

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

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**R.T., Appellant**

**and**

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

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**Docket No. 12-1647  
Issued: January 15, 2013**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 30, 2012 appellant, through his attorney, filed a timely appeal from a June 5, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

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<sup>1</sup> The last merit decision in this case was the March 24, 2011 hearing representative's decision denying appellant's claim for greater impairment than 28 percent permanent impairment of the right upper extremity. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). More than 180 days has elapsed between the most recent merit decision dated March 24, 2011 to the filing of this appeal on July 23, 2012, the Board lacks jurisdiction to review the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's March 8, 2012 claim for reconsideration under 5 U.S.C. § 8128(a).

On appeal, appellant's counsel alleges that the decision was contrary to fact and law.

## FACTUAL HISTORY

This case was previously before the Board.<sup>3</sup> In a decision dated May 4, 2005, the Board affirmed a May 21, 2004 decision granting appellant a schedule award of eight percent permanent impairment of the right upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of the Permanent Impairment*<sup>4</sup> (A.M.A., *Guides*). OWCP accepted that on December 7, 2002 appellant, then a 35-year-old correctional officer, sustained a right shoulder strain in the performance of duty. The facts of the case as set forth in the Board's prior decision are adopted herein by reference.

On January 5, 2006 appellant submitted a request for an additional schedule award.

In a decision dated March 27, 2006, OWCP granted a schedule award for an additional 20 percent loss of use of the right upper extremity according to the fifth edition of the A.M.A., *Guides* for a total of 28 percent permanent impairment of the right arm. Appellant received a lump-sum settlement of the schedule award.

On July 13, 2009 appellant submitted a request for an additional schedule award.

On January 27, 2010 OWCP expanded appellant's claim to include right carpal tunnel syndrome and right cubital tunnel syndrome.

In a decision dated March 17, 2010, OWCP denied appellant's claim for an additional schedule award.

On March 21, 2010 appellant, through counsel, submitted a request for a telephone hearing, which was held on June 1, 2010. Counsel contended that OWCP should expand appellant's claim to include post-traumatic arthritis and requested 30 days to obtain additional medical evidence.

Following the hearing, appellant submitted a June 6, 2010 report from Dr. William Grant, a Board-certified internist, who found that, according to Table 15-21, page 441, appellant had 25 percent impairment of the right shoulder based on peripheral nerve impairment and that, according to Table 15-20, page 434, appellant had 20 percent impairment for his right cubital and carpal tunnel syndrome or a total of 40 percent right upper extremity impairment.

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<sup>3</sup> Docket No. 04-1890 (issued May 4, 2005).

<sup>4</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2008).

By decision dated July 20, 2010, OWCP vacated the March 17, 2010 decision and remanded the case to OWCP to review the new medical evidence and issue an appropriate decision.

In a decision dated September 16, 2010, OWCP denied appellant's claim for additional schedule award finding that the medical evidence was insufficient to establish that he sustained greater impairment.

On September 23, 2010 appellant, through counsel, requested a telephone hearing, which was held on January 13, 2011. He contended that the medical evidence established 40 percent impairment based on Dr. Grant's report.

In a November 8, 2010 report, Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation, provided an accurate history of injury. He noted appellant's accepted diagnoses for right shoulder sprain, carpal tunnel syndrome, rotator cuff and lesion of the ulnar nerve. Dr. Hebrard reviewed appellant's history and conducted an examination. He observed moderate atrophy of the anterior, posterior and middle head of the deltoid and tenderness to palpation of the bicipital tendon and acromioclavicular (AC) joint. Dr. Hebrard also noted cubital tunnel syndrome and ulnar neuropathy about the right elbow and adhesive capsulitis of the shoulder. He stated that appellant reached maximum medical improvement on or about April 2006, one year after the second surgery. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Hebrard opined that appellant had 38 percent right upper extremity impairment.<sup>5</sup>

By decision dated March 24, 2011, OWCP's hearing representative denied appellant's claim. He found that the reports of Drs. Hebrard and Grant were of diminished probative value as their impairment ratings did not conform to the A.M.A., *Guides*.

On March 8, 2012 counsel submitted a request for reconsideration of the March 24, 2011 decision based on Dr. Hebrard's November 8, 2010 report. Appellant resubmitted a copy of the November 8, 2010 report.

By decision dated June 5, 2012, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the materials were repetitive of evidence previously submitted.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>6</sup> OWCP's regulations provide that OWCP may

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<sup>5</sup> Dr. Hebrard referred to Table 15-34, page 475, to determine that appellant had 6 percent impairment rating for abduction to 80 degrees, 9 percent impairment rating for flexion to 80 degrees, 4 percent impairment rating for internal rotation to 40 degrees, and 4 percent impairment rating for external rotation, for a total of 33 percent impairment due to loss of range of motion of the shoulder. According to Table 15-35, he found a grade modifier of 3. Referring to Table 15-36, Dr. Hebrard multiplied 33 percent by 15 percent to equal 5 percent. He added the 5 percent to 33 percent for a total of 38 percent right upper extremity impairment.

<sup>6</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district OWCP.<sup>7</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup>

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.<sup>9</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>11</sup>

### ANALYSIS

The Board has no jurisdiction to review OWCP's March 24, 2011 hearing representative decision denying an additional schedule award for more than 28 percent impairment for the right upper extremity. Appellant did not file a timely appeal of that decision and the Board may not review the merits of his case on this appeal. The only decision the Board may review is the June 5, 2012 nonmerit decision denying his request for reconsideration. The Board finds that OWCP properly denied appellant's request for reconsideration because Dr. Hebrard's November 8, 2010 report was not sufficient to warrant further merit review.

Dr. Hebrard determined that appellant had 38 percent impairment of the right upper extremity. The record reveals, however, that appellant previously submitted this report and it was reviewed by OWCP in its March 24, 2011 merit decision. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>12</sup> Thus, the Board finds that appellant's report was insufficient to warrant further merit review.

Appellant did not submit any other evidence with his request for reconsideration to show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal

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<sup>7</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>8</sup> *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>11</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>12</sup> *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

argument not previously considered by OWCP. Because he did not meet any of the necessary requirements, he is not entitled to further merit review.

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen his case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

The Board notes that a claim for an increased schedule award may be based on relevant medical evidence establishing the progression of the accepted employment-related condition.<sup>13</sup> To support such a contention, appellant may submit medical evidence to OWCP with a request for reconsideration, at anytime.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's March 8, 2012 request for reconsideration under 5 U.S.C. § 8128.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 5, 2012 nonmerit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2013  
Washington, DC

Patricia Howard Fitzgerald, 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>13</sup> See A.A., 59 ECAB 726 (2008).