

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 19, 1993 appellant, then a 48-year-old parcel sorter machine operator, filed an occupational disease claim (Form CA-2) alleging that she sustained upper extremity injuries causally related to factors of her federal employment. The reverse side of the claim form indicated that she stopped work on May 14, 1993.

By decision dated September 13, 1994, OWCP accepted the claim for left shoulder myositis, but found that appellant's degenerative arthritis of the left acromioclavicular (AC) joint and her related surgery were not causally related to the accepted injury. Appellant received wage-loss and medical compensation benefits on the supplemental rolls as of June 3, 1993.

In the February 27, 1997 decision, the Board affirmed the September 13, 1994 OWCP decision finding that degenerative arthritis of the left AC joint was not employment related.⁴ The Board also found that an October 6, 1993 left shoulder surgery was not established as employment related.

By decision dated January 8, 1998, OWCP found that the medical evidence of record failed to establish that appellant was totally disabled during intermittent periods from October 1, 1992 to April 4, 1994, except for specific dates she underwent medical examinations or treatment.

Appellant requested reconsideration by letter dated July 28, 1998. By decision dated October 7, 1998, OWCP found that the additional evidence was immaterial and insufficient to warrant review of its prior decision.

On December 23, 1998 appellant again requested reconsideration. In a decision dated February 24, 1999, OWCP found that the additional evidence was immaterial and insufficient to warrant review of its prior decision.

On December 23, 1998 appellant also appealed to the Board. By order dated October 2, 1999, the Board dismissed her appeal docketed as No. 99-0982.⁵ The Board held that OWCP, rather than the Board, had jurisdiction over the case with regard to appellant's December 23, 1998 letter, which was the basis of the Board docketing the appeal.⁶

³ Docket No. 95-0651 (issued February 27, 1997); Docket No. 99-0982 (issued October 2, 1999); Docket No. 01-0855 (issued January 23, 2002).

⁴ Docket No. 95-0651 (issued February 27, 1997).

⁵ Docket No. 99-0982 (issued October 2, 1999).

⁶ *Id.*

By letter dated October 17, 2000, appellant again requested reconsideration. By decision dated November 6, 2000, OWCP found that her October 17, 2000 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. The Board affirmed the November 6, 2000 decision on January 23, 2002.⁷

On July 17, 2006 appellant filed a recurrence of disability claim (Form CA-2a) seeking wage-loss compensation benefits due to her left upper extremity condition. By decision dated November 29, 2006, OWCP denied her recurrence claim. On January 29, 2007 appellant filed a request for reconsideration with OWCP. By decision dated April 24, 2007, OWCP accepted the recurrence of disability on April 17, 1993 due to the left shoulder myositis. The recurrence was accepted only for treatment of appellant's left shoulder myositis.

OWCP referred appellant for a second opinion examination by Dr. Edward Forman, an osteopath, to determine whether she had any other diagnosed medical conditions causally related to the accepted injury. In a report dated June 21, 2007, Dr. Forman opined that appellant had sustained temporary aggravation of AC joint osteoarthritis. He found that total disability would have ceased two or three months after the October 6, 1993 left shoulder surgery.

On July 12, 2007 OWCP advised appellant that her claim was now accepted for: myalgia and myositis, left, temporary aggravation of AC joint osteoarthritis of the left shoulder region, resolved.

Appellant submitted a schedule award claim (Form CA-7) on August 24, 2007. She submitted a form report dated January 14, 2008 from Dr. Ignas Labanauskas, a Board-certified orthopedic surgeon, opining that appellant had 75 percent left upper extremity permanent impairment.

An OWCP medical adviser, Dr. David Garelick, a Board-certified orthopedic surgeon, reviewed the evidence and, in an April 7, 2008 report, opined that appellant had 23 percent left upper extremity permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He indicated that the permanent impairment was based on loss of shoulder range of motion and surgery. Dr. Garelick determined the date of maximum medical improvement (MMI) was one year after the October 6, 1993 surgery.

