



On appeal appellant contends that an electromyogram and nerve conduction velocity (EMG/NCV) study she submitted in support of her request for reconsideration was sufficient to warrant a merit review of her claim.

### **FACTUAL HISTORY**

On January 6, 2004 appellant, then a 34-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she had carpal tunnel syndrome in both hands as a result of her repetitive work duties. She first became aware of her condition on December 8, 2003 and realized that it was causally related to factors of her federal employment on December 15, 2003. On the reverse side of the claim form, the employing establishment indicated that appellant performed light-duty work following her claimed injury.

On January 20, 2004 OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent an authorized right carpal tunnel release and a right flexor tenosynovectomy on March 5, 2004 and left carpal tunnel release on April 23, 2004 performed by Dr. Thomas E. Shockley, Jr., an attending Board-certified orthopedic surgeon. OWCP paid wage-loss compensation benefits. Appellant returned to work on July 6, 2004.

In a November 15, 2004 decision, OWCP terminated appellant's entitlement to future wage-loss compensation and medical benefits, effective that same date. It determined that the weight of the medical evidence rested with the July 6, 2004 medical opinion of Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon and second opinion specialist, who found that appellant no longer had any residuals or disability from work causally related to her accepted employment-related injury.

After 2004, the claim lay dormant until January 20, 2016 when appellant filed a claim for a schedule award (Form CA-7).

By letter dated April 19, 2016, OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Edward G. Fisher, a Board-certified orthopedic surgeon, to determine the nature and extent of her permanent impairment. In a May 9, 2016 report, Dr. Fisher noted that he examined appellant on May 5, 2016. He reviewed her history, the SOAF, and the medical record. Dr. Fisher provided findings on examination and determined that appellant had reached maximum medical improvement (MMI) on August 2, 2004, the date of Dr. Shockley's examination. He found that, under Table 15-23, page 449, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>3</sup> (hereinafter A.M.A., *Guides*), appellant had one percent permanent impairment of each arm due to her work-related bilateral carpal tunnel syndrome and authorized surgeries.

On May 18, 2016 OWCP routed Dr. Fisher's May 9, 2016 report, the SOAF, and the medical record, to Dr. Morley Slutsky, an OWCP district medical adviser (DMA) Board-certified in occupational medicine, for review and a determination on whether appellant sustained a permanent impairment of her bilateral upper extremities.

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<sup>3</sup> A.M.A., *Guides* (2009).

In a May 28, 2016 report, Dr. Slutsky reviewed Dr. Fisher's May 9, 2016 findings and disagreed with his impairment ratings as he used Table 15-23, page 449 (compression neuropathy table), without determining whether his report met the criteria of the A.M.A., *Guides* (Appendix 15-B, pages 487-90) for the use of this table. He opined that appellant had no permanent impairment of either arm. Dr. Slutsky noted her diagnosis of bilateral carpal tunnel syndrome and that he did not have a copy of her EMG/NCV study. He related that, under these circumstances, the A.M.A., *Guides*, pages 445 and 446 required the wrists to be rated as nonspecific wrist pain.<sup>4</sup> Using Table 15-3, page 395, the diagnosis of bilateral wrist nonspecific pain was adjusted to zero percent bilateral upper extremity impairment. Dr. Slutsky determined that appellant reached MMI on May 5, 2016, the date of Dr. Fisher's examination.

By decision dated June 1, 2016, OWCP denied appellant's claim for a schedule award, finding that she had not established permanent impairment to a scheduled member due to her accepted work injury. It discussed the evidence of record, including Dr. Slutsky's May 28, 2016 assessment and found that the evidence of record did not establish that appellant had permanent impairment of a scheduled member.

In a letter and on an undated appeal request form, received by OWCP on July 6, 2016, appellant requested reconsideration. She indicated that an EMG/NCV study accompanied her reconsideration request.

By decision dated November 30, 2016, OWCP denied further merit review of appellant's claim finding that she had not raised substantive legal questions, nor had she submitted new and relevant evidence. It noted that no additional medical evidence had been received as part of the reconsideration request.

In a letter and an appeal request form, received by OWCP on December 20, 2016, appellant again requested reconsideration. She again indicated that an EMG/NCV study accompanied her reconsideration request.

