

**United States Department of Labor
Employees' Compensation Appeals Board**

D.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Macon, GA, Employer**

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**Docket No. 11-613
Issued: September 21, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 7, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) August 30, 2010 nonmerit decision denying her request for merit review. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. The last merit decision of OWCP was issued on July 6, 2010. The Board lacks jurisdiction to review the merits of this claim.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

Appellant's October 20, 2006 occupational disease claim was accepted for other affections of the bilateral shoulders not elsewhere classified (impingement syndrome); bilateral radial styloid tenosynovitis (de Quervain's tenosynovitis); and bilateral carpal tunnel syndrome. She was released by Dr. S. Mark Kamaleson, a treating physician, to return to light duty on April 4, 2008.

On November 20, 2009 OWCP asked Dr. Kamaleson to provide an opinion as to whether appellant had any permanent impairment of her upper extremities and to rate any such impairment according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a report dated November 18, 2009, Dr. Kamaleson opined that appellant had a 34 percent permanent impairment of her right upper extremity and a 26 percent impairment of her left upper extremity. He found that she had reached maximum medical improvement.

In a March 24, 2010 report, the district medical adviser applied the diagnosis-based index approach referenced in the sixth edition of the A.M.A., *Guides*. He opined that appellant had a five percent right shoulder impairment and a one percent right upper extremity impairment, for a combined right upper extremity impairment of six percent. The medical adviser also concluded that appellant had a four percent left shoulder impairment and a one percent left upper extremity impairment, for a combined left upper extremity impairment of five percent.

In an April 19, 2010 decision, OWCP granted appellant schedule awards for six percent for the right arm and five percent for the left arm. The date of maximum medical improvement was determined to be November 18, 2009.

On May 26, 2010 appellant requested reconsideration.

In a May 5, 2010 report, Dr. Kamaleson revised his ratings referencing the sixth edition of the A.M.A., *Guides*. He opined that appellant had a 6 percent left shoulder impairment and a 6 percent left hand impairment (CTS), for a combined left upper extremity impairment of 11 percent. Dr. Kamaleson further opined that appellant had a 5 percent right shoulder impairment, a 2 percent right elbow impairment and a 6 percent right hand impairment (CTS), for a combined right upper extremity impairment of 13 percent.

In a June 11, 2010 report, the district medical adviser stated that the medical evidence of record provided no basis for an impairment rating for carpal tunnel syndrome. He noted that there was no evaluation of a median nerve electrodiagnostic study, which was a requirement for an impairment assessment under the A.M.A., *Guides*. The medical adviser reiterated his opinion that appellant had a six percent permanent impairment of the right upper extremity and a five percent permanent impairment of the left upper extremity.

In a July 6, 2010 decision, OWCP denied modification of its April 19, 2010 schedule award decision, finding that the district medical adviser's June 11, 2010 report conformed with the requirements of the sixth edition of the A.M.A., *Guides* and constituted the weight of the medical evidence.

On August 18, 2010 appellant submitted an appeal request form requesting reconsideration. She submitted additional notes and reports from Dr. Kamaleson. On July 14, 2010 Dr. Kamaleson listed appellant's complaint's of chronic upper extremity pain. He stated that she was overweight and had normal heel/toe gait. In an accompanying workers' compensation report, Dr. Kamaleson indicated that appellant could return to work without restrictions. The record also contains a prescription for a functional capacity evaluation.

Appellant submitted an August 10, 2010 functional capacity evaluation, signed by Cheryl Armstrong, an occupational therapist. Appellant's range of motion was within normal limits except for shoulder flexion, which was from 0 to 130 degrees on the right and from 0 to 150 degrees on the left. Sensory evaluation indicated that bilateral upper and lower extremities were intact to light touch. Muscle strength in all extremities was 5/5. Ms. Armstrong stated that appellant demonstrated medium physical demand level based on her ability to lift, carry, push and pull.

By decision dated August 30, 2010, OWCP denied appellant's request for reconsideration, finding that the evidence presented was insufficient to warrant further merit review.

On appeal, appellant contends that her ratings should be higher because she experiences throbbing pain and numbness in her hands and wrists.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP 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, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶ The Board

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the 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).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁷

ANALYSIS

By decision dated July 6, 2010, OWCP denied modification of its April 19, 2010 schedule award decision, finding that the district medical adviser's June 11, 2010 report conformed to the requirements of the sixth edition of the A.M.A., *Guides* and constituted the weight of the medical evidence. The issue is whether the evidence submitted in support of appellant's August 18, 2010 request for reconsideration is sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(2). The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of her claim.

In her application for reconsideration, appellant did not identify a specific point of law or show that it was erroneously applied or interpreted. She did not advance a new and relevant legal argument. A claimant may be entitled to a merit review by submitting new and relevant evidence. Appellant did not, however, submit new and relevant medical evidence in this case.

Appellant submitted notes and reports from Dr. Kamaleson, who noted her complaint of chronic upper extremity pain, provided minimal examination findings, and indicated that she could return to work without restrictions. Dr. Kamaleson prescribed a functional capacity evaluation. The issue for determination was whether appellant has more than six percent right upper extremity impairment or five percent of the left arm. Dr. Kamaleson's reports, which did not address the degree of appellant's permanent impairment, are irrelevant to this issue.

Appellant also submitted a functional capacity evaluation in which an occupational therapist reported on appellant's current work capacity. By definition, a functional capacity evaluation is not relevant to the issue of permanent impairment. Additionally, the issue in this case is medical in nature. As an occupational therapist is not considered a "physician" under FECA, her report does not constitute probative medical evidence.⁸ Accordingly, OWCP properly determined that this evidence did not constitute a basis for 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.

⁷ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁸ A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2). 5 U.S.C. § 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

On appeal, appellant contends that her ratings should be higher because she experiences throbbing pain and numbness in her hands and wrists. As noted, the Board does not have jurisdiction over the merits of this case. For reasons stated, the Board finds that the evidence submitted in support of appellant's request for reconsideration is insufficient to warrant further merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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