



## ISSUE

The issue is whether OWCP properly denied appellant's January 8, 2015 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued February 11, 2003,<sup>3</sup> the Board affirmed OWCP's June 7, 2002 merit decision denying recurrences of disability commencing October 5, 1994, December 7, 1995, and February 18, 1996. The law and facts of the case as set forth in the Board's prior decision are incorporated by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted that on March 27, 1989 appellant, then a 30-year-old distribution clerk, sustained a sprain of her left arm from pulling a tub of mail. On November 25, 1991 it also accepted that she had left thoracic outlet syndrome, for which she underwent resection of the left first rib in 1991, and a left brachial plexus neurolysis, a scalenectomy, and a sympathectomy in 1993. Appellant remained under medical treatment.<sup>4</sup>

On April 17, 2003 Dr. Frank J.E. Falco, an attending physician Board-certified in pain medicine, performed right C3-7 facet joint ablation. In a May 8, 2003 report, he opined that appellant's bilateral cervical spine pain and upper extremity numbness and paresthesias were all related to the accepted 1989 injury and surgeries. March 28, 2005 electromyography and nerve conduction velocity studies of the arms were normal. Dr. Randeep S. Kahlon, an attending Board-certified orthopedic surgeon, opined on April 4, 2005 that appellant's irritable nerves at the carpal, cubital, and radial tunnels bilaterally indicated a significant distal neuritis from a proximal lesion.

Appellant claimed a schedule award on November 10, 2008. Dr. Nicholas Diamond, an attending osteopath, provided a September 10, 2007 impairment rating finding 16 percent impairment of the left arm due to limited motion, sensory loss, and C5-7 nerve root involvement, according to the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) then in effect. An OWCP medical adviser opined on March 13, 2008 that appellant had no ratable impairment due to sensory deficit.

By decision dated April 2, 2008, OWCP denied the claim as the medical evidence did not indicate a ratable impairment due to the accepted injury. Following an August 28, 2008 telephonic hearing, its Branch of Hearings and Review issued an April 17, 2009 decision setting aside the April 2, 2008 determination and remanding the claim to determine if the accepted thoracic outlet syndrome caused any ratable impairment. Dr. Diamond provided a September 20, 2009 impairment rating utilizing the sixth edition of the A.M.A., *Guides*, finding 16 percent impairment of the left upper extremity due to a class 1 sensory deficit of the upper and middle trunks of the brachial plexus.

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<sup>3</sup> Docket No. 02-2261 (issued February 11, 2003).

<sup>4</sup> Appellant retired from federal employment in late 1996. She then worked in the private sector.

An OWCP medical adviser opined on October 31, 2009 that appellant's only objective impairment was restricted left shoulder motion due to the 1991 rib resection. He explained that the medical record did not support a stretch palsy or brachial plexus involvement. The medical adviser calculated six percent left arm impairment due to limited shoulder motion, pursuant to the Table 15-34: Shoulder Range of Motion, p. 475, of the sixth edition of the A.M.A., *Guides*.

On November 10, 2009 appellant again filed a schedule award claim. By decision dated December 1, 2009, OWCP granted her a schedule award for six percent impairment of the left arm, based on the medical adviser's October 31, 2009 opinion.

In a December 7, 2009 letter, counsel requested an oral hearing, later modified to a request for a review of the written record. He contended that the district medical adviser failed to discuss or provide a rating for the diagnosed conditions in the statement of accepted facts and that OWCP should consider permanent impairment of appellant's right upper extremity. Counsel provided an April 2, 2010 report from Dr. Diamond, finding 31 percent impairment of the left arm due to thoracic outlet syndrome of the brachial plexus neuritis type.

By decision dated June 15, 2010, OWCP's Branch of Hearings and Review found that the case was not in posture for a decision due to a conflict between Dr. Diamond, for appellant, and the medical adviser, for the government, regarding the nature and extent of the accepted thoracic outlet syndrome. OWCP directed selection of an impartial medical specialist to resolve the conflict.

