



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> In a December 13, 2010 decision, the Board found the case was not in posture for decision regarding the degree of permanent impairment of appellant's right arm.<sup>5</sup> In a March 19, 2015 decision, the Board found that OWCP had met its burden of proof to reduce appellant's wage-loss compensation on April 2, 2014 based on her capacity to earn wages in the constructed position of receptionist. OWCP found that the weight of the evidence regarding appellant's work ability rested with the opinion of Dr. Brian E. Morgan, an attending Board-certified orthopedic surgeon, who advised that appellant was no longer disabled from all work. The Board, however, found that OWCP erred in merit decisions dated July 17 and August 25, 2014, when it reviewed the case under section 8128 of FECA (5 U.S.C. § 8128(a)) and section 10.609 of OWCP regulations (20 C.F.R. § 10.609). The Board found that OWCP should have adjudicated the issue as a modification of the loss of wage-earning capacity determination and remanded the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights on this issue.<sup>6</sup>

Following remand, in a June 16, 2015 decision, OWCP reviewed the case using the proper standard, but denied modification of the April 2, 2014 loss of wage-earning capacity determination.<sup>7</sup> Appellant, through counsel, timely requested a hearing with a representative of OWCP's Branch of Hearings and Review. At the hearing, held on February 11, 2016, appellant testified that she could not perform the receptionist position because she had memory loss due to diabetes and could not learn computer skills. She also indicated that because she had a frozen shoulder, she could not perform the duties of receptionist.

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<sup>4</sup> On October 22, 2005 appellant, a mail handler, filed an occupational disease claim (Form CA-2) that was accepted for right lateral epicondylitis. OWCP adjudicated the claim under File No. xxxxxx861. On July 30, 2007 appellant filed a traumatic injury claim (Form CA-1) for a left elbow condition, adjudicated by OWCP under File No. xxxxxx069. This claim was initially accepted for left lateral epicondylitis and later expanded to include left elbow tenosynovitis and right shoulder strain. Appellant also filed a traumatic injury claim (Form CA-1) on December 22, 2007, adjudicated under File No. xxxxxx009, accepted for left shoulder impingement syndrome and left shoulder rotator cuff tear. The three files were combined under File No. xxxxxx069.

<sup>5</sup> Docket No. 10-1008 (issued December 13, 2010). Appellant had previously been granted a schedule award for one percent permanent impairment of the right arm on April 26, 2007, and on January 27, 2009 a schedule award for six percent permanent impairment of the left arm. On June 30, 2009 she was granted a schedule award for an additional two percent right arm permanent impairment. After the Board's December 13, 2010 decision, in a February 7, 2011 decision, OWCP reiterated that appellant had three percent right arm permanent impairment. In June 16, 2011 and July 10, 2013 decisions, it determined that she was not entitled to schedule awards greater than those received for either the right or left arms.

<sup>6</sup> Docket No. 14-2040 (issued March 19, 2015).

<sup>7</sup> OWCP previously issued a decision on June 4, 2015 denying modification of the April 2, 2014 decision. On June 11, 2016 it vacated the June 4, 2015 decision and noted that a new decision would be issued regarding appellant's request to modify the April 2, 2014 loss of wage-earning capacity determination.

Appellant elected Office of Personnel Management (OPM) retirement, effective March 1, 2016.

In correspondence dated April 27, 2016, counsel asked that additional conditions of left shoulder pain, rotator cuff tendinitis, left elbow pain, ulnohumeral arthritis, and mild-to-moderate left shoulder degenerative joint disease be accepted. He attached a May 5, 2015 left shoulder magnetic resonance imaging (MRI) scan suggested a tiny supraspinatus perforation and mild-to-moderate osteoarthritis. In a May 11, 2015 report, Dr. Raymond C. Hui, a Board-certified orthopedic surgeon, reviewed the left shoulder MRI scan and diagnosed the above-listed conditions.

By decision dated April 21, 2016, an OWCP hearing representative affirmed the June 16, 2015 decision that had denied modification of the April 2, 2014 loss of wage-earning capacity decision.

In a May 26, 2016 letter, OWCP informed appellant of the accepted conditions which were osteoarthritis, left shoulder; tendinitis (rotator cuff) of left shoulder; lateral epicondylitis, bilateral; closed dislocation of elbow, bilateral; sprain of shoulder and upper arm, rotator cuff bilateral; wrist sprain, bilateral; and lesion of ulnar nerve, bilateral.<sup>8</sup>

In correspondence dated and reviewed August 11, 2016, appellant, through counsel, requested reconsideration of the April 21, 2016 decision. Counsel attached the May 26, 2016 acceptance letter and stated:

“Upon receipt of this request, please review all necessary documents before making a decision. Based upon this new evidence, the decision should be vacated. The previous decision should be overturned.”

In a nonmerit decision dated August 25, 2016, OWCP denied appellant’s reconsideration request.

### **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>9</sup> Section 10.608(a) of OWCP’s regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented

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<sup>8</sup> Appellant filed a schedule award claim (Form CA-7) on June 30, 2016. In a July 10, 2016 report, an OWCP medical adviser opined that appellant had three percent left arm permanent impairment for partial thickness rotator cuff tear. The medical adviser noted that appellant had previously received a schedule award for three percent right arm permanent impairment. In a July 26, 2016 decision, appellant was granted a schedule award for three percent left arm permanent impairment. The Board, however, notes that under File No. xxxxxx009, appellant received a schedule award for six percent permanent impairment of the left arm on January 27, 2009. This award was for left rotator cuff tear and impingement syndrome. *See supra* note 5. Counsel has not appealed the July 26, 2016 decision to the Board.

<sup>9</sup> 5 U.S.C. § 8128(a).

evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).<sup>10</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.<sup>11</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, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>12</sup>

### ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated August 25, 2016 denying appellant's application for review.

With the August 11, 2016 request for reconsideration, counsel attached a May 26, 2016 acceptance letter in which OWCP listed all accepted conditions. He maintained that since this letter showed newly accepted conditions, the previous decision should be overturned. However, the merit issue was whether an April 2, 2014 loss of wage-earning capacity determination should be modified. Modification is only warranted where the party seeking modification establishes a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>13</sup> Counsel's attachment of the letter showing accepted conditions and his mere assertion that the previous decision should be overturned does not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b).<sup>14</sup> As to the third above-noted requirement under section 10.606(b)(3), while he submitted the acceptance letter, this does not address the particular merit issue described above. The hearing representative noted in her merit decision that appellant had not provided a physician's report containing medical rationale or objective findings to support modification of the wage-earning capacity determination due to a material worsening of appellant's accepted condition. The reconsideration request contained no new medical opinion evidence. The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup>

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<sup>10</sup> 20 C.F.R. § 10.608(a).

<sup>11</sup> *Id.* at § 10.606(b)(3).

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Id.* at § 10.511.

<sup>14</sup> *Id.* at § 10.606(b).

<sup>15</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

While the May 26, 2016 OWCP letter is new, counsel provided no argument as to its relevance to the underlying issue. While it does appear from the May 26, 2016 letter that OWCP expanded the accepted condition, this alone is not sufficient to establish its relevance, thereby warranting a merit review.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied her reconsideration request.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>16</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.