

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

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L.N., Appellant

and

DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Lompoc, CA, Employer

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**Docket No. 13-1187  
Issued: August 23, 2013**

*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 April 23, 2013 appellant filed a timely appeal from the March 11, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits because more than 180 days elapsed from the last merit decision to the filing of this appeal.<sup>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

## **FACTUAL HISTORY**

OWCP accepted that on March 11, 2010 appellant, then a 44-year-old utility systems worker, sustained a herniated disc at C6-7 with radiculopathy due to a fall at work.<sup>3</sup> On April 30, 2010 appellant underwent OWCP-authorized anterior cervical fusion surgery at C5-6. On January 12, 2012 he filed a claim for a schedule award due to his accepted neck injury.

In a March 1, 2012 report, Dr. Robert M. Ruth, an attending Board-certified hand surgeon, reported findings of his physical examination of appellant. He determined that appellant had an eight percent impairment of his left arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent* (5<sup>th</sup> ed. 2001). Dr. Ruth utilized Table 16-10 and Table 16-15 and based his rating on appellant's left carpal tunnel syndrome. He stated, "If additional rating is needed for his cervical radiculopathy, this may need to be performed by a spine surgeon."

In an April 25, 2012 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser determined that, due to his March 11, 2010 work injury, appellant had a one percent permanent impairment of his right arm and a one percent permanent impairment of his left arm under the standards of the sixth edition of the A.M.A., *Guides* (6<sup>th</sup> ed. 2009). The rating was based on the accepted March 11, 2010 work injury, herniated disc at C6-7 with radiculopathy. Dr. Harris stated that appellant's left carpal tunnel syndrome could not be included in the impairment calculation because this condition was not work related.

OWCP requested that Dr. Harris provide a supplemental opinion noting that appellant had previously received a schedule award for 33 percent permanent impairment of his right arm under a claim for a separate work injury sustained on July 2, 2004. On August 30, 2012 Dr. Harris stated:

"There is NO overlap between the 33 percent impairment for the right upper extremity for residual problems with the right shoulder, right thumb and anterior interosseous nerve palsy under case file [xxxxxxx239] and the one percent right upper extremity impairment under case file [xxxxxxx732] for residual problems with cervical radiculopathy. The claimant's right upper extremity impairment has INCREASED by an additional one percent right upper extremity impairment."

In an October 11, 2012 decision, OWCP granted appellant a schedule award for one percent permanent impairment of his right arm (in addition to the schedule award compensation already awarded for 33 percent impairment of his right arm) and one percent permanent impairment of his left arm. The award ran for 6.24 weeks from March 1 to April 13, 2012 and was based on Dr. Harris' impairment calculation as derived from the findings of Dr. Ruth.

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<sup>3</sup> OWCP previously accepted, under a separate file number, that appellant sustained work injuries on July 2, 2004 in the form of lumbar sprain, intervertebral disc displacement, right shoulder sprain with arthroscopic subacromial decompression, and right thumb flexor pollicis longus injury with anterior interosseous nerve decompression. In connection with this claim, OWCP granted appellant a schedule award on March 18, 2009 for a 33 percent permanent impairment of his right arm. The award was based on the impairment calculation of an OWCP medical adviser who evaluated the findings of Dr. Stephen R. Birch, an attending Board-certified orthopedic surgeon.

In a November 15, 2012 letter, appellant requested reconsideration of OWCP's October 11, 2012 decision. He stated that, per Dr. Harris' August 25, 2012 report, his cervical radiculopathy was not considered in his impairment rating. Appellant stated:

“Dr. Ruth stated in his evaluation notes March 1, 2012, that he was unable to perform permanent and stationary evaluation from the standpoint of cervical radiculopathy (from my injury March 11, 2010) because it was beyond his area of expertise. His rating was in respect to my left carpal tunnel syndrome only. He stated I would need to be evaluated by spine surgeon for the cervical radiculopathy I am left with as a result of my injury March 11, 2010.

“I was not evaluated for the permanent cervical radiculopathy that I have in my left arm and left hand due to my neck injury March 11, 2010. I am requesting to be evaluated and rated for the proper impairment.”<sup>4</sup>

In a March 11, 2013 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that his argument on reconsideration was without merit and that he did not submit new and relevant evidence.

### **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 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.<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> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>9</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup> While a 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.<sup>11</sup>

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<sup>4</sup> Appellant also submitted previously submitted documents, including a March 1, 2010 report of Dr. Ruth and an August 25, 2012 report of Dr. Harris.

<sup>5</sup> Under section 8128 of FECA, “[t]he 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).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

The schedule award provision of FECA<sup>12</sup> and its implementing regulations<sup>13</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>14</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>15</sup>

### ANALYSIS

OWCP issued a decision on October 11, 2012. Appellant requested reconsideration of this decision on November 15, 2012.

As noted above, the Board does not have jurisdiction over the October 11, 2012 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his November 12, 2012 application 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 that had a reasonable color of validity.<sup>16</sup> His argument was that OWCP did not consider his accepted C5-6 radiculopathy in calculating his schedule award. However, the record clearly shows that OWCP did in fact consider appellant's accepted C5-6 radiculopathy in calculating his schedule award. Although Dr. Ruth, an attending Board-certified hand surgeon, did not consider appellant's C5-6 radiculopathy in calculating an impairment rating, it was in fact considered by Dr. Harris, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, who evaluated the findings of Dr. Ruth and provided an impairment rating for both arms based on appellant's accepted injury, herniated disc at C6-7 with radiculopathy, and the October 11, 2012 schedule award was premised on this impairment rating.

The underlying issue in this case was whether appellant showed that he was entitled to additional schedule award compensation beyond that which had already been awarded. That is a medical issue which must be addressed by relevant medical evidence.<sup>17</sup> A claimant may be

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<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404 (1999).

<sup>14</sup> *Id.*

<sup>15</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>16</sup> *See supra* note 11.

<sup>17</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.<sup>18</sup>

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.<sup>19</sup>

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2013  
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

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<sup>18</sup> Appellant submitted a March 1, 2010 report of Dr. Ruth and an August 25, 2012 report of Dr. Harris, but these reports had already been submitted and considered by OWCP and their submission would not constitute a basis for reopening his claim. *See supra* note 9.

<sup>19</sup> On appeal, appellant argued that OWCP did not properly calculate his permanent impairment caused by a cervical radiculopathy. For the reasons explained above, he was not entitled to a merit review of his schedule award claim.