

ISSUE

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

FACTUAL HISTORY

On September 14, 2009 appellant, then a 50-year-old fire monitoring specialist, filed an occupational disease claim (Form CA-2) alleging that he sustained thoracic outlet syndrome, chronic myofascial pain, and tenosynovitis as a result of using a keyboard and mouse at work. He stopped work on July 14, 2009 and returned on September 14, 2009.

OWCP accepted appellant's claim for bilateral tenosynovitis of the hand and wrist and neck sprain.

On September 28, 2009 the employing establishment placed appellant on temporary total disability status because he was unable to perform the full duties of his position and there were no other work duties, within its program, that he could perform given the nature of his condition. Appellant retired from federal employment on September 12, 2010. He continued to receive medical treatment and submit medical reports, including reports from treating physician Dr. Jules P. Steimnitz, Board-certified in pain medicine and physical medicine and rehabilitation.

On September 24, 2013 appellant filed a claim for a schedule award (Form CA-7).

In a letter dated November 18, 2013, OWCP requested that Dr. Steimnitz provide a medical report with an opinion on whether appellant had reached maximum medical improvement (MMI) and whether he had a permanent impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*). Dr. Steimnitz was provided 30 days to submit the requested information.

Dr. Steimnitz provided a December 19, 2013 narrative report and examination note. He reported that appellant reached MMI with regard to his neck and upper extremities as of his prior November 22, 2010 examination and noted that appellant was not capable of resuming his usual and customary work activities as a fire monitoring specialist. Dr. Steimnitz explained that according to the fifth edition of the A.M.A., *Guides*, Table 17-2, page 565, cervical category one, appellant had five percent permanent impairment of the whole person. He related that the above rating did not adequately describe appellant's permanent disability and he would draw analogies to other chapters, tables, and methods of assessing impairment from the fifth edition of the A.M.A., *Guides*. Dr. Steimnitz reported that pursuant to Table 13-22, page 343, appellant had class 2 or 20 percent permanent impairment of the whole person for the dominant right extremity and had class 2 or 10 percent whole person permanent impairment for the nondominant left upper extremity. He indicated that using the Combined Values Chart on page 604 of the fifth edition of the A.M.A., *Guides* appellant's whole person permanent impairment was 32 percent. Dr. Steimnitz explained that he was unable to provide impairment ratings to the upper extremities according to the sixth edition.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the record, to Dr. Bruce E. Thompson, Board-certified in occupational medicine, for a second opinion examination in order to determine whether appellant had reached MMI and to calculate whether appellant sustained any ratable impairment under the sixth edition of the A.M.A., *Guides* due to his accepted cervical and upper extremities condition.

In a July 3, 2014 report, Dr. Thompson related that appellant had worked for the employing establishment since June 1989 and he described appellant's employment duties. He discussed appellant's history and provided a detailed description of the medical records that he reviewed. Upon examination of appellant's cervical spine, Dr. Thompson observed no tenderness to palpation and no scoliosis. Neurological examination showed full cerebral function and full and equilateral motor and sensory function. Dr. Thompson reported no tenderness to palpation, muscle atrophy, or deformity in appellant's bilateral shoulders. Range of motion was full. Dr. Thompson diagnosed resolved cervical sprain, resolved bilateral hand tenosynovitis, hypochondriasis, and major depressive disorder. He opined that appellant reached MMI on November 22, 2010. Dr. Thompson reported that according to the sixth edition of the A.M.A., *Guides*, appellant had a class zero diagnosis with no permanent impairment because his conditions of cervical sprain and tenosynovitis of the hands had resolved.

Dr. Ellen Pichey, Board-certified in occupational and family medicine and an OWCP medical adviser, reviewed appellant's claim. In a September 6, 2014 report, she noted that appellant's claim was accepted for neck sprain and other tenosynovitis of the bilateral hand and wrist. Dr. Pichey indicated that according to the sixth edition of the A.M.A., *Guides*, Table 15-3, page 395, appellant was class zero and had zero percent permanent impairment due to no significant objective abnormality of his bilateral wrists. She noted a date of MMI of November 22, 2010. Dr. Pichey explained that she disagreed with Dr. Steimnitz's permanent impairment rating because his rating was based on the fifth edition of the A.M.A., *Guides*, which was no longer the standard used for impairment determination, and was based on whole person permanent impairment.

By decision dated September 15, 2014, OWCP denied appellant's schedule award claim. It determined that he did not have any ratable permanent impairment to a member or function of the body causally related to his accepted cervical and upper extremities conditions. OWCP found that Dr. Thompson, the second opinion physician, and Dr. Pichey, OWCP's medical adviser, determined that appellant did not sustain any permanent impairment of his upper extremities causally related to his accepted conditions and properly applied the sixth edition of the A.M.A., *Guides*.

In an appeal request form dated October 13, 2014, which was received by OWCP on October 17, 2014, appellant disagreed with the decision and requested an oral hearing before an OWCP hearing representative.