On August 4, 2010 OWCP obtained an impartial opinion from Dr. Karl Rosenfeld a Board-certified orthopedic surgeon, who found 13 percent impairment of the left upper extremity due to thoracic outlet symptoms in the absence of positive electrodiagnostic findings. Dr. Rosenfeld noted that, as appellant had reached maximum medical improvement, he did not expect her condition to change. An OWCP medical adviser reviewed the record on September 7, 2010 and found Dr. Rosenfeld's opinion did not conform to the A.M.A., *Guides*. Dr. Rosenfeld found no left arm impairment as there was no objective evidence of a brachial plexus impairment.

By decision dated September 8, 2010, OWCP affirmed the prior decision, finding that appellant had not established that she sustained more than six percent impairment of the left upper extremity.

In response to appellant's September 13, 2010 hearing request, on December 27, 2010 an OWCP hearing representative found that the case was not in posture for a hearing, and remanded the case to obtain clarification from Dr. Rosenfeld. Dr. Rosenfeld provided a February 28, 2011 report, concurring that there were no objective signs of brachial plexus involvement.

By decision dated March 24, 2011, OWCP denied appellant's claim for an additional schedule award, as Dr. Rosenfeld found no objective impairment of the left upper extremity. Counsel requested a hearing which was held on August 8, 2011.<sup>5</sup> He contended that the medical

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<sup>5</sup> Counsel submitted June 30 and November 1, 2011 reports from Dr. J. Douglas Patterson, an attending Board-certified orthopedic surgeon, requesting authorization for bilateral carpal tunnel releases, a left ulnar nerve release, and multiple trigger finger releases.

adviser was disqualified from serving in appellant's case as he assisted Dr. Diamond in formulating his September 2009 impairment rating. Dr. Diamond provided an August 3, 2011 report contending that Dr. Rosenfeld did not perform a complete or appropriate examination, and ignored objective signs of impairment.

By decision dated September 19, 2011, the hearing representative set aside the March 24, 2011 decision, and remanded the case to obtain additional clarification from Dr. Rosenfeld. Dr. Rosenfeld submitted an October 10, 2011 letter, stating that appellant did not have objective findings of thoracic outlet syndrome.

OWCP then found a conflict of opinion between Dr. Diamond, for appellant, and a second OWCP's medical adviser regarding the nature and extent of the injury-related impairments. It selected Dr. Jerry L. Case, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Case submitted a January 30, 2012 report that was not imaged completely into the case record. The medical adviser reviewed the record on March 29, 2012, finding that Dr. Case's findings supported 13 percent impairment of the left upper extremity due to thoracic outlet syndrome with brachial plexus impairment.

By decision dated April 25, 2012, OWCP issued a schedule award for an additional 7 percent impairment of the left upper extremity, for a total of 13 percent. Counsel disagreed, and in a May 3, 2012 letter requested a hearing.

By decision dated July 9, 2012, a representative of OWCP's Branch of Hearings and Review found that the case was not in posture for a hearing as Dr. Case's report could not be reviewed in its entirety. The hearing representative remanded the case for reconstruction of the case record. In a July 17, 2012 letter, counsel requested a hearing.

On July 24, 2012, the medical adviser reviewed the case record. He opined that, as Dr. Case found no objective signs of a brachial plexus lesion, appellant did not have a ratable impairment of the left upper extremity.

By decision dated July 30, 2012, OWCP found that appellant had not established that she sustained more than the 13 percent impairment of the left upper extremity previously awarded, based on Dr. Case's opinion as the weight of the medical evidence. Counsel disagreed and in an August 3, 2012 letter requested a hearing, which was held November 28, 2012. At the hearing, he contended that OWCP must image Dr. Case's entire report into the record, and obtain clarification from him regarding the nature and extent of the injury-related condition.

By decision dated February 19, 2013, the hearing representative vacated OWCP's July 30, 2012 decision and remanded the case for reconstruction of the record. On remand, OWCP imaged Dr. Case's complete January 30, 2012 report into the record. Dr. Case opined that appellant had 13 percent impairment of the left upper extremity due to thoracic outlet syndrome, a vascular condition. He opined that she did not have brachioplexopathy, as she had no objective neurologic findings.

