

FACTUAL HISTORY

On February 3, 2011 appellant, then a 45-year-old city letter carrier, filed a traumatic injury claim alleging that on that date he slipped on a patch of black ice and cracked his left elbow while in the performance of duty. He did not initially stop work. On March 31, 2011 OWCP accepted the claim for radial head fracture, left, and triangular fibrocartilage complex (TFCC) tear left. On October 23, 2011 it expanded the claim to include left wrist sprain and sprain of the left shoulder and rotator cuff. On February 6, 2012 appellant underwent authorized arthroscopy with rotator cuff repair to the left shoulder. OWCP also accepted a June 2, 2012 claim for a recurrence of disability.

In a June 30, 2013 report, Dr. David Weiss, an osteopath, noted appellant's history of injury and treatment. He examined appellant and provided findings. Dr. Weiss utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (*hereinafter*, A.M.A., *Guides*). He determined that appellant would qualify for seven percent impairment due to a class 1 full thickness left rotator cuff tear with residual loss, four percent impairment due to a radial head fracture to the left elbow, and 10 percent impairment due to a left wrist TFCC tear. Dr. Weiss determined that appellant had 19 percent impairment to the left arm.

In a January 22, 2014 report, an OWCP medical adviser noted appellant's history of injury and treatment. He noted that the accepted conditions were radial head fracture and TFCC tear on the left. The medical adviser specifically noted that the accepted conditions did not include rotator cuff or any shoulder injury. He indicated that Dr. Weiss' recommendation for a schedule award for rotator cuff tear should not be accepted. The medical adviser determined that appellant sustained 14 percent impairment to the left arm.

On February 20, 2014 OWCP granted appellant a schedule award for 14 percent impairment of the left upper extremity. The award covered a period of 43.68 weeks from June 2, 2013 to April 2, 2014.

In a letter dated May 21, 2014, appellant's attorney requested reconsideration. He argued that the schedule award for 14 percent impairment was incorrect as the medical adviser did not have an accurate history of the claim since the medical adviser did not consider the impairment to the left shoulder, despite OWCP accepting left rotator cuff tear and authorizing surgery.

In an August 19, 2014 decision, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision. It noted that the medical adviser explained why appellant was not eligible for an award due to the rotator cuff tear. OWCP found that appellant's attorney's arguments did not warrant a merit review as no new medical evidence was submitted.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal

² 5 U.S.C. § 8128(a).

regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

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

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

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

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.⁴

ANALYSIS

Appellant’s attorney disagreed with the amount of the February 20, 2014 left arm schedule award and requested reconsideration on May 21, 2014. He asserted that OWCP erred in not considering impairment to appellant’s left shoulder region in issuing its schedule award decision.

OWCP denied appellant’s application on August 19, 2014, finding that no new evidence was offered warranting further merit review. Appellant’s attorney argued that the award for 14 percent impairment was incorrect, as the medical adviser did not consider the impairment to the left shoulder, despite OWCP accepting the left rotator cuff condition and authorizing surgery to repair the injured rotator cuff. OWCP denied merit review on the basis that no relevant new medical evidence was submitted. However, as noted above, a claimant who advances a relevant legal argument not previously considered by OWCP is entitled to a merit review of the claim. In the August 19, 2014 decision, OWCP indicated that the argument regarding the rotator cuff tear was not sufficient to warrant a merit review as no new medical evidence was submitted. However, the Board finds that appellant’s attorney has, in fact, raised a relevant new legal argument regarding the accepted conditions. The Board notes that the medical adviser did not appear to be aware that the rotator cuff tear and surgery were accepted by OWCP. In fact, he specifically noted that the accepted conditions did not include rotator cuff or any shoulder injury.⁵ As this is not the case, appellant’s attorney presented a valid new and relevant legal

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

⁵ OWCP procedures provide that impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(d) (February 2013).

argument. It is well established that the conditions accepted by OWCP should be identified so the physician can properly assess the issue presented.⁶

The Board, therefore, finds appellant has advanced a relevant legal argument that OWCP failed to correctly consider the relevant medical conditions. Pursuant to 20 C.F.R. § 10.606(b)(2), appellant is entitled to a merit review of the claim. The case will be remanded for a decision by OWCP on the merits of the claim. In light of the Board's finding, it is premature to address additional arguments on appeal.

CONCLUSION

The Board finds appellant is entitled to a merit review of the claim

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded for further action consistent with this decision.

Issued: January 20, 2015
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁶ See, e.g., *Gwendolyn Merriweather*, 50 ECAB 411, 415 (1999).