DECISION AND ORDER

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 5, 2013 appellant, through her attorney, filed a timely appeal from an April 24, 2013 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP) which denied her request for reconsideration. Because more than 180 days elapsed since the most recent merit decision dated January 3, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees’ Compensation Act\(^1\) (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant’s request for reconsideration under 5 U.S.C § 8128(a).

\(^1\) 5 U.S.C. §§ 8101-8193.
**FACTUAL HISTORY**

On October 21, 2002 appellant, a 47-year-old letter carrier, was injured when her truck was struck from the rear. OWCP accepted her claim for cervical, right shoulder, right wrist and lumbar strains. On March 7, 2005 appellant filed an occupational disease claim for bilateral knee condition which was accepted for bilateral knee arthritis and aggravation of internal knee derangement, file number xxxxxxx049. The claim was combined with the current claim before the Board. Appellant stopped work on October 23, 2012 and did not return.

On March 3, 2004 appellant was treated by Dr. Donald Bassman, a Board-certified orthopedic surgeon, who performed a right knee arthroscopy and partial medial meniscectomy and arthroplasty of the medial tibial and medial femoral surfaces. Dr. Bassman diagnosed a torn medial meniscus and degenerative joint disease. On November 5, 2004 appellant filed a claim for a schedule award.

In a decision dated December 14, 2006, OWCP granted appellant a schedule award for 22 percent impairment of the right and left lower extremities pursuant to the sixth edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (A.M.A., Guides). The period of the awards was from June 4, 2004 to November 8, 2006.

On December 18, 2006 Dr. Bassman performed a total right knee replacement and diagnosed degenerative joint disease of the left knee. On May 7, 2007 appellant filed a claim for a schedule award. On August 6, 2007 OWCP’s medical adviser opined that appellant sustained a 37 percent impairment of the left lower extremity pursuant to the A.M.A., Guides for good results following a total knee replacement. He noted that the award replaced the prior award for 22 percent impairment of the left leg.

In a decision dated September 18, 2007, OWCP granted appellant a schedule award for an additional 15 percent impairment of the left leg for a total left leg impairment of 37 percent. The period of the award was from June 5, 2007 to April 2, 2008.

On September 26, 2008 Dr. Bassman performed a removal and excision of osteochondroma from the distal right femur and diagnosed osteochondroma of the distal right femur medially.

On August 24, 2009 OWCP’s medical adviser opined that appellant had 34 percent impairment of the right leg pursuant to the A.M.A., Guides.

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In a September 25, 2009 decision, OWCP granted appellant a schedule award for an additional 12 percent impairment of the right leg. The period of the award was May 5, 2009 to January 1, 2010. OWCP noted that appellant was previously paid a schedule award for 22 percent impairment of the right lower extremity and had an additional 12 percent impairment.3

Appellant came under the treatment of Dr. Jody T. Jachna, a Board-certified orthopedic surgeon. On August 15, 2011 Dr. Jachna performed a right knee patellar resurfacing and diagnosed right painful total knee arthroplasty due to lack of patella resurfacing. On November 15, 2011 she performed a left knee revision total knee arthroplasty for patellar resurfacing and diagnosed left knee patellar degenerative joint disease after knee arthroplasty.

On December 12, 2011 appellant filed a claim for a schedule award. On June 12, 2012 OWCP’s medical adviser found that she had 34 percent impairment of both the left and right lower extremities pursuant to the A.M.A., Guides. He determined that appellant was not entitled to an additional schedule award.

In a decision dated August 6, 2012, OWCP denied appellant’s claim for additional schedule awards.

On November 2, 2012 appellant requested reconsideration. She submitted a September 19, 2012 report from Dr. Jachna, who treated her for a right shoulder injury which appellant reported, occurred in 2002. Appellant reported a recent exacerbation when using a walker after recent patellar resurfacing. Dr. Jachna noted a recent magnetic resonance imaging (MRI) scan of the right shoulder revealed a full thickness tear of the supraspinatus with retraction. She also noted that appellant had bilateral knee pain, swelling and issues with patellar tracking that gave her limitations on a daily basis. Dr. Jachna stated that the findings supported 37 percent permanent impairment of the lower extremities pursuant to the A.M.A., Guides. She recommended steroid injection and physical therapy for the right shoulder injury.

