

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

---

**J.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Poland, OH, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 16-0217  
Issued: April 4, 2016**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 16, 2015 appellant, through counsel, filed a timely appeal of a May 21, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated February 27, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to consider the merits of this case.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

Appellant, a 41-year-old postal clerk, injured her left arm, right shoulder, and neck when she passed out and fell on July 19, 2008. She filed a traumatic injury claim (Form CA-1) for

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

benefits on July 25, 2008, which OWCP accepted for left arm contusion, cervical strain, right shoulder strain, and right rotator cuff tear with impingement.

On June 9, 2009 appellant underwent arthroscopic surgery on her right shoulder to ameliorate right shoulder impingement syndrome and acromioclavicular joint degenerative joint disease, which was performed by Dr. Joseph Stefko, Board-certified in orthopedic surgery. She has not worked since her June 9, 2009 surgery. OWCP commenced payment for temporary total disability compensation and placed appellant on the periodic rolls as of July 5, 2009.

Dr. Ronald J. Hartwig, a treating physician specializing in geriatric medicine, reported on November 8, 2010 that appellant required permanent work restrictions. OWCP then referred appellant to Dr. Manhal A. Ghanma, an orthopedic surgeon, for a second opinion evaluation to determine appellant's disability status. Dr. Ghanma reported on April 21, 2011 that appellant's accepted conditions had resolved. OWCP thereafter found a conflict in the medical opinion evidence and referred appellant to Dr. Mark S. Berkowitz, Board-certified in orthopedic surgery. Dr. Berkowitz opined in a September 22, 2011 report that appellant could return to work without restrictions and that appellant did not require further medical treatment.

By decision dated October 14, 2011, OWCP terminated appellant's compensation, effective October 23, 2011, finding that she was no longer disabled and had no residuals from her accepted July 19, 2008 employment injury.

By letter dated October 26, 2011, appellant, through counsel, requested a hearing before an OWCP hearing representative, which was held on February 9, 2012.

By decision dated May 8, 2012, an OWCP hearing representative affirmed the October 14, 2011 termination decision.

On August 3, 2012 appellant filed a claim for schedule award, Form CA-7, based on a partial loss of use of her right upper extremity.

In support of her schedule award claim appellant submitted an October 16, 2012 report from Dr. John L. Dunne, an osteopathic physician. Dr. Dunne related that he evaluated appellant's permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition). He concluded that appellant had one percent permanent impairment of the cervical spine. Dr. Dunne then assessed appellant's right shoulder impairment pursuant to Table 15-34, Table 15-35, and Table 15-7 for loss of range of motion. He concluded that appellant had 16 percent permanent impairment of the right shoulder.

OWCP on August 22, 2012 advised appellant of the deficiencies in her evidence. Appellant did not respond within the time allotted.

By decision dated November 29, 2012, OWCP found that appellant had no ratable impairment of the right upper extremity causally related to her accepted right shoulder condition and therefore was not entitled to a schedule award.

By letter dated December 4, 2012, counsel requested an oral hearing. In a decision dated February 6, 2013, the OWCP hearing representative vacated the November 29, 2012 decision

and remanded the case to the district office for further development of the medical evidence, based upon Dr. Dunne's report.

In a March 12, 2013 report, Dr. Brian Tonne, an OWCP medical adviser and a Board-certified orthopedic surgeon, found that appellant had 14 percent permanent impairment of the right upper extremity from her accepted right shoulder condition pursuant to the A.M.A., *Guides*.

In a report dated April 17, 2013, Dr. Dunne advised that he concurred with Dr. Tonne's rating of 14 percent right upper extremity impairment.

By letter dated May 3, 2013, OWCP advised Dr. Dunne that it had terminated appellant's medical benefits and compensation for wage loss in its October 14, 2011 decision and had found that she had no residuals from her accepted conditions. It noted that, once a determination was made which terminates continuing entitlement to compensation and medical benefits because the effects of the injury ceased and that there are no residuals, entitlement to a schedule award ceases. OWCP advised Dr. Dunne that the only way appellant would be entitled to an impairment rating would be if it could be medically proven that the 14 percent impairment rating was effective before October 23, 2011, when her benefits were terminated. It therefore asked him to provide a medical opinion including rationale for why and how the 14 percent impairment rating should be rated before October 23, 2011.

In a report dated May 21, 2013, Dr. Dunne advised that there was nothing in his reports which demonstrated an ongoing impairment that would indicate that this impairment somehow occurred after 2008; and nothing in his report or in his records that would suggest that the July 19, 2008 employment injury had completely resolved and that her shoulder impairment had developed postoperatively after that date.

By decision dated July 10, 2013, OWCP denied modification of the November 29, 2012 decision. It found, based on OWCP's October 23, 2011 determination that appellant had no residuals from the July 19, 2008 employment injury, that there was no basis to show permanent impairment from an accepted condition. Therefore, appellant's entitlement to a schedule award had ceased.

By letter dated July 15, 2013, appellant, through counsel, requested a hearing which was held on December 18, 2013. By decision dated February 27, 2014, an OWCP hearing representative affirmed the July 10, 2013 decision denying a schedule award.

In a December 22, 2014 report, Dr. Dunne advised that he did not have an opportunity to review appellant's postoperative medical records, including her physical examinations at the completion of her postoperative physical therapy and subsequent discharge from the care of her surgeon. He noted that, when he did examine her, there was evidence of impairment in motion and strength testing concerning the right shoulder. Dr. Dunne opined that a fairly common outcome of a shoulder subacromial decompression and distal clavicle excision procedure that the patient is left with less than full recovery, with generally some degree of motion loss above the horizontal and a degree of weakness in certain shoulder girdle muscles. He advised that his October 16, 2012 examination of appellant provided objective evidence of impairment consistent with an operated shoulder injury, with typical residual impairments. Dr. Dunne concluded that

to determine whether appellant had impairment resulting directly from her injury to the right shoulder, he would have to review the records of her treating physician from 2009 as well as the reports from the operative surgeon.

By letter dated and received on January 27, 2015, appellant's counsel requested reconsideration.

By decision dated May 21, 2015, OWCP denied appellant's request for reconsideration, finding that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>2</sup> 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.<sup>3</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>4</sup> 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.<sup>5</sup>

### **ANALYSIS**

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by OWCP. She submitted the December 22, 2014 report of Dr. Dunne. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>6</sup> The evidence submitted in connection with appellant's January 27, 2015 reconsideration request, however, is not pertinent to the issue on appeal; *i.e.*, whether she had any ratable, permanent impairment stemming from her accepted July 19, 2008 right shoulder injury. Dr. Dunne's report merely reiterated his previously held opinion regarding his October 16, 2012 physical examination findings. He did not evaluate appellant's permanent impairment, and he indicated that he could not provide further opinion regarding appellant's entitlement to a schedule award, without review of appellant's earlier medical records. Dr. Dunne's opinion was considered by OWCP in previous merit decisions and

---

<sup>2</sup> Section 8128 (a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>3</sup> 20 C.F.R. § 10.606(b)(3).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> See *David J. McDonald*, 50 ECAB 185 (1998).

found insufficient to establish entitlement to a schedule award. His report is therefore cumulative and duplicative.<sup>7</sup>

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, and failed to advance a point of law or fact not previously considered by OWCP. OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits in its May 21, 2015 decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2016  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>7</sup> See *Patricia G. Aiken*, 57 ECAB 441 (2006).