



## **FACTUAL HISTORY**

On April 4, 2009 appellant, then a 44-year-old supervisory special agent, sustained multiple injuries due to being impacted with debris from a building explosion while fighting Taliban insurgents in Afghanistan. OWCP accepted that he sustained abdominal wall and breast contusions, abrasion/friction burn of his left leg, bilateral umbilical hernia, left upper arm contusion, pelvis sprain, left shoulder/upper arm sprain, right hip/thigh contusion and partial tear of the right supraspinatus tendon. On July 14, 2009 appellant underwent OWCP-authorized surgery, including a laparoscopic left inguinal hernia repair, open right inguinal hernia repair and primary umbilical hernia repair.

On February 14, 2010, while in a firefight with Taliban insurgents, appellant was shot in his right hand twice with a bullet going into his right leg, breaking bones and damaging a tendon. OWCP accepted, under a separate case file, that he sustained gunshot wounds to his right hip/thigh and right hand, joint contracture of his right hand and retained deep metal and extensor tendon adhesions, dorsal capsular contracture and proximal phalanx fracture of his right ring finger. On February 24, 2010 appellant underwent surgical exploration of his right ring finger volar wound and irrigation and debridement of the proximal phalanx fracture of his right ring finger with open reduction and internal fixation. On August 30 and November 22, 2010 he had further surgery on his right hand. These procedures were authorized by OWCP.

On April 18, 2011 appellant filed a claim for a schedule award due to his accepted employment injuries.

In a November 8, 2011 decision, OWCP granted appellant a schedule award for a three percent permanent impairment of his left arm. The award ran for 9.36 weeks from May 7 to July 11, 2011. It based its award on May 26 and October 27, 2011 reports of Dr. Christopher R. Brigham, a Board-certified occupational medicine physician serving as an OWCP medical adviser, who had evaluated the findings of Dr. Kostas J. Constantine, an attending Board-certified orthopedic surgeon, which were contained in reports dated March 31, May 7 and June 25, 2011. OWCP also found that appellant was not entitled to schedule award compensation for permanent impairment of his right arm and right leg.<sup>2</sup>

In a January 5, 2012 letter, appellant requested reconsideration of his claim. He submitted a December 13, 2011 report from Dr. Constantine who rated a 20 percent permanent impairment of appellant's right arm and a 15 percent permanent impairment of his right leg under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009).

In an April 11, 2012 decision, OWCP 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>2</sup> On appeal, appellant indicated that he was not contesting OWCP's determination with respect to the permanent impairment of his left arm. In an April 23, 2012 decision, OWCP granted appellant a schedule award for an additional six percent permanent impairment of his left arm in order to compensate him for his total left arm impairment of nine percent. On appeal, appellant has challenged OWCP's finding that he did not have permanent impairment of his right arm and right leg.

## LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</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>4</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>5</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>6</sup>

## ANALYSIS -- ISSUE 2

Considering the second issue of the present appeal, the Board finds that the evidence submitted by appellant in connection with his January 2012 reconsideration request constitutes relevant and pertinent evidence which had not been previously considered by OWCP. In connection with his January 2012 reconsideration request, appellant submitted a December 13, 2011 report from Dr. Constantine who determined that he had a 20 percent permanent impairment of his right arm and a 15 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*. OWCP had previously found that appellant was not entitled to schedule award compensation for permanent impairment of his right arm and right leg.

The submission of this new and relevant evidence requires reopening of appellant's claim for merit review.<sup>7</sup> The case will be remanded to OWCP and, after any development deemed necessary, OWCP shall conduct a merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a) and issue an appropriate merit decision regarding appellant's entitlement to schedule award compensation for his right arm and right leg.<sup>8</sup>

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<sup>3</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>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *See D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>8</sup> Given the Board's determination on the nonmerit issue of this case, it is not necessary to consider the merit issue at this time. OWCP created separate case files for appellant's April 4, 2009 and February 14, 2010 employment injuries. OWCP procedure provides that case files should be doubled when correct adjudication of the issues depends on frequent cross-referencing between files. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance & Management*, Chapter 2.400.8 (February 2000). The Board notes that, given the misfiling of a number of documents between the two case files, it would be appropriate to double the case files for appellant's two injury dates.

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The case is remanded to OWCP for further development including the performance of a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 11, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 9, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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