

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

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**D.S., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
WRIGHT-PATTERSON AIR FORCE BASE,  
OH, Employer**

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**Docket No. 14-12  
Issued: March 18, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On October 7, 2013 appellant, through her attorney, filed a timely appeal of a September 13, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed from the issuance of OWCP's last merit decision of January 11, 2013 to the filing of this appeal, the Board has no jurisdiction over the merits of the case.<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 has jurisdiction over only the May 21, 2013 nonmerit decision.

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<sup>1</sup> 20 C.F.R. § 501.3(e). The record contains a July 17, 2013 decision of the Board in Docket No. 13-659 (issued July 17, 2013). In the absence of further review by OWCP on the issue addressed by the July 17, 2013 Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

## ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's attorney asserts that the September 13, 2013 decision is contrary to fact and law.

## FACTUAL HISTORY

This case has previously been before the Board. In a July 17, 2013 decision, the Board found that appellant did not have more than 11 percent impairment to her right arm or any permanent impairment of her legs. The facts of the previous Board decision are incorporated herein by reference.

On September 4, 2013 appellant, through her attorney, requested reconsideration. In her reconsideration request, she contended that the American Medical Association, *The Guides Newsletter*, (hereinafter A.M.A., *Guides Newsletter*) of July/August 2009 constituted junk science with no scientific validity. Further the A.M.A., *Guides Newsletter* was not an official publication of the American Medical Association and was authored by a for-profit organization. Counsel presented additional arguments disputing the validity of the A.M.A., *Guides Newsletter*, concluding that it was improper for OWCP to rely on it for determining permanent impairment. He stated that the case should be remanded to OWCP.

In a September 13, 2013 decision, OWCP denied merit review on the grounds that counsel's argument was insufficient to warrant further merit review. Counsel's contentions concerning the validity of the A.M.A., *Guides* were irrelevant and immaterial to the merit issue in this case.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>3</sup> Section 10.608(a) of the Code of Federal Regulations (C.F.R.) provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>4</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.<sup>5</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements,

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<sup>3</sup> *Id.* at § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.608(a).

<sup>5</sup> *Id.* at § 10.606(b)(3).

OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

### ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated September 13, 2013 denying appellant's application for review. Because more than one year had elapsed between the date of OWCP's most recent merit decision dated January 11, 2013 and the filing of this appeal with the Board on October 7, 2013, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>7</sup>

OWCP denied appellant's claim for increased schedule awards in a January 11, 2013 decision. Counsel requested reconsideration before OWCP on September 4, 2013 asserting that the A.M.A., *Guides Newsletter* constituted junk science and, as such, should not be utilized by OWCP in impairment evaluations. He further maintained that the A.M.A., *Guides Newsletter* was not an official publication of the American Medical Association. The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.<sup>8</sup>

OWCP has adopted the sixth edition for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures which memorializes proposed tables outlined in the July to August 2009 A.M.A., *Guides Newsletter*.<sup>9</sup> The Board has recognized this adoption as proper in order to provide a uniform standard applicable to each clamant for a schedule award.<sup>10</sup> Consequently, counsel's argument has no reasonable color of validity.<sup>11</sup> He did not establish an error on a specific point of law or advance a relevant legal argument. Counsel did not otherwise make any argument specific to appellant's claim. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>12</sup>

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<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *Id.* at § 501.3(e).

<sup>8</sup> See *Harry D. Butler*, 43 ECAB 859, 866 (1992).

<sup>9</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>10</sup> See *e.g.*, *M.W.*, Docket No. 13-928 (issued August 15, 2013); *P.B.*, Docket No. 11-1153 (issued February 13, 2012); *G.N.*, Docket No. 10-850 (issued November 12, 2010).

<sup>11</sup> See *L.H.*, 59 ECAB 253 (2007) (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).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2).

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence. As she did not submit relevant and pertinent new argument or evidence not previously considered, OWCP properly denied her reconsideration request.<sup>13</sup>

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 13, 2013 is affirmed.

Issued: March 18, 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

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<sup>13</sup> *Id.*