

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 16, 1999 appellant, a 50-year-old radiology technician, sustained injuries to her left arm and back in the performance of duty. Her traumatic injury claim was accepted for left lateral epicondylitis a left rotator cuff strain, a lumbar strain and a right leg strain under File No. xxxxxx153.⁴ Appellant underwent left rotator cuff repair on April 25, 2000.

On a May 12, 2006 decision in File No. xxxxxx573, OWCP granted appellant a schedule award for a 14 percent permanent impairment of the left upper extremity, finding that the date of maximum medical improvement (MMI) was April 25, 2001. The period of the award was from February 2 to December 3, 2004. In a decision dated October 24, 2007, OWCP's hearing representative affirmed the schedule award for a 14 percent impairment of the left upper extremity, but denied schedule award compensation for any impairment of appellant's lower extremities on the grounds that MMI had not been reached.

By decision dated December 11, 2008, OWCP granted appellant's request for an additional schedule award and modified its October 24, 2007 decision to approve schedule award compensation for a 4 percent impairment of each lower extremity and a 28 percent impairment of the left upper extremity, with a date of MMI of April 25, 2001. The decision was based on the district medical adviser's (DMA) report of October 13, 2008. The claims examiner noted that a claimant may not receive compensation for temporary total disability and compensation under a schedule award covering the same period of time. As appellant received wage-loss compensation for total disability for work from April 25, 2001 and continued to do so, she was not eligible to receive schedule award benefits during the period of the award.

On April 23, 2009 appellant, through her representative, submitted a request for reconsideration based on new legal argument not previously submitted. Counsel argued that the schedule award should be payable for a future date to allow appellant to elect OPM annuity benefits in lieu of compensation benefits from OWCP. He stated that according to the FECA Procedural Manual, if a date in the past will result in conversion of a period paid for temporary total disability (TTD) into payment for schedule award, it may not be chosen unless the record contains persuasive proof that MMI had in fact been reached on that date.⁵ Counsel contended that the record did not contain persuasive proof that MMI had been reached, as evidenced by the

⁴ Appellant's February 1, 1994 traumatic injury claim was accepted for an acute lumbar strain under File No. xxxxxx614. Her June 14, 1994 traumatic injury claim was accepted for lumbosacral strain under File No. xxxxxx322. Appellant's January 22, 1997 traumatic injury claim (File No. xxxxxx573) was accepted for a left shoulder strain, left elbow strain, left leg strain, left rotator cuff tear and herniated disc at L4-5 with radiculopathy. On November 14, 2008 OWCP combined File No. xxxxxx573 with File No. xxxxxx153, which serves as the master file.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.(a)(1) (April 1995).

fact that OWCP's May 12, 2006 schedule award decision in File No. xxxxxx573 determined that the period of the award began February 2, 2004, rather than April 25, 2001, the date stated for MMI. He argued that OWCP's procedures required appellant's additional schedule award payment to begin on the day following the end of the award issued previously, rather than on April 25, 2001.⁶ As the December 11, 2008 decision found appellant to be entitled to additional schedule award benefits to her left upper extremity, the award was in fact payable and should be paid the day following the conclusion of her left arm schedule award, beginning on December 4, 2004. Counsel noted that appellant would then be able to elect to receive OPM annuity benefits during the period of this award, so that she was not disadvantaged.

Appellant submitted medical evidence, including an April 30, 2009 work capacity evaluation from Dr. Robert Gerwin, a Board-certified neurologist.

By decision dated February 2, 2010, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted did not warrant further merit review.

On appeal, appellant's representative contends that OWCP violated its own procedures in selecting a starting date for the additional schedule award payment and, as such, disadvantaged appellant. He also contended that his legal argument constituted a basis for merit review and that the claims examiner who denied reconsideration was improperly assigned to the case, as he has served as a claims examiner in prior decisions.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of the FECA, section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must submit evidence or argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by it; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ 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.⁸ Section 10.608(b) provides that, when an application for review of the merits of a claim 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.⁹

⁶ *Id.* at Chapter 2.808.8.(b) (1) ("If it is determined after payment of a schedule award that the claimant is entitled to a greater percentage of loss, an amended award should be issued. The pay rate will remain the same, and the revised award will begin on the day following the end of the award issued previously.")

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b). *See also T.E.*, Docket No. 07-2227 (issued March 19, 2008).

ANALYSIS

The Board finds that OWCP abused its discretion in denying appellant's request for reconsideration.

OWCP denied appellant's reconsideration request on the grounds that she had not fulfilled any of the requirements under section 10.606(b)(2) of Title 20 of the Code of Federal Regulations. The Board notes, however, that counsel advanced a relevant legal argument not previously considered, namely, that OWCP had violated its procedures by selecting a start date for the additional schedule award payments that would disadvantage appellant and that the procedures required his additional schedule award payment to begin on the day following the end of the award issued previously, rather than on the date of MMI. Counsel referred to specific sections of the procedure manual, which he applied to the facts of this case. As appellant advanced a relevant legal argument not previously considered by OWCP, she would be entitled to merit review on that basis.

As OWCP abused its discretion in denying appellant's request for reconsideration, the case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further review of the merits under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2010 is set aside. The case is remanded for further proceedings consistent with the decision of the Board.

Issued: August 24, 2011
Washington, DC

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

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

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