On December 3, 2012 Dr. David H. Gorelich, OWCP’s medical adviser, opined that appellant had 34 percent impairment of the left and right legs under the A.M.A., Guides and was not entitled to a greater schedule award. With regard to the right shoulder, he opined that she had a full thickness right rotator cuff tear that yielded five percent right arm impairment under the A.M.A., Guides.

In a decision dated January 3, 2013, OWCP granted appellant a schedule award for five percent impairment of the right upper extremity. The period of the award was from September 19, 2012 to January 6, 2013. OWCP also found that there was no increase in impairment to either leg.

In an appeal request form received March 8, 2013, appellant requested reconsideration. In a February 1, 2013 report, Dr. Jachna treated appellant for swelling in the legs. Appellant

3 In an August 12, 2009 decision, OWCP reduced appellant’s monetary compensation finding that her actual earnings as a restricted letter carrier fairly and reasonably represented her wage-earning capacity. It noted that her actual earnings met or exceeded the current wages of her job when injured such that she had no loss of wage-earning capacity.
reported slipping and falling several times with subsequent pain and swelling below her knees. She also noticed increasing pain in her right shoulder around the deltoid insertion with problems raising her arms with weakness. Dr. Jachna noted soft tissue swelling in the legs below the knee, ecchymosis posteriorly on the right calf, full range of motion of the knees, intact strength without crepitus or instability, right shoulder impingement with supraspinatus weakness. The x-rays revealed no abnormalities. Dr. Jachna diagnosed a possible recurrent rotator cuff tear of the right shoulder and bilateral knee arthroplasties with patellar resurfacing and contusions. Appellant submitted an MRI scan of the right shoulder dated February 7, 2013 which revealed a full thickness tear of the entirety of the supraspinatus tendon with retraction, similar to prior examination, suspected tear of the biceps tendon and superior anterior labrum.

In an April 24, 2013 decision, OWCP denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review.

**LEGAL PRECEDENT**

Under section 8128(a) of FECA, OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by [OWCP]; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.

**ANALYSIS**

OWCP’s most recent merit decision dated January 3, 2013 granted appellant a schedule award for five percent impairment of the right upper extremity and denied any additional award to the lower extremities. It denied her reconsideration request, without a merit review, and she appealed this decision to the Board.

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5 20 C.F.R. § 10.606(b)(2).

6 Id. at § 10.608(b).
As noted, the Board does not have jurisdiction over the January 3, 2013 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 her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She 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.

The Board notes that the underlying issue in this case is whether appellant has greater than five percent impairment of the right arm, 37 percent impairment of the left leg or 34 percent impairment of the right leg. That is a medical issue which must be addressed by relevant medical evidence. However, appellant did not submit any new and relevant medical evidence in support of his claim.

Appellant submitted a February 1, 2013 report from Dr. Jachna, who treated her for swelling in the legs. She reported slipping and falling several times and had right shoulder pain. Dr. Jachna diagnosed right shoulder possible recurrent rotator cuff tear and bilateral knee arthroplasties with patellar resurfacing and contusions. She included a February 7, 2013 MRI scan of the right shoulder. The Board finds that these reports are not relevant because they do not specifically address whether appellant has greater impairment to the right arm or either leg. Dr. Jachna did not provide any impairment rating relevant to the prior schedule award. Appellant did not submit any new and relevant medical evidence addressing whether she had increased permanent impairment in her legs or right arm. Therefore, this material is not relevant and is insufficient to warrant reopening the case for a merit review.

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.

On appeal, appellant reiterated that her physician provided support for an additional schedule award and that the impairment evaluation provided no true indication of the weakness of her knees. She asserted that the schedule awards granted for her right upper extremity and both lower extremities are inadequate to compensate her for the pain she lives with daily. As noted, the Board does not have jurisdiction to review the merits of the claim. Appellant did not submit any evidence or argument in support of her reconsideration request that warrants reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(2).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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7 See Bobbie F. Cowart, 55 ECAB 746 (2004).
CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2013 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: February 21, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees’ Compensation Appeals Board

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

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