

ISSUES

The issues are: (1) whether OWCP abused its discretion in denying appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b); and (2) whether OWCP 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.

On October 26, 2012 appellant, then a 60-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2012 he sprained his lower back while transferring and pulling mail from a dolly in the performance of duty. He stopped work on October 18, 2012. On November 29, 2012 OWCP accepted the claim for lumbar sprain. It subsequently expanded acceptance of the claim to include aggravation of lumbar stenosis and displacement of lumbar intervertebral disc without myelopathy. Appellant received wage-loss compensation on the supplemental rolls as of December 2, 2012, and on the periodic rolls as of April 7, 2013.

On September 6, 2013 appellant underwent anterior lumbar discectomy at L3-4 and L4-5, anterior interbody fusion at L3-4 and L4-5, and lateral fusion from L3 to L5. On September 13, 2013 he underwent re-exploration of the laminectomy at the fusion site and a debridement and primary closure. Appellant returned to work in a full-duty capacity on April 11, 2014.

On January 30, 2014 appellant filed a claim for a schedule award (Form CA-7).

On June 4, 2015 OWCP granted appellant a schedule award for four percent permanent impairment of the left lower extremity.

Following further development of the claim on May 5, 2016, OWCP granted appellant a schedule award for an additional two percent permanent impairment of the left lower extremity. It also found that appellant had zero percent permanent impairment of the right lower extremity.

On October 28, 2016 appellant appealed to the Board. By decision dated July 18, 2017, the Board affirmed OWCP's May 5, 2016 schedule award decision.⁴

Appellant filed Form CA-7 claims for an increased schedule award on June 9 and August 7, 2018. He submitted additional evidence in support of the claims.

By decision dated November 14, 2018, OWCP denied appellant's claims for an increased schedule award.

³ Docket No. 17-1805 (issued March 6, 2018); Docket No. 17-0144 (issued July 18, 2017).

⁴ Docket No. 17-0144 (issued July 18, 2017).

On December 11, 2018 appellant requested reconsideration. On March 11, 2019 OWCP denied modification of its November 14, 2018 decision.

On March 26, 2019 appellant requested reconsideration of the March 11, 2019 decision. By decision dated July 22, 2019, OWCP denied modification of the March 11, 2019 decision. It found that the report from Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as a district medical adviser, was well rationalized and properly determined that the evidence was insufficient to establish that appellant had more than six percent permanent impairment of the left lower extremity.

On September 3, 2019 appellant requested reconsideration. By decision dated December 2, 2019, OWCP denied her request for reconsideration of the merits of her claim, finding that it neither raised substantive legal questions nor included new and relevant evidence.

On January 6, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 4, 2020, OWCP denied appellant's January 6, 2020 request for an oral hearing, noting that he had previously requested reconsideration and that OWCP had issued a decision on December 2, 2019. It explained that, under 5 U.S.C. § 8124(b)(1), he was not entitled to a hearing on the same issue as a matter of right. OWCP also considered whether to grant a discretionary hearing and found that the issue could be addressed by requesting reconsideration and submitting evidence not previously considered.

OWCP subsequently received a November 21, 2019 progress note from Dr. Saied Jamshidi, a Board-certified neurosurgeon, which related appellant's findings of radicular pain and lumbar disc degeneration. Dr. Jamshidi also noted that he had treated appellant with a steroid injection on November 21, 2019.

On February 18, 2020 appellant again requested reconsideration. He argued that Dr. Harris never examined him and always found different reasons for denying an additional schedule award every time he reviewed the medical record.

By decision dated April 30, 2020, OWCP denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

A claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.⁵ Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his or her claim

⁵ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

before a representative of the Secretary.”⁶ OWCP regulations further explain that the claimant must have not previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁷ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not abuse its discretion in denying appellant’s January 23, 2020 request for an oral hearing before an OWCP hearing representative.

OWCP denied appellant’s claim for an increased schedule award by decision dated July 22, 2019. On September 3, 2019 appellant requested reconsideration of the July 22, 2019 OWCP decision. In its December 2, 2019 decision, OWCP denied merit review. Appellant then requested an oral hearing before OWCP’s Branch of Hearings and Review on January 6, 2020. As appellant had previously requested reconsideration of OWCP’s July 22, 2019 merit decision under section 8128 of FECA, he was not entitled to an oral hearing as a matter of right under section 8124(b)(1).⁹ OWCP properly exercised its discretion and determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of new evidence.¹⁰ Therefore, the Board finds that OWCP, in its February 4, 2020 decision, did not abuse its discretion in denying appellant’s January 6, 2020 request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 2

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.¹¹ 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.¹² A request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for

⁶ 5 U.S.C. § 8124(b)(1).

⁷ *Id.*

⁸ See *J.C.*, Docket No. 19-1293 (issued December 16, 2019); *T.M.*, Docket No. 18-1418 (issued February 7, 2019); *M.W.*, Docket No. 16-1560 (issued May 8, 2017); *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

⁹ 20 C.F.R. §10.616(a); *J.H.*, Docket No. 17-1796 (issued February 6, 2018).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8128(a); see *P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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).

¹² 20 C.F.R. § 10.606(b)(3); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); see *J.W.*, Docket No. 19-1795 (issued March 13, 2010); see also *L.G.*, Docket No. 091517 (issued March 3, 2010).

which review is sought.¹³ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

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).

In his February 18, 2020 request for reconsideration, appellant argued that OWCP had improperly denied his requests for an additional schedule award based upon the reports from DMA Harris as he had never examined him and Dr. Harris had found different reasons for denying an additional schedule award every time he reviewed the record. The issue in the present claim is whether appellant was entitled to an increased schedule award. While appellant disagrees with the DMA's findings, his argument does not address the medical evidence of record and establish a legal basis for an additional schedule award. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶ The Board finds that appellant's reconsideration request did not advance a new legal argument not previously considered nor show that OWCP erroneously applied or interpreted a specific point of law. Thus, 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).¹⁷

As to the third above-noted requirement under section 10.606(b)(3), appellant did not submit any relevant or pertinent new evidence in support of his request for an increased schedule award. OWCP received a November 21, 2019 progress note from Dr. Jamshidi, who assessed radicular pain and lumbar disc degeneration, and noted that appellant had been provided a steroid injection. However, Dr. Jamshidi did not address the issue at hand, that being whether appellant was entitled to an increased schedule award. As appellant did not provide relevant and pertinent

¹³ *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 (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). Chapter 2.1602.4b.

¹⁴ *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹⁵ *Id.* at § 10.608(b); *see C.L.*, Docket No. 20-0385 (issued August 5, 2020; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁶ *See M.S.*, Docket No. 19-1090 & 20-0408 (issued April 20, 2020); *R.C.*, Docket No. 17-1294 (issued December 20, 2018).

¹⁷ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹⁸

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.¹⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing. The Board also 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 February 4 and April 30, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 27, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ 20 C.F.R. § 10.606(b)(3)(iii).

¹⁹ See *L.A.*, Docket No. 18-1226 (issued December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).