In a report dated November 18, 2014, Dr. Steimnitz related that appellant continued to have problems with his neck and upper extremities, but believed he had better control over his pain. He provided physical examination findings and diagnosed cervical sprain, degenerative cervical disease, and tenosynovitis of the upper extremities. Dr. Steimnitz noted that appellant

should have a qualified medical examiner rate his permanent impairment pursuant to the A.M.A., *Guides*.

In a report dated December 2, 2014, Dr. Joel W. Rembaum, a Board-certified orthopedic surgeon, indicated that he examined appellant on November 7, 2014 due to problems he had in his bilateral hands, wrists, and cervical spine. He noted that he reviewed appellant's medical records and provided an accurate history of injury. Dr. Rembaum reported mild tenderness to palpation from C4 to T1 in the midline and normal contour of appellant's neck. He indicated that inspection of appellant's bilateral shoulders and elbows showed no localizing tenderness and normal contour. Examination of appellant's bilateral hands and wrists showed mild tenderness to palpation over the volar wrists. Tinel's and Finkelstein's tests were negative. Dr. Rembaum diagnosed cervical strain superimposed on multilevel degenerative disc disease and repetitive stress injury, bilateral upper extremities, with tendinitis. He opined that according to the sixth edition of the A.M.A., *Guides* appellant had no ratable impairment of the cervical spine or bilateral upper extremities. Dr. Rembaum explained that appellant was in class zero for all body parts with no permanent impairment of the right upper extremity.

On February 25, 2015 a hearing was held. Counsel was present and asserted that the determination of a class zero rating was erroneous because Dr. Thompson did not describe how the sixth edition of the A.M.A., *Guides* led him to conclude that appellant had a class zero permanent impairment rating. Counsel also alleged that Dr. Steimnitz's permanent impairment rating should be given greater weight. She indicated that she would be submitting a report by Dr. Steimnitz, which addressed appellant's permanent impairment rating using the sixth edition of the A.M.A., *Guides*.

However, counsel informed OWCP, in a letter dated March 25, 2015, that Dr. Steimnitz was unable to rate appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. She explained that she had arranged for appellant to be evaluated by Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation.

In a March 18, 2015 report, Dr. Hebrard indicated that appellant had worked for the employing establishment since June 1989. He described appellant's job duties and reviewed the medical treatment he had received. Dr. Hebrard reported that examination of appellant's neck revealed trigger points upon palpation in the splenius capitis and the upper and lower trapezius regions. He also noted mild crepitus with passive range of motion of appellant's shoulders. Dr. Hebrard diagnosed cervical radiculitis. He referenced Proposed Table 1, Cervical Spine of the sixth edition of the A.M.A., *Guides* and determined that appellant had five percent permanent impairment of C5 for mild sensory and mild motor deficit and six percent permanent impairment of C6 for mild sensory and motor deficit. Dr. Hebrard reported that using the Combined Values Chart on page 604, the deficit at C5-C6 resulted in 11 percent permanent impairment of the left upper extremity and 11 percent right upper extremity permanent impairment.

Counsel filed a legal brief dated April 2, 2015. She noted that appellant's claim was accepted for neck strain and bilateral tenosynovitis of the hands. Counsel discussed in detail the medical treatment that appellant had received. She asserted that OWCP erred in relying on Dr. Thompson and OWCP's medical adviser's reports because they were of diminished probative value. Counsel also alleged that Dr. Thompson failed to provide any explanation or

indicate what tables or modifiers he used in providing his impairment rating. She pointed out that OWCP's medical adviser did not personally examine appellant and asserted that his opinion lacked the accuracy and completeness of records to support a denial of schedule award. Counsel further claimed that OWCP erred in ignoring Dr. Steimnitz's report since he was appellant's treating physician and his reports should be given the weight of evidence. She also alleged that Dr. Hebrard thoroughly examined appellant and found that he had 11 percent permanent impairment of each upper extremity pursuant to the sixth edition of the A.M.A., *Guides*.

By decision dated April 14, 2015, an OWCP hearing representative affirmed the September 15, 2014 decision denying appellant's schedule award claim. She found that OWCP appropriately referred the medical evidence, including Dr. Thompson's second opinion report, to the medical adviser who properly relied on Dr. Thompson's examination findings and provided clear medical reasoning explaining why appellant did not have any permanent impairment according to the sixth edition of the A.M.A., *Guides*. The hearing representative also determined that Dr. Hebrard's March 18, 2015 permanent impairment rating report was of diminished probative value as his impairment rating was based on a diagnosis of cervical radiculitis, which was not an accepted condition.

On April 15, 2016 OWCP received appellant's request, through counsel, for reconsideration. Counsel noted that appellant's reconsideration request was based on new issues.

Appellant submitted medical reports by Dr. Steimnitz dated May 19 and November 17, 2015. Dr. Steimnitz indicated that he was evaluating appellant for problems involving his neck and upper extremities, and conducted a physical examination.

