

FACTUAL HISTORY

On September 15, 2005 appellant, then a 52-year-old food inspector, filed an occupational disease claim alleging that he sustained right carpal tunnel syndrome and ulnar nerve compression of the right elbow causally related to repetitive work duties. OWCP accepted the claim for right carpal tunnel syndrome and right ulnar nerve compression. On December 20, 2005 appellant underwent a right carpal tunnel decompression and flexor radical tenosynovectomy of the right wrist and a right ulnar nerve decompression. On July 18, 2006 he underwent a fusion of the metacarpophalangeal (MP) joint of the right thumb with a bone graft and screw placement.²

In an impairment evaluation dated October 25, 2007, Dr. Raymond P. Van Den Hoven, a Board-certified physiatrist, diagnosed status post right ulnar nerve transposition and right carpal tunnel release, status post tendon transfers for right thumb pinch strength, status post joint fusion of the MP joint of the right thumb, and probable bilateral elbow osteoarthritis. He noted that the December 20, 2005 operative report found atrophy of the ulnar area. Dr. Van Den Hoven found that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), appellant had a 49 percent right upper extremity impairment due to dysfunction of the ulnar nerve, thumb joint problems, and arthritis of the elbow.

On April 25, 2011 appellant filed a claim for a schedule award. On May 5, 2011 OWCP requested that he submit an impairment evaluation from his attending physician addressing the extent of any permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*.

In an impairment evaluation dated June 13, 2011, Dr. Gregory Reichhardt, a Board-certified physiatrist, diagnosed pain and weakness in the right upper extremity due to repetitive work activities, status post right carpal tunnel , and multiple right thumb surgeries. Citing the sixth edition of the A.M.A., *Guides*, he determined that appellant had a 7 percent permanent impairment of the right upper extremity due to thumb ankyloses, a 4 percent impairment due to loss of motion of the wrist, a 2 percent impairment due to loss of range of motion of the elbow, and a 23 percent impairment for a motor deficit of the ulnar nerve, for a total right upper extremity impairment of 33 percent.

On June 4, 2013 an OWCP medical adviser reviewed Dr. Reichhardt's report. He found that appellant had 11 percent right upper extremity impairment due to compression neuropathy and a 3 percent impairment of the right thumb due to ankyloses for a total of 14 percent of the right upper range of motion. The medical adviser opined that Dr. Reichhardt's range of motion measurements were not valid as he performed the measurements only one time. He also noted that appellant had atrophy from disuse rather than neurological atrophy.

² By decision dated January 16, 2007, an OWCP hearing representative reversed a February 22, 2006 decision and found that appellant was entitled to compensation for total disability from November 10 through December 19, 2005. In a decision dated September 23, 2010, OWCP reduced appellant's compensation based on its finding that he had the capacity to earn wages in the selected position of chauffeur/driver.

By decision dated October 8, 2013, OWCP granted appellant a schedule award for a 14 percent right upper extremity impairment. The period of the award ran for 43.68 weeks from September 22, 2013 to July 24, 2014. In a form dated November 8, 2013, received by OWCP on November 14, 2013, appellant requested an oral hearing.

By decision dated December 20, 2013, OWCP's Branch of Hearings and Review denied his request as untimely under 5 U.S.C. § 8124.

On April 17, 2014 appellant requested reconsideration.³ He discussed his history of surgeries on the right upper extremities. Appellant related that he submitted Dr. Van Den Hoven's impairment rating in 2007 but OWCP did not adjudicate his schedule award claim until May 2011, after its adoption of the sixth edition of the A.M.A., *Guides*. He asserted that OWCP should use Dr. Van Den Hoven's impairment rating. Appellant further noted that he obtained an opinion from Dr. Reichhardt that he had a 33 percent impairment under the sixth edition of the A.M.A., *Guides*. He questioned how the medical adviser determined that he had only a 14 percent impairment rating given that he did not perform an examination. Appellant disagreed with the medical adviser's findings that he had atrophy from disuse. He also noted that his right hand was worse than his left hand but he received a greater schedule award for the left upper extremity under the fifth edition of the A.M.A., *Guides*. Appellant submitted photographs of his hand.

In a decision dated April 30, 2013, OWCP denied appellant's request for reconsideration on the grounds that he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under section 8128. It noted that he had received a schedule award for the left upper extremity under another file number.

On appeal, appellant argues that on April 25, 2007 he submitted a schedule award claim and impairment evaluation from Dr. Van Den Hoven using the fifth edition of the A.M.A., *Guides* but OWCP did not adjudicate his claim until after the sixth edition of the A.M.A., *Guides* became effective. He asserts that using the sixth edition resulted in a lower impairment rating and requests that OWCP use the fifth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ To be entitled to a merit review of an OWCP decision denying or

³ In an undated and unsigned response to OWCP's March 28, 2014 request for a periodic medical report, Dr. Randy M. Bussey, a Board-certified orthopedic surgeon, related that it was unknown if appellant continued to experience the accepted conditions and indicated that he had referred him for an impairment evaluation on June 13, 2011.

⁴ *Supra* note 1. Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁵ 20 C.F.R. § 10.606(b)(3).

terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ 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.⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹ While the 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.¹⁰

ANALYSIS

In the last merit decision dated October 8, 2013, OWCP granted appellant a schedule award for a 14 percent permanent impairment of the right upper extremity. On April 17, 2014 appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the October 8, 2013 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, he did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument. Appellant argued that in 2007 he submitted an impairment rating from Dr. Van Den Hoven using the fifth edition of the A.M.A., *Guides* but that OWCP delayed adjudicating his schedule award claim until 2011, after it adopted the sixth edition of the A.M.A., *Guides*. On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.¹¹ The applicable date of the sixth edition is as of the date of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed.¹² Appellant thus has not raised a legal argument sufficient to warrant reopening his case for further merit review.

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁹ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹² See *J.D.*, Docket No. 11-427 (issued November 14, 2011); *R.W.*, Docket No. 11-456 (issued September 28, 2011).

Appellant also maintained that OWCP should accept Dr. Reichhardt's finding that he had a 33 percent impairment under the sixth edition of the A.M.A., *Guides* rather than the opinion of the medical adviser, who did not perform an examination.¹³ He further noted that he had received a greater schedule award for his left upper extremity even though his right hand was worse than his left hand and challenged the medical adviser's finding that his atrophy resulted from disuse.¹⁴ The relevant issue, however, is the extent of appellant's permanent impairment of the right upper extremity, which is a medical question that can only be resolved through the submission of probative medical evidence from a physician.¹⁵ Appellant has not submitted any pertinent new and relevant evidence. The Board finds that his lay opinion is not relevant to this medical issue, and thus his contentions are insufficient to warrant reopening his case for further merit review.¹⁶

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. Appellant submitted a photograph of his hand but this evidence is not relevant to determining the extent of his permanent impairment. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹⁷

On appeal, appellant argues that he received a lower schedule award than he would have if OWCP used the fifth edition of the A.M.A., *Guides*. As discussed, however, as of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁸

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹³ OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guide*. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

¹⁴ A claimant may request an increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment. *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994). As discussed, however, appellant did not submit any new evidence supporting an increased impairment or raise any argument relevant to the issue of the extent of his permanent impairment.

¹⁵ *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁶ *Id.*

¹⁷ *Freddie Mosley*, 54 ECAB 255 (2002).

¹⁸ *Supra* note 13 at Chapter 2.808.5(a) (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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