OWCP determined that Dr. Case's opinion was insufficient to resolve the conflict between the medical adviser and Dr. Diamond. It selected Dr. Andrew Gelman, an osteopath

Board-certified in orthopedic surgery, as an impartial medical examiner, to resolve the conflict.<sup>6</sup> Dr. Gelman provided a May 15, 2013 report finding no ratable impairment of the left upper extremity due to thoracic outlet syndrome or a brachial plexus lesion. In a July 10, 2013 report, the medical adviser concurred with Dr. Gelman's assessment.

By decision dated July 11, 2013, OWCP denied appellant's claim for an additional schedule award, based on Dr. Gelman's opinion as the weight of the medical evidence. Counsel disagreed, and in a July 16, 2013 letter requested a hearing. He provided a November 8, 2013 report from Dr. Diamond, asserting that Dr. Gelman did not perform a thorough examination. At the hearing, held November 15, 2013, counsel asserted that Dr. Gelman could not serve as impartial medical examiner as he treated appellant in 1989 and 1990.

By decision dated January 29, 2014, an OWCP hearing representative vacated OWCP's July 11, 2013 decision, finding that Dr. Gelman was disqualified from serving as impartial medical examiner as he previously treated appellant. He remanded the case to OWCP for selection of a new impartial medical examiner.

On February 27, 2014 OWCP selected Dr. Donald B. Haskins, a Board-certified orthopedic surgeon, as impartial medical examiner. It included a bypass history report listing 13 other physicians considered in appellant's commuting area: one retired; two had previously participated in the case; three could not be reached; two were spine, neck, and back specialists; one was a "foot doctor only;" four did not perform impairment ratings.

In a March 25, 2014 report, Dr. Haskins reviewed the medical record and a statement of accepted facts and concurred that appellant had reached maximum medical improvement. He related appellant's symptoms of neck and left arm pain and paresthesias throughout the left arm and hand. Dr. Haskins noted restricted motion of the cervical spine, "normal" range of motion in the left elbow, "limited" motion in the left wrist, no left scapular atrophy, surgical scars in the left distal radius and bilateral carpal tunnel regions, bilateral ulnar nerve release scars, and no objective focal sensory loss to light touch in either arm. He noted reviewing Dr. Gelman's 1989 and 1990 reports as well as his May 15, 2013 impartial report. Dr. Haskins diagnosed thoracic outlet syndrome status postsurgical procedures and a left wrist sprain. He noted nonoccupational conditions of a left wrist fracture, nerve entrapment of the elbows and wrists, trigger finger, cervical spine abnormalities, and complex regional pain syndrome. Dr. Haskins explained that appellant had no ratable impairment due to residuals of thoracic outlet syndrome or the two surgical procedures. He opined that she did not have a brachial plexus lesion. Dr. Haskins noted that he "did not have Semmes-Weinstein equipment for light touch testing," but that appellant had "either perceived or minimal sensory changes" resulting in a grade 1 or mild impairment according to Table 15-14, page 425. He found no motor deficiency as appellant had normal manual strength. Dr. Haskins noted a grade modifier for Functional History (GMFH) of two, a grade modifier for Physical Findings (GMPE) of zero, and a grade modifier for Clinical Studies (GMCS) of one. He then calculated a left upper extremity impairment of four percent, based on brachial plexopathy. The medical adviser review the record on April 18, 2014 and found that

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<sup>6</sup> By decision dated March 20, 2013, OWCP denied counsel's February 25, 2013 request to participate in the selection of a new impartial medical examiner, as he did not provide an acceptable reason for his request. The March 20, 2013 decision is not before the Board on the present appeal.

appellant had no ratable impairment of the left upper extremity as she had normal manual strength, and no objective sensory deficit.

By decision dated April 23, 2014, OWCP denied appellant's claim for an additional schedule award, finding that Dr. Haskins' opinion established that she had not sustained greater than the 13 percent impairment of the left upper extremity for which she received schedule awards.

In an April 28, 2014 letter, counsel requested a hearing, which was held October 20, 2014. At the hearing, he asserted that OWCP should have removed Dr. Gelman's May 15, 2013 impartial report from the record following his disqualification from participating in the case. Counsel contended that, in selecting Dr. Haskins, OWCP improperly bypassed two spine surgeons who could have provided the required opinion, as appellant had cervical spine complaints. He also argued that Dr. Haskin's opinion could not represent the weight of the medical evidence as he did not provide complete upper extremity range of motion measurements, and did not perform Semmes-Weinstein monofilament testing. Counsel contended that Dr. Diamond's reports outweighed Dr. Haskin's opinion.