By decision dated March 8, 2017, OWCP denied further merit review of appellant's claim. It again found that she neither raised substantive legal questions nor submitted new and relevant evidence. OWCP noted that no additional medical evidence was received as part of the reconsideration request.

In a letter received by OWCP on March 23, 2017, appellant again requested reconsideration. She submitted a June 27, 2016 EMG/NCV study performed by Dr. Ayse L. Lee-Robinson, a Board-certified physiatrist. Dr. Lee-Robinson provided an impression of abnormal findings related to the upper extremity studies. Studies testing median nerve function across the wrist segment were abnormal and consistent with bilateral median mononeuropathy or carpal tunnel syndromes of moderate/mild degree. Median/radial and median/ulnar sensory latency comparisons continued to reveal significant prolongation of median sensory latency. Median/ulnar motor latency comparisons continued to reveal significant prolongation of the median motor latency. EMG testing of the median innervated abductor pollicis brevis muscles revealed abnormal motor unit recruitment. A comparison with left 2010 findings revealed

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<sup>4</sup> *Id.* at 445-46.

minimal improvement of the left carpal tunnel syndrome from a moderate to moderate/mild degree. Studies testing ulnar nerve function across the elbow segment were also abnormal and consistent with additional ulnar mononeuropathy at the elbow of moderate degree, left greater than right. Ulnar motor conduction velocity across the elbow segment was significantly reduced below the normal greater than 52 meter per second (m/s) to 45 m/s for both left and right side. Ulnar sensory amplitudes were significantly reduced, left greater than right. EMG testing of left ulnar hand muscles revealed abnormal motor unit recruitment. A comparison with the 2010 study revealed improvement of the left ulnar motor conduction across the elbow segment from 34.7 and 35.1 m/s to 45 m/s (with normal being greater than 52 m/s). Dr. Lee-Robinson advised that the current findings were without electrodiagnostic evidence of overlying cervical radiculopathy, brachial plexopathy, and peripheral polyneuropathy or myopathy.

In a March 28, 2017 decision, OWCP denied appellant's request for reconsideration without conducting a merit review of her claim. It found that the evidence submitted was irrelevant or immaterial.

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a 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>5</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.<sup>7</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>8</sup>

### **ANALYSIS**

OWCP issued a June 1, 2016 decision denying appellant's claim for a schedule award. It found that the weight of the medical evidence rested with the May 28, 2016 report of Dr. Slutsky, OWCP's DMA, who determined that appellant had no permanent impairment of either upper extremity based upon his diagnosis-based impairment evaluation based upon the diagnosis of nonspecific wrist pain.

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> *Id.* at § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

The Board does not have jurisdiction over the June 1, 2016 merit decision and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue in this case is whether the medical evidence of record demonstrated permanent impairment of a scheduled member due to the accepted work injury, warranting schedule award compensation under FECA. That is a medical issue which must be addressed by relevant medical evidence.<sup>9</sup>

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered in her March 23, 2017 request for reconsideration. Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board finds, however, that appellant did submit relevant and pertinent new evidence with her final request for reconsideration made before OWCP. Along with her March 23, 2017 request for reconsideration appellant submitted an EMG/NCV study. She had previously stated that she had submitted these diagnostic-testing reports along with her July 6 and December 20, 2016 requests for reconsideration. However, OWCP determined that it had not received any medical evidence with her first two reconsideration requests. Therefore, the EMG/NCV test results accompanying appellant's March 23, 2017 request for reconsideration constitute the submission of new medical records into evidence. Moreover, these new records are found to be relevant and pertinent as OWCP's DMA specifically performed a rating examination based upon the diagnosis of nonspecific wrist pain because the EMG/NCV reports were not of record. As the DMA's rating was expressly premised upon the lack of EMG/NCV tests results, their submission is clearly relevant.

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in her reconsideration request of March 23, 2017. Appellant submitted relevant and pertinent evidence not previously considered in her claim for a schedule award. Thus, pursuant to 20 C.F.R. § 10.608, it is concluded that OWCP improperly denied merit review.<sup>10</sup>

On appeal appellant contends that the report of the EMG/NCV study she had submitted in support of her request for reconsideration was sufficient to warrant a merit review of her claim. As indicated above, the Board agrees.

### **CONCLUSION**

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

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<sup>9</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>10</sup> See *L.H.*, 59 ECAB 253 (2007); *K.M.*, Docket No. 15-1290 (issued September 23, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: August 17, 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