

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

B.W., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
U.S. COAST GUARD, Baltimore, MD, Employer**

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**Docket No. 14-627
Issued: July 24, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 26, 2014 appellant filed a timely appeal from a December 20, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.¹ As OWCP has not issued a merit decision within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen his claim for further merit review under 5 U.S.C. § 8128(a).

¹ Pursuant to 20 C.F.R. § 501.5(b), appellant submitted a timely request for oral argument before the Board. By order dated June 23, 2014, the Board denied the request on the grounds that the argument raised could be adequately addressed in a decision based on a review of the record. *Order Denying Request for Oral Argument*, Docket No. 14-627 (issued June 23, 2014).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated August 15, 2008, the Board affirmed an October 26, 2007 decision denying appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128.³ In an order dated August 15, 2012, the Board set aside a September 23, 2011 decision denying his request for reconsideration as untimely and insufficient to establish clear evidence of error.⁴ The Board determined that appellant had timely requested reconsideration and remanded the case for OWCP to apply the standard for timely reconsideration requests set forth at 20 C.F.R. § 10.606(b)(2). By decision dated February 7, 2013, the Board affirmed a September 11, 2012 decision finding that he had not established a permanent impairment of the right upper extremity due to his accepted work injury. The facts and the circumstances as set forth in the prior decisions and order are hereby incorporated by reference.

By letter dated September 11, 2013, received by OWCP on September 23, 2013, appellant requested reconsideration of the denial of his schedule award claim. He summarized medical evidence and asserted that OWCP had a responsibility to assist in the development of the evidence. Appellant related that he asked a claims examiner to develop the medical evidence to determine whether he had a consequential injury. The claims examiner, however, indicated that he had alleged in a May 23, 2008 letter that he had a permanent impairment. Appellant argued that his May 23, 2008 letter was not new evidence and that OWCP erred in failing to address the substance of the evidence submitted. He alleged that the September 11, 2012 decision contained inadequate findings of facts and conclusions of law. Appellant contended that he is entitled to a merit review of his schedule award claim.

In a decision dated December 20, 2013, OWCP denied appellant's request for reconsideration as he had not submitted evidence or raised an argument sufficient to warrant reopening his case for further merit review under section 8128. It found that he had not submitted evidence relevant to the pertinent issue of whether the medical evidence established permanent impairment of the right upper extremity due to his work injury.

On appeal appellant argues that the November 19, 2007 report from Dr. Michael A. Franchetti, a Board-certified orthopedic surgeon, is sufficient to establish that he has a permanent impairment due to his employment injury.

³ Docket No. 08-331 (issued August 15, 2008); *petition for recon. denied*, Docket No. 08-331 (issued May 5, 2009). OWCP accepted that on January 14, 2000 appellant, then a 61-year-old supervisor, sustained left shoulder strain and bilateral knee sprain due to a January 14, 2000 work injury. Appellant had a prior injury to his leg on September 14, 1992. OWCP granted him schedule awards for a 32 percent permanent impairment of the left lower extremity and a 15 percent permanent impairment of the right lower extremity. By decision dated June 8, 2001, it granted appellant a schedule award for a nine percent permanent impairment of the left upper extremity. On June 27, 2003 OWCP granted him a schedule award for an additional 25 percent permanent impairment of the left upper extremity. In decisions dated March 23, 2004 and February 10, 2005, it denied modification of its June 27, 2003 decision. By decision dated October 26, 2007, OWCP denied appellant's request for reconsideration of the June 27, 2003 decision as the evidence submitted was insufficient to warrant reopening the case for further merit review.

⁴ *Order Remanding Case*, Docket No. 12-701 (issued August 15, 2012).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that 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.⁶ 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.⁷ 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.⁸

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁹ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹¹

ANALYSIS

By decision dated February 27, 2013, the Board affirmed OWCP's September 11, 2012 decision denying appellant's claim for a schedule award. The Board found that appellant had not submitted sufficient medical evidence to establish that he sustained a permanent impairment of the right upper extremity as a result of his accepted employment injury. On September 23, 2013 appellant requested reconsideration, which OWCP denied in a nonmerit decision dated December 20, 2013.¹²

⁵ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[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."

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁰ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹¹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹² While a claimant may request an increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment, appellant did not submit any new evidence supporting an impairment or evidence of new exposure but instead requested reconsideration of the prior decision. See *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3) requiring OWCP to reopen the case for review of the merits of the claim. In his September 23, 2013 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 not previously considered. He argued that he requested OWCP to develop the evidence and adjudicate whether he had a consequential injury. Appellant also maintained that his May 23, 2008 letter was not new evidence and that OWCP erred in failing to review the substance of the letter. His contentions, however, are not relevant to the underlying issue in this case, which is whether the medical evidence is sufficient to show that he sustained an employment-related right upper extremity impairment. As it is a medical issue, it must be addressed by relevant medical evidence.¹³ Appellant further contended that the September 11, 2012 decision contained inadequate findings of facts and conclusions of law. The Board, however, previously reviewed and affirmed OWCP's September 11, 2012 decision, and thus the issue is *res judicata* and not subject to further consideration by the Board.¹⁴ A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case.

On appeal appellant maintains that Dr. Franchetti's November 19, 2007 report establishes that he has a permanent impairment. His opinion, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁵ Additionally, the Board previously considered the November 19, 2007 report from Dr. Franchetti and determined that it was insufficient to establish that he sustained a permanent impairment due to his work injury. Consequently, the matter is *res judicata* and not subject to further consideration.¹⁶

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his claim for further merit review under section 8128(a).

¹³ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁴ See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁵ *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁶ See *G.S.*, Docket No. 14-408 (issued June 10, 2014); *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 24, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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