

FACTUAL HISTORY

On May 17, 2011 appellant, then a 53-year-old mail processing clerk, sustained a left shoulder injury in the performance of duty. OWCP accepted the claim for left shoulder sprain and rotator cuff tear. On July 5, 2011 appellant underwent authorized left shoulder arthroscopic labral debridement with proximal biceps tenotomy, rotator cuff repair, subacromial decompression and distal clavicle resection. OWCP paid wage-loss compensation. On February 13, 2012 appellant was released to full-time unrestricted work.

On February 2, 2012 appellant filed a Form CA-7 claim for a schedule award. In a February 13, 2012 report, Dr. Brian Ratigan, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement. On examination, appellant had full range of motion of the left shoulder without pain and the majority of his strength had returned. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Ratigan rated 10 percent left upper extremity impairment under Table 15-5.

In a November 15, 2012 report, Dr. Nabil F. Angley, an OWCP medical adviser, reviewed the statement of accepted facts and Dr. Ratigan's February 13, 2012 report. He found that Dr. Ratigan's impairment rating should be discarded as appellant had restricted left shoulder motion and Table 15-5 was not applicable. He recommended that appellant be referred for a second opinion on any permanent impairment.

OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for an impairment evaluation. In a January 7, 2013 report, Dr. Obianwu found that appellant had 10 percent left upper extremity impairment under Table 15-5 for s/p distal clavical resection, class 1 grade C. He discussed the grade modifiers under the sixth edition of the A.M.A., *Guides*. On January 31, 2013 Dr. Angley agreed with Dr. Obianwu's impairment rating of 10 percent to the left arm.

By decision dated March 22, 2013, OWCP granted appellant a schedule award for 10 percent left arm impairment. Appellant received 31.2 weeks of compensation for the period July 1, 2012 through February 4, 2013.

On April 23, 2013 appellant filed a claim for an increased schedule award. On July 22, 2013 OWCP received a reconsideration request from him. In an undated letter appellant noted that his left biceps cramped whenever he lifted items over five pounds. He contended that he experienced daily pain and that his daily activities were affected by his injury. Appellant stated that his left arm was worse and it was almost impossible to lift his 16-month-old grandson. No medical evidence was submitted.

On September 16, 2013 OWCP received another undated statement from appellant requesting reconsideration on the grounds that his left arm condition has worsened. Appellant noted that the August 28, 2013 magnetic resonance imaging (MRI) scan detailed damage to his left biceps since his last MRI scan. He stated that he was informed surgery would not help his condition. Appellant indicated that he can only lift 10 to 15 pounds with his left arm for a short period before his biceps start to cramp.

Progress reports from Dr. Ratigan dated February 11, 2013, August 21 and 30, 2013 noted appellant should modify his activities to avoid an increase in pain and that he should continue working on strengthening. He indicated that the previous permanent partial impairment would stand and appellant can return to work without restrictions. An August 28, 2013 MRI scan of the left shoulder was also received.

By decision dated August 6, 2013 but issued on December 2, 2013, 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,³ 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.⁴ 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.⁵ When a claimant fails to meet one of the above standards, it will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

OWCP's most recent merit decision dated March 22, 2013 granted appellant a schedule award for 10 percent left upper extremity impairment. It denied his reconsideration request, without a merit review and he appealed this decision to the Board.

As noted, the Board does not have jurisdiction over the March 22, 2013 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

The Board notes that the underlying issue in this case is whether appellant has greater than 10 percent impairment of the left upper extremity. That is a medical issue which must be

³ Under section 8128 of FECA, [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. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

addressed by relevant medical evidence.⁷ However, appellant failed to submit any new and relevant medical evidence in support of his claim.

Appellant submitted progress reports from Dr. Ratigan dated February 11, August 21 and 30, 2013, which noted that he should modify his activities to avoid an increase in pain and continue working on strengthening. Dr. Ratigan also indicated that the previous permanent partial impairment would stand and appellant could return to work without restrictions. He also included an August 28, 2013 MRI scan of the left shoulder. The Board finds that these reports are not relevant because they do not specifically address whether appellant has greater impairment to the left arm. Dr. Ratigan specifically stated that the previous permanent partial impairment would stand. The MRI scan report does not address permanent impairment. Appellant did not submit any new and relevant medical evidence addressing whether he had increased permanent impairment in his left arm. Therefore, this material is not relevant and is insufficient to warrant reopening the case for a merit review.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.⁸

On appeal, appellant reiterated that his left arm condition has worsened. He may request an 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.

CONCLUSION

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

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁸ *Robert E. Cullison*, 55 ECAB 570 (2004); *M.E.*, 58 ECAB 694 (2007) (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).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2013 decision of the Office of Workers' Compensation Programs issued on December 2, 2013 is affirmed.

Issued: December 17, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board