By decision dated December 5, 2014, the hearing representative affirmed OWCP's April 23, 2014 decision. He found that Dr. Haskins' report was sufficiently detailed and well-rationalized to represent the weight of medical opinion in the case. The hearing representative also found that Dr. Haskins' reliance on clinical findings and the studies of record provided sufficient evaluation of sensory functioning, without need for Semmes-Weinstein monofilament testing. He further found that OWCP was not required to exclude Dr. Gelman's report as it was not obtained through improper telephone contact, by means of leading questions, or improperly influenced by surveillance video of the injured worker. The hearing representative also noted that as Dr. Diamond was on one side of the conflict Dr. Haskins was appointed to resolve, his reports could not outweigh Dr. Haskins' opinion.

In a January 8, 2015 letter, counsel requested reconsideration, contending that Dr. Haskins' report could not carry the weight of the medical evidence as he did not perform Semmes-Weinstein monofilament testing or a complete neurologic examination. He contended that Dr. Diamond's opinion was sufficient to establish 31 percent impairment of the left upper extremity. Counsel provided a December 22, 2014 report from Dr. Diamond, asserting that appellant had 31 percent impairment of the left arm, and that Dr. Haskins' failure to perform Semmes-Weinstein monofilament testing negated the probative value of his neurologic assessment.

By nonmerit decision dated January 20, 2015, OWCP denied reconsideration, finding that the evidence submitted in support of the request was "cumulative and thus substantially similar to evidence or documentation that is already contained in the case file and was previously considered."

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>7</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>10</sup> She need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>11</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>12</sup>

## ANALYSIS

The Board finds that OWCP appropriately denied reconsideration as counsel's argument was duplicative of his prior arguments. At the October 20, 2014 hearing, counsel asserted that the report of Dr. Gelman, a Board-certified orthopedic surgeon providing an opinion to OWCP, should have been excluded from the record after he was disqualified from serving as an impartial medical examiner. He also argued that OWCP improperly bypassed two spine surgeons in selecting Dr. Haskins and that Dr. Haskins' report was fatally flawed as he failed to perform Semmes-Weinstein monofilament testing or provide complete range of motion measurements. Counsel asserted that the reports of Dr. Diamond, an attending osteopath, outweighed those of Dr. Haskins. In its December 5, 2014 merit decision, OWCP answered each of his contentions, explaining that Dr. Haskins' report was sufficient to represent the weight of the medical evidence, that OWCP was not required to exclude Dr. Gelman's report, and that Dr. Diamond's opinion could not outweigh that of Dr. Haskins as Dr. Diamond was on one side of the conflict of opinion Dr. Haskins was selected to resolve.

In his January 8, 2015 request for reconsideration, counsel repeated his October 20, 2014 arguments that Dr. Haskins failed to perform Semmes-Weinstein testing or a complete examination, and that Dr. Diamond's opinion was sufficient to establish 31 percent impairment

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>10</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>11</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>12</sup> *Annette Louise*, 54 ECAB 783 (2003).

of the left arm. Evidence which is duplicative or cumulative or repetitive in nature is insufficient to warrant reopening a claim for merit review.<sup>13</sup> Counsel also provided a December 22, 2014 report from Dr. Diamond, which although new, was repetitive of both his prior opinions and of counsel's contentions. It is therefore insufficient to warrant consideration on the merits.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel contends that OWCP did not properly use the physician directory system in selecting Dr. Haskins, as it bypassed two spine specialists who could have offered an opinion on appellant's cervical spine. He also argues that OWCP improperly failed to exclude Dr. Gelman's report from the record after he was disqualified, thereby tainting Dr. Haskins' opinion as he referenced Dr. Gelman's opinion in his report. Counsel also asserts that Dr. Haskins' examination was deficient as he did not provide range of motion measurements for the left elbow or left wrist, perform Semmes-Weinstein monofilament testing, or provide an adequate neurologic examination. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal. Also, counsel's arguments were considered and rejected by OWCP prior to its December 5, 2014 merit decision.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's January 8, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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<sup>13</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).



**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 20, 2015 is affirmed.

Issued: September 29, 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