



## **FACTUAL HISTORY**

On October 18, 1997 appellant, then a 38-year-old letter carrier, filed an occupational disease claim alleging that she sustained shoulder, hand and cervical conditions due to repeatedly pulling the hand brakes on the postal vehicle she drove. OWCP accepted the claim for right shoulder and upper arm sprain; cervical strain, right rotator cuff syndrome, right shoulder impingement, right carpal tunnel syndrome and cervical degenerative disc disease. It also accepted appellant's November 13, 1999 recurrence claim.

On June 15, 2010 Dr. Aubrey A. Swartz, a second opinion Board-certified orthopedic surgeon, found that appellant had a seven percent impairment of the right arm using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Using Table 15-34, he found a three percent impairment for 125 degrees range of motion, a one percent impairment for 30 degrees extension, a three percent impairment for 35 degrees abduction, a zero percent impairment for 80 degrees internal rotation,<sup>2</sup> a zero percent impairment for 90 degrees external rotation and a zero percent impairment for 40 degrees adduction.<sup>3</sup>

On August 8, 2010 Dr. Ellen Pichey, an OWCP medical adviser Board-certified in family and occupational medicine, concluded that appellant had a 10 percent right arm impairment using the sixth edition of the A.M.A., *Guides*. She concluded that appellant had a greater impairment rating using Table 15-5, page 403 for appellant's acromioclavicular joint injury.

On February 2, 2011 OWCP granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity. The award was based upon the opinions of Drs. Pichey and Swartz.

OWCP received a February 2, 2011 report from Dr. Maureen D. Miner, a treating Board-certified physiatrist with a subspecialty in pain medicine. Dr. Miner diagnosed carpal tunnel syndrome, epicondylitis, cervical radiculopathy, thoracic outlet syndrome, right subscapularis and myofascial syndrome. She noted appellant's complaints and provided physical findings from her examination.

On March 2, 2011 appellant requested reconsideration.

OWCP received a May 4, 2011 report from Dr. Miner who restated the diagnosed conditions. Dr. Miner noted appellant's complaints and provided physical findings from her examination.

By decision dated May 17, 2011, OWCP denied modification of the February 2, 2011 schedule award.

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<sup>2</sup> This figure was rounded up from 75 degrees.

<sup>3</sup> This figure was rounded up from 35 degrees.

On September 1, 2011 appellant requested reconsideration and submitted an August 5, 2011 letter from Dr. Miner who related that appellant had been treated for a right shoulder condition which resulted from overuse of the left shoulder. She currently had pain and disability in her left shoulder. In a September 13, 2011 report, Dr. Miner noted physical findings and reiterated the diagnoses contained in her previous reports. A September 28, 2011 diagnostic report noted a history of repetitive trauma-induced arthritis and found no acute osseous abnormalities.

By nonmerit decision dated November 2, 2011, OWCP denied reconsideration.<sup>4</sup>

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

### **ANALYSIS**

Appellant submitted her September 1, 2011 reconsideration request within one calendar year of OWCP's February 2, 2011 schedule award decision and the May 17, 2011 decision denying modification. Her request was therefore timely. The question is whether appellant's request met one of the three standards for obtaining a merit review of her case.

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law not previously considered. Moreover, she did not advance a relevant legal argument not previously considered.

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<sup>4</sup> The Board notes that, following the November 2, 2011 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Greasy*, 57 ECAB 281 (2005); *Rosemary A. Keyes*, 54 ECAB 373 (2003).

<sup>5</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>6</sup> 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Firkins*, 57 ECAB 630 (2006).

<sup>7</sup> 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>8</sup> 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Pirelli-Ball*, 57 ECAB 598 (2006).

Appellant also failed to submit any relevant and pertinent new evidence with her July 1, 2011 request for reconsideration. Although the August 5, 2011 letter and September 13, 2011 report from Dr. Miner and a September 28, 2011 diagnostic radiology report were new to the record, they do not address the issue of upper extremity impairment under the A.M.A., *Guides* (6<sup>th</sup> ed. 2008). Dr. Miner's September 13, 2011 report merely chronicled appellant's ongoing complaints and the treatment she received. The August 5, 2011 letter requested that a left shoulder condition be accepted as employment related and a September 28, 2011 diagnostic report noted a repetitive trauma-induced arthritis.<sup>9</sup> Appellant did not provide any new medical evidence relevant to the issue of impairment to her right arm. Consequently, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).<sup>10</sup>

On appeal appellant contends that her impairment rating was incorrectly calculated. As noted, the Board does not have jurisdiction to consider the merits of the claim. Appellant's assertions regarding Dr. Swartz's report and her impairment rating does not establish that OWCP erred in applying a point of law or advanced a relevant legal argument not previously considered.

Because appellant's September 1, 2011 reconsideration request did not meet one of the three standards for obtaining a merit review of his case, the Board finds that OWCP properly denied her request. The Board will affirm OWCP's November 2, 2011 decision.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's September 12, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>9</sup> *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *R.M.*, 59 ECAB 690 (2008); *Dwayne Avila*, 57 ECAB 642 (2006) (evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2)(1) and (2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 2, 2011 is affirmed.

Issued: October 24, 2012  
Washington, DC

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

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

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