

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

D.C., Appellant)
and) Docket No. 12-204
DEPARTMENT OF THE NAVY,) Issued: July 6, 2012
PORTSMOUTH NAVAL SHIPYARD,)
Portsmouth, NH, Employer)

)

Appearances:

Appellant, pro se

Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 27, 2011 appellant filed a timely appeal from a May 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed from the last merit decision of January 27, 2011 to the filing of the appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over only the May 19, 2011 nonmerit decision.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.3(e).

On appeal, appellant asserted that he did not realize Dr. Moby Parsons, an orthopedic surgeon, used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) in his December 12, 2010 report and should have resubmitted his report under the sixth edition. Dr. Parsons did not understand the difference in percentages between the fifth and sixth edition as noted by OWCP's medical adviser, Dr. David I. Krohn, a Board-certified internist.

FACTUAL HISTORY

On November 29, 2006 appellant, then a 49-year-old electrician, filed a claim for a left shoulder strain due to repetitive work duties involving his hands, arms and use of overhead equipment. OWCP accepted the claim for calcifying tendinitis of left shoulder, sprain of left shoulder and upper arm, superior glenoid labrum lesion. Appellant had a left total shoulder replacement on October 30, 2007.

On October 30, 2008 appellant filed a claim for a schedule award. In a September 21, 2009 report, Dr. Robert E. Eberhart, a Board-certified surgeon, found that appellant was at maximum medical improvement. He opined that under the sixth edition of the A.M.A., *Guides*, appellant had 25 percent left arm impairment. Under Table 5-5, page 405, Dr. Eberhart found appellant had a total shoulder arthroplasty with moderate restricted motion. In a May 2, 2010 report, Dr. Krohn utilized Dr. Eberhart's findings and opined that appellant had 26 percent left arm impairment under the A.M.A., *Guides*. Under Table 15-5, page 405, he opined that appellant had a class 3 or default 30 percent impairment for shoulder arthroplasty. Under Table 15-7, page 406, Dr. Krohn found grade modifier 1 for functional history; under Table 15-8, page 408 and Table 15-34, page 475, he found grade modifier 1 for physical examination; and under Table 15-9, page 410, he found grade modifier 4 for clinical studies. He applied the net adjustment formula and found a negative three, which moved the diagnosed class position two positions to the left or 26 percent left upper extremity impairment.

By decision dated May 26, 2010, OWCP granted appellant a schedule award for 26 percent impairment of the left upper extremity.

On June 14, 2010 appellant requested a hearing before an OWCP hearing representative, which was held on October 13, 2010. In a December 12, 2010 report, Dr. Parsons stated that appellant reached maximum medical improvement and had 38 percent left arm impairment. This was based on 18 percent impairment due to lost range of motion and 24 percent impairment due to total shoulder arthroplasty.

By decision dated December 30, 2010, OWCP's hearing representative set aside the May 26, 2010 decision. The hearing representative found that Dr. Parsons' report was sufficient to warrant review by an OWCP medical adviser to determine if there was greater impairment of the left upper extremity.

In a January 20, 2011 report, OWCP's medical adviser, Dr. Krohn, reviewed Dr. Parson's December 12, 2010 report. He determined that Dr. Parson utilized the fifth edition of the A.M.A., *Guides* instead of the sixth edition of the A.M.A., *Guides* to rate impairment. Dr. Krohn noted that under the sixth edition of the A.M.A., *Guides*, a range of motion impairment is not

combined with a diagnosis-based impairment. He determined that under the range of motion impairment method, appellant had 17 percent impairment. Dr. Krohn stated that his prior assignment of 26 percent impairment was derived from the diagnosis category of total shoulder arthroplasty and there was insufficient evidence from Dr. Parsons' report to alter his prior rating.

By decision dated January 27, 2011, OWCP denied the claim for an increased schedule award.

In a February 16, 2011 letter, appellant requested reconsideration. He disagreed with OWCP's use of the sixth edition of the A.M.A., *Guides* and requested that OWCP use Dr. Parson's impairment rating rather than that of Dr. Krohn. Appellant noted that Dr. Krohn did not disagree with Dr. Parson's application of the fifth edition of the A.M.A., *Guides*.

In a nonmerit decision dated May 19, 2011, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁴ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The only decision before the Board on appeal is the May 19, 2011 nonmerit decision denying appellant's application for review. The most recent merit decision on the issue of

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(a).

⁵ *Id.* at § 10.608(b)(1) and (2).

⁶ *Id.* at § 10.608(b).

impairment was the January 27, 2011 decision. The Board lacks jurisdiction to review the merits of appellant's schedule award claim as the appeal was not filed until October 27, 2011.⁷

With his February 16, 2011 reconsideration request, appellant asserted that OWCP should have utilized Dr. Parsons' impairment rating, which was made under the fifth edition of the A.M.A., *Guides*. For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸ For decisions issued after May 1, 2009, the sixth edition is used.⁹ The Board finds that appellant's contention does not rise to the level of relevant new argument. OWCP exercised its discretion to adjudicate decisions issued after May 1, 2009 under the sixth edition.¹⁰

Appellant did not address any specific point of contention with OWCP's medical adviser's application of the sixth edition of the A.M.A., *Guides*. He argued that he preferred the rating of his physician and that OWCP should rely on the fifth edition of the A.M.A., *Guides*. This does not constitute a new or relevant legal argument. While appellant noted that the medical adviser did not disagree with Dr. Parson's application of the fifth edition of the A.M.A., *Guides*, as previously indicated, the sixth edition of the A.M.A., *Guides* is to be used for all decisions issued after May 1, 2009. He did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit any new and relevant evidence. Thus, he is not entitled to a merit review based on the third above noted requirement under section 10.606(b)(2).

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.¹¹

On appeal, appellant contended that Dr. Parson's report was found incorrect as he used the wrong edition of the A.M.A., *Guides*, OWCP should have requested Dr. Parson to resubmit a new report under the sixth edition. As noted, the Board does not have jurisdiction to consider the merits of the claim. Appellant's assertions regarding Dr. Parson's report does not establish that OWCP erred in applying a point of law or advance a relevant legal argument not previously considered.

⁷ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2007). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* C.F.R. § 501.3(e) (2008); R.C., Docket No. 10-2371 (issued July 14, 2011).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ *Id.* *See* D.O., Docket No. 11-383 (issued November 8, 2011). E.M., Docket No. 11-885 (issued November 7, 2011). *See also* Henry D. Butler, 43 ECAB 859 (1992).

¹¹ Joseph A. Brown, Jr., 55 ECAB 542 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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