideration of the June 27, 2016 schedule award decision. In support of his reconsideration request, he submitted a July 14, 2016 narrative statement reiterating the factual history of his claim as well as physician's orders dated January 28, 2015 for continuity of care.

On August 29, 2016 Dr. Stephen W. Dailey, a Board-certified orthopedic surgeon, reviewed x-rays of appellant's hips and diagnosed severe end-stage degenerative joint disease of the hips, bilaterally.

In an October 6, 2016 report, Dr. Todd Kelley, a Board-certified orthopedic surgeon, diagnosed two weeks status post left total hip arthroplasty, right hip pain, and right hip osteoarthritis.

Appellant also resubmitted medical reports dated January 27, 28, and 29, 2015, and February 11, 2016.

By decision dated November 10, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[6] and its implementing regulations provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[7] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.[8]

[5] OWCP noted that appellant's current rating was 23 percent minus the previously paid 1 percent in the previous schedule award dated January 12, 2011 and 10 percent in the schedule award dated May 13, 2010.

[6] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

[7] *See Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000). *See also id.* at § 8107.

[8] *See D.T.*, Docket No. 12-0503 (issued August 21, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[9] Under the sixth edition, the evaluator identifies the impairment Class of Diagnosis (CDX), condition which is then adjusted based on 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]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained synovitis of the left knee, torn lateral meniscus of the left knee, chondromalacia of the left patella, loose body in the knee, torn medial meniscus of the right knee, and chondromalacia of the right patella at work. It had awarded him a schedule award for an additional 12 percent permanent impairment of the right lower extremity, for a total of 23 percent. The award ran for 34.56 weeks for the period July 29, 2015 to March 26, 2016. It is appellant's burden of proof to submit sufficient evidence to establish the extent of permanent impairment.[12] The Board finds that he has not established greater than the 23 percent permanent impairment of his left lower extremity previously awarded.

In an April 29, 2016 supplemental report, Dr. Bender reiterated his prior examination findings from July 14, 2015 and indicated that appellant had less than optimal ROM. Appellant had 110 degrees of knee flexion on the left side and the mobility of his right knee was functional. Dr. Bender found that appellant had ligament instability in the left leg and the right knee was entirely stable, but the left knee had collateral ligament instability from 30 to 60 degrees with knee flexion. He advised that this was "a very critical finding in terms of function and ambulatory confidence in the left knee." Dr. Bender asserted that, based upon his review, his determination of the right knee was now changed and he believed that appellant had a "good" result of the right knee and assigned a class 2 diagnosis, equaling 23 percent permanent impairment of the right lower extremity.

The Board finds that Dr. Bender is accorded the special weight of the medical evidence as he correctly applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides*. His calculations were mathematically accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Accordingly, the Board finds that OWCP properly relied on Dr. Bender's assessment of 23 percent permanent impairment of the right lower extremity, in

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

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

[11] *See R.V.*, Docket No. 10-1827 (issued April 1, 2011).

[12] *See Annette M. Dent*, 44 ECAB 403 (1993).

granting appellant's schedule award. As such, appellant has not established that he is entitled to a schedule award greater than that previously awarded.[13]

Appellant may request a schedule award or increased schedule award at any time 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

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[14] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[15] 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.[16] A timely application 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.[17] When a timely application 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.[18]

ANALYSIS -- ISSUE 2

Appellant's July 18, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. As well, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP because the July 14, 2016 narrative statement merely reiterated the factual history of his claim. Consequently,

[13] FECA provides for reduction of compensation for subsequent injury to the same body member. It provides that schedule award compensation is reduced by the compensation paid for an earlier injury where the compensation in both cases are for impairment of the same member or function and where it is determined that the compensation for the later disability in whole or part would duplicate the compensation payable for the preexisting disability. 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

[14] 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." *Id.* at § 8128(a).

[15] 20 C.F.R. § 10.607.

[16] *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 (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.

[17] 20 C.F.R. § 10.606(b)(3).

[18] *Id*. at § 10.608(a), (b).

appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of his reconsideration request, appellant submitted physician's orders dated January 28, 2015 for continuity of care and reports from Drs. Dailey, and Kelley who provided medical diagnoses. The Board finds that submission of this evidence did not require reopening appellant's case for merit review because it failed to address the point at issue before OWCP.[19] As OWCP denied the claim based on the lack of supportive medical evidence establishing his entitlement to an additional schedule award under the sixth edition of the A.M.A., *Guides*, the Board finds that this evidence does not constitute pertinent new and relevant evidence. Therefore, it is not sufficient to require OWCP to reopen appellant's claim for reconsideration of the merits.

Appellant also resubmitted medical reports dated January 27, 28, and 29, 2015 and February 11, 2016 in support of his reconsideration request. The Board finds that submission of this evidence did not require reopening his case for merit review. As OWCP denied appellant's claim based on the lack of supportive medical evidence and these reports repeat evidence already in the case record, they are cumulative and do not constitute relevant and pertinent new evidence.[20] Therefore, they are not sufficient to require OWCP to reopen the claim for consideration of the merits.

The Board finds that, as appellant did not satisfy any of the three requirements under section 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained more than an additional 12 percent permanent impairment of the right lower extremity, for a total of 23 percent permanent impairment, for which he previously received schedule awards. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[19] The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *See S.T.*, Docket No. 17-0790 (issued May 22, 2018); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[20] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *See A.R.*, Docket No. 17-1504 (issued May 25, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the November 10 and June 27, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 24, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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