

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 May 20, 2013 appellant, then a 49-year-old federal air marshal, participated in a physical training test and pistol qualification exercise when he started having trouble manipulating his firearm. He had pain in his right shoulder area, elbow, forearm, and hand. OWCP accepted post-traumatic nerve compression syndrome, right and mononeuritis of upper limb, right.³ Appellant performed light duty following the injury. He remained under medical treatment. OWCP paid wage-loss compensation for work absences due to medical and physical therapy appointments. Appellant returned to full duty on October 22, 2013. He continued to participate in physical and occupational therapy.

On January 15, 2016 appellant claimed a schedule award (Form CA-7) for permanent impairment of the right upper extremity. In support of his claim, he provided an October 28, 2015 impairment rating of Dr. Neil Allen, an attending Board-certified neurologist and internist. Dr. Allen found 17 percent permanent impairment of the right upper extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), seven percent for compression neuropathy of the posterior interosseous (radial) nerve, five percent for a labral injury in the right shoulder joint, and five percent for median nerve impairment at the right wrist, based on objective electrodiagnostic evidence of median nerve entrapment and objective signs of carpal tunnel syndrome on physical examination.

In a July 14, 2016 report, an OWCP medical adviser concurred with Dr. Allen's radial neuropathy permanent impairment rating of seven percent, and five percent permanent impairment for labral injury. He opined, however, that median nerve impairment should not be included in the assessment because it was not an accepted condition, and that OWCP's acceptance of mononeuritis would only apply to the radial nerve. The medical adviser found 12 percent permanent impairment of the right upper extremity.

By decision dated July 14, 2016, OWCP granted appellant a schedule award for 12 percent permanent impairment of the right upper extremity, based on OWCP's medical adviser's review of Dr. Allen's clinical findings and impairment rating.

³ OWCP accepted two prior right upper extremity injuries under separate claims. Under File No. xxxxxx152, OWCP accepted that on January 31, 2012, appellant sustained a right shoulder and upper arm sprain with a right rotator cuff tear. Under File No. xxxxxx940, OWCP accepted that on April 16, 2012, appellant sustained a right shoulder and upper arm sprain, superior right glenoid labrum lesion, and right biceps tendon tear. Appellant underwent right shoulder arthroscopy authorized by OWCP under File No. xxxxxx152. All of appellant's claims are combined under Master File No. xxxxxx152.

In a letter received on November 17, 2016, appellant, through counsel, requested reconsideration.⁴ He submitted a November 9, 2016 addendum report from Dr. Allen, explaining why it was fully appropriate to include median nerve mononeuritis in appellant's impairment rating. Dr. Allen pointed out that it was important to rate each injured nerve individually, as "the median nerve and posterior interosseous nerve provide unique, essential function(s) to the limb. The median nerve branches directly off of the brachial plexus while the posterior interosseous nerve is a branch of the radial nerve." Dr. Allen emphasized that the two nerves had "essentially opposite functions and therefore would produce unrelated impairment."

By decision dated March 13, 2017, OWCP denied reconsideration, finding that Dr. Allen's November 9, 2016 addendum report was irrelevant to the claim, because OWCP had not accepted median nerve mononeuropathy.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that the evidence or argument submitted by 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.⁶ 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 by OWCP within one year of the date of that decision.⁷ 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.⁸

ANALYSIS

OWCP accepted that appellant sustained post-traumatic nerve compression syndrome, and mononeuritis of upper limb, right. He claimed a schedule award on January 15, 2016. Dr. Allen, an attending Board-certified neurologist and internist, provided an October 28, 2015 impairment rating assessing 17 percent permanent impairment of the right arm, seven percent due to compression neuropathy of the radial nerve, five percent for a labral injury, and five percent for median nerve impairment. In a July 14, 2016 report, an OWCP medical adviser concurred with the ratings for radial nerve compression and labral injury, but excluded the five percent for median nerve impairment as it was not an accepted condition. He therefore concluded that appellant had only 12 percent permanent impairment of the right upper extremity.

⁴ Counsel submitted March 2 and March 6, 2017 status requests, inquiring why OWCP had not yet acted on the November 17, 2016 reconsideration request.

⁵ 5 U.S.C. §§ 8128(a). Under section 8128 of FECA, "[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."

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

On that basis, OWCP issued a schedule award on July 14, 2016 for 12 percent permanent impairment of the right arm.

Appellant, through counsel, requested reconsideration by letter received on November 17, 2016. In support of his request, appellant submitted a new report from Dr. Allen dated November 9, 2016. Dr. Allen indicated that he had reviewed Dr. Slutsky's report and offered extensive rationale, based on a detailed explanation of upper extremity innervation, as to why inclusion of objectively demonstrated median nerve impairment was crucial to an accurate impairment rating. He explained that the median and radial nerves served "essentially opposite functions and therefore would produce unrelated impairment." OWCP denied reconsideration by decision dated March 13, 2017, finding that Dr. Allen's November 9, 2016 report was irrelevant to the claim as