Counsel filed a six-page legal brief in support of appellant's reconsideration request. She asserted that OWCP erred in not considering Dr. Hebrard's March 18, 2015 permanent impairment rating as it was consistent with the sixth edition of the A.M.A., *Guides*. Counsel alleged that, although Dr. Hebrard's permanent impairment rating was based on a diagnosis of cervical radiculitis, instead of cervical strain, it still consistently supported that appellant sustained a permanent impairment to a part of his body. She resubmitted Dr. Hebrard's March 18, 2015 report.

By decision dated May 9, 2016, OWCP denied reconsideration of the merits of appellant's claim. It found that Dr. Hebrard's March 18, 2015 report was previously considered by OWCP and, thus, repetitive of previous evidence. OWCP also determined that appellant did not raise a relevant legal argument sufficient to warrant merit review according to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁴

⁴ 5 U.S.C. § 8128(a).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

OWCP accepted that appellant sustained bilateral tenosynovitis of the hand and wrist and neck strain as a result of his employment. On September 24, 2013 appellant filed a claim for a schedule award. OWCP denied his schedule award claim in a decision dated September 15, 2014, which was affirmed by an OWCP hearing representative in a decision dated April 14, 2015. On April 14, 2016 OWCP received appellant's request for reconsideration. By decision dated May 9, 2016, it denied further merit review of appellant's case because the evidence submitted on reconsideration neither raised a substantive legal question, nor constituted new and relevant evidence sufficient to warrant merit review. The Board finds that OWCP properly considered counsel's April 14, 2016 submission as a request for reconsideration and not as a claim for an increased schedule award. In her brief, attached to the reconsideration request, she specifically argued that OWCP had erred in not considering medical opinion evidence from Dr. Hebrard and had thus erred in failing to grant a merit review.⁹

The Board further finds that OWCP properly denied further merit review as appellant did not submit any evidence with his reconsideration request to warrant merit review under 5 U.S.C. § 8128(a).

Counsel did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. She submitted a six-page legal brief in support of appellant's reconsideration request. Counsel resummarized the medical evidence of record and then reargued that Dr. Hebrard's March 18, 2015 impairment rating was consistent with the sixth edition of the A.M.A., *Guides*. OWCP's hearing representative had previously considered these arguments regarding the probative value of the

⁵ 20 C.F.R. § 10.606(b)(3); *see also* L.G., Docket No. 09-1517 (issued March 3, 2010); C.N., Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *see also* M.S., 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); E.R., Docket No. 09-1655 (issued March 18, 2010).

⁹ *See* J.B., Docket No. 17-0628 (issued June 28, 2017).

medical evidence of record and had explained in the April 14, 2015 decision that Dr. Hebrard's March 18, 2015 permanent impairment rating was of diminished probative value as it was based on a diagnosis of cervical radiculitis, which was not an accepted condition. The Board finds therefore that counsel offered no relevant legal argument which had not previously been considered by OWCP nor did she show that OWCP had erroneously applied or interpreted a specific point of law.

The Board also finds that appellant did not submit any pertinent new and relevant evidence in support of his request for reconsideration.

Along with his reconsideration request, appellant resubmitted Dr. Hebrard's March 18, 2015 report. The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰

Appellant also submitted new medical reports by Dr. Steimnitz dated May 19 and November 17, 2015. The critical issue on which OWCP denied appellant's schedule award claim was insufficient medical evidence to demonstrate that appellant sustained any ratable permanent impairment utilizing the sixth edition of the A.M.A., *Guides*, of his accepted conditions. The Board finds that Dr. Steimnitz's medical reports failed to address the issue of permanent impairment due to appellant's accepted neck strain or bilateral upper extremity condition. Dr. Steimnitz did not provide a new opinion as to permanent impairment. The Board has found that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ Accordingly, Dr. Steimnitz's medical reports are insufficient to require further merit review of appellant's claim.

Because appellant failed to meet one of the standards enumerated under 20 C.F.R. § 10.606(b)(3), he was not entitled to further merit review of his schedule award claim.¹²

On appeal, counsel contends that OWCP erred in refusing to give proper weight to Dr. Hebrard's permanent impairment rating, which appropriately applied the protocols in the sixth edition of the A.M.A., *Guides*. She further argues that OWCP failed to properly develop appellant's claim because it should have requested clarification from Dr. Hebrard regarding his permanent impairment rating instead of dismissing it entirely. As noted above, however, the only issue before the Board is whether OWCP properly denied further merit review of appellant's case in its May 9, 2016 decision. Because the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review counsel's arguments regarding appellant's schedule award claim on appeal.¹³

¹⁰ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

¹¹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *See A.M.*, Docket No. 16-0499 (issued June 28, 2016); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration 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).

¹³ *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

Appellant did not submit any evidence along with his request for reconsideration to show that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by OWCP, nor did his submissions constitute pertinent new and relevant evidence. Because he did not meet any of the necessary requirements, the Board finds that OWCP properly refused to reopen his case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2017
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