By decision dated May 21, 2008, OWCP issued a schedule award for 23 percent left upper extremity permanent impairment. The period of the award was 71.76 weeks commencing October 6, 1994.

On February 3, 2009 appellant requested reconsideration. In a supplemental report dated July 27, 2009, Dr. Garelick again opined that appellant's left upper extremity permanent impairment was 23 percent. By decision dated August 20, 2009, OWCP found the evidence was insufficient to warrant modification of the schedule award decision.

⁷ Docket No. 01-0855 (issued January 23, 2002).

By report dated February 25, 2010, Dr. Samuel Chmell, a Board-certified orthopedic surgeon, opined that appellant had a left rotator cuff tear that was employment related. He noted that appellant had a 1992 work injury and that on November 11, 2009 she had lifted a tray of mail at work. An OWCP medical adviser opined in a March 31, 2010 report that the left rotator cuff tear diagnosis was employment related.

On April 12, 2010 OWCP advised appellant that her claim was accepted for left rotator cuff tear. Appellant received intermittent wage-loss compensation from June 17, 2010.

On August 25, 2010 appellant again requested reconsideration of the schedule award decision. Dr. Chmell submitted a July 31, 2010 note indicating that appellant had reached MMI.

In a September 22, 2010 report, an OWCP medical adviser, Dr. Neil Ghodadra, a Board-certified orthopedic surgeon, opined that the medical evidence did not establish more than 23 percent left upper extremity permanent impairment. He reported that Dr. Chmell had given appellant a permanent impairment rating based on left cervical symptoms and radicular symptoms.⁸

By decision dated October 5, 2010, OWCP denied modification of the August 20, 2009 schedule award decision. It determined that the medical evidence did not establish an increased schedule award.

By letter dated August 11, 2011, appellant again requested reconsideration. She argued that Dr. Garelick had improperly disregarded the opinion of Dr. Labauskas. In a July 18, 2011 report, Dr. Labauskas opined that appellant had complete disability with regard to her left upper extremity. He determined that, according to A.M.A., *Guides*, complete disability for a single extremity was 60 percent permanent impairment.

An OWCP medical adviser reviewed the evidence and opined in an August 29, 2011 report that there was no probative medical evidence of an increased left upper extremity permanent impairment. By decision dated October 7, 2011, OWCP denied modification of the October 5, 2010 OWCP decision. It found that the medical evidence of record did not support an increased schedule award.

On October 22, 2012 OWCP received another reconsideration request. Appellant wrote that she felt OWCP had not properly considered her claim for permanent impairment, as she continued to have left shoulder symptoms and OWCP's medical adviser had not examined her. The medical evidence submitted included March 24, November 24, and December 22, 2012 reports from Dr. Chmell, who provided results on examination and diagnosed torn left rotator cuff, cervical disc herniation, right rotator cuff tendinitis, and left upper extremity regional pain syndrome.

In a report dated December 27, 2012, Dr. Chmell opined that appellant had 75 percent left upper extremity permanent impairment. He completed a worksheet indicating that the

⁸ Dr. Ghodadra did not identify the specific permanent impairment rating from Dr. Chmell.

impairment was based on loss of range of motion, and a severe shoulder problem, under an adjustment grid summary (Table 15-6) of the sixth edition of the A.M.A., *Guides*.

By decision dated January 23, 2013, OWCP denied modification. It determined that the medical evidence had previously been considered and there was no new objective medical evidence to support an increased permanent impairment.

On January 24, 2014 appellant again requested reconsideration of the merits of her claim. She submitted a January 11, 2014 report from Dr. Chmell providing results on examination. In a February 4, 2013 report, Dr. Chmell wrote that his opinion as to permanent impairment was based on the left shoulder, not on cervical symptoms, as asserted by an OWCP medical adviser on September 22, 2010.

In a March 24, 2014 report, Dr. Garelick opined that the opinion of Dr. Chmell should be disregarded. He indicated that Table 15-6 of the sixth edition of the A.M.A., *Guides* (6th ed. 2009) was an adjustment grid not a diagnosis-based impairment regional grid.

By decision dated April 7, 2014, OWCP again reviewed the merits of the claim, but denied modification. It found the medical evidence did not establish an increased left upper extremity permanent impairment.

Appellant again submitted a reconsideration request on April 7, 2015. She submitted an August 28, 2014 report from Dr. Chmell. Dr. Chmell reported that Dr. Garelick had not examined appellant, and the A.M.A., *Guides* provides that a physician determining permanent impairment must examine the patient.

Dr. Garelick responded in a May 18, 2015 report that Dr. Chmell had not properly applied the A.M.A., *Guides*. OWCP's medical adviser opined that the medical evidence did not establish more than 23 percent left upper extremity permanent impairment.

By decision dated July 6, 2015, OWCP reviewed the merits of the claim, but denied modification. It found that the evidence of record did not establish an increased schedule award was warranted.

On July 3, 2016 appellant again requested reconsideration. She resubmitted medical evidence previously of record, including the January 14, 2008 report from Dr. Labanauskas, the February 3, 2014 report from Dr. Chmell, and a March 2, 2012 magnetic resonance imaging (MRI) scan. Additionally, appellant submitted a July 9, 2016 report from Dr. Chmell, who provided results on examination and indicated that appellant needed an updated left shoulder MRI scan due to a worsening of her condition. There is also a brief note from Dr. Chmell dated July 9, 2016 confirming that appellant had left shoulder pain, and he recommended an updated MRI scan. Appellant also submitted an August 13, 2016 report from Dr. Chmell providing results on examination. He indicated that a pain medication prescription would be refilled.

By decision dated September 22, 2016, OWCP declined to review the merits of the claim. It found that appellant had not submitted relevant and pertinent new evidence on reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."¹⁰ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹¹

ANALYSIS

In the present case, appellant submitted a July 3, 2016 reconsideration request. She did not attempt to show that OWCP erroneously applied or interpreted a specific point of law. Nor did appellant advance a relevant legal argument not previously considered by OWCP.

Appellant did submit additional evidence with her reconsideration request. Some of the evidence, such as the January 14, 2008 report from Dr. Labanauskas, the February 3, 2014 report from Dr. Chmell, and a March 2, 2012 MRI scan were previously of record. Evidence that was previously submitted and considered by OWCP is insufficient to require OWCP to review the merits of the claim.¹²

As to new medical evidence, the Board finds that it did not constitute relevant and pertinent new evidence to the issue of the extent of her left upper extremity permanent impairment. The Board notes that a claimant may at any time submit new medical evidence with respect to an increased permanent impairment and receive a merit decision.¹³ However, in this case, the July 9 and August 13, 2016 reports from Dr. Chmell do not discuss permanent impairment. Dr. Chmell does not discuss the prior schedule award and provide new and relevant information, or opine that appellant had an increased permanent impairment based on his current examination. Evidence that does not address the relevant permanent impairment issue is insufficient to warrant a merit review.¹⁴

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a

⁹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

¹² *See J.P.*, 58 ECAB 289 (2007).

¹³ *See Linda T. Brown*, 51 ECAB 115 (1999).

¹⁴ *C.C.*, Docket No. 11-1900 (issued June 25, 2012); *D.A.*, Docket No. 11-0622 (issued October 7, 2011).

specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered by OWCP.

On appeal appellant refers to the accepted left rotator cuff tear as a separate injury. She argues that Dr. Garelick was not her attending physician and did not properly evaluate her permanent impairment. The only decision before the Board is the September 22, 2016 OWCP decision denying merit review. For the reasons noted above, the Board finds that OWCP properly denied merit review. As the Board indicated, 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. Based on the evidence of record, OWCP properly denied merit review in this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2016 is affirmed.

Issued: August 10, 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