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<b>D.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 12-247</b>
	)	<b>Issued: May 22, 2012</b>
	)	
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION MEDICAL</b>	)	
<b>CENTER, Atlanta, GA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

On November 14, 2011 appellant filed a timely appeal from the September 13, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for further review of his claim. As more than 180 days elapsed from the last merit decision of March 11, 2011 and 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 only has jurisdiction over the nonmerit decision.

The issue is whether OWCP properly denied appellant's request for merit review under 20 C.F.R. § 8128(a).

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

On appeal appellant asks that the Board review his impairment rating and alleges that he is entitled to an impairment rating of the right upper extremity in the amount of either 12 percent or 15 percent.

### **FACTUAL HISTORY**

On October 20, 2009 appellant, then a 56-year-old medical supply technician, filed a traumatic injury claim alleging that on October 15, 2009 he injured his right shoulder and arm when he fell when a chair rolled from him while he was trying to sit down. On February 19, 2010 OWCP accepted appellant's claim for a right rotator cuff tear. On March 26, 2010 appellant underwent an arthroscopic rotator cuff repair, arthroscopic subacromial decompression and arthroscopic distal clavicle excision. On June 18, 2010 he accepted a job offer as lead medical supply technician for the employing establishment.

Appellant filed a claim for a schedule award. In an October 21, 2010 report, Dr. Michael P. Bernot, appellant's Board-certified orthopedic surgeon, opined that appellant had a 15 percent impairment of his upper right extremity. OWCP wrote Dr. Bernot a letter requesting that he apply the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, in determining the amount of appellant's impairment. It did not receive a response, so the case was referred to OWCP's medical adviser. In a December 12, 2010 report, OWCP's medical adviser applied the sixth edition of the A.M.A., *Guides* and determined that appellant had a 10 percent impairment of the right upper extremity. On February 23, 2011 OWCP's medical adviser reviewed appellant's physician's report, but reiterated that appellant had a 10 percent impairment of the right upper extremity.

On March 11, 2011 OWCP issued a schedule award for 10 percent impairment of the right arm.

On August 31, 2011 appellant requested reconsideration. In support of his reconsideration request, he submitted a copy of the March 26, 2010 operative report by Dr. Michael Miller, an osteopath; a March 7, 2011 note by Dr. Michael B. Miller discussing appellant's treatment; a May 19, 2011 physical and occupational therapy prescription; a May 19, 2011 workers' compensation form wherein Dr. Bernot indicated that appellant can return to light-duty work; and a July 5, 2011 note by Dr. Michael Miller, an osteopath, indicating that appellant is not able to perform the essential functions of his job as lead medical supply technician. Other documents received by OWCP since the March 11, 2011 decision include multiple reports and forms by Dr. Bernot addressing appellant's symptoms and restrictions.

On September 13, 2011 OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>2</sup> OWCP's regulations provide that the evidence or argument submitted by 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.<sup>3</sup> To be entitled to a merit review of an OWCP 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.<sup>4</sup> 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.<sup>5</sup>

## **ANALYSIS**

Appellant requested reconsideration of a March 11, 2011 decision by OWCP issuing a schedule award for a 10 percent impairment of the right arm. The Board finds that he has not shown that OWCP erroneously applied or interpreted a specific point of law, has not advanced a relevant legal argument not previously considered by OWCP and has not submitted relevant and pertinent new evidence not previously considered by OWCP.

Although Dr. Bernot continued to submit medical reports, he did not submit any new reports indicating that appellant was entitled to a greater schedule award. His recently submitted reports merely address appellant's medical condition and work status. Similarly, the physical and occupational therapy orders and the July 5, 2011 note by Dr. Miller do not contain any opinion with regard to appellant's permanent impairment rating. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>6</sup> Furthermore, the Board notes that certain items of evidence, including the March 26, 2010 operative report, are duplicates of evidence already in the case record. The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>7</sup>

On appeal appellant makes various arguments concerning the merits of the case. As previously noted, the Board does not have jurisdiction to consider the merits of the decision as the last merit decision in this case was issued more than 180 days prior to the date appellant filed his appeal.<sup>8</sup> The Board further notes that appellant has submitted additional evidence with his

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *J.K.*, Docket No. 11-1759 (issued February 21, 2012).

<sup>7</sup> *See E.L.*, Docket No. 11-1116 (issued December 19, 2011); *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>8</sup> 20 C.F.R. § 501.3(e).

appeal. Evidence submitted by appellant after the final decision cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.<sup>9</sup>

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 13, 2011 is affirmed.

Issued: May 22, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> *Id.* at § 501.2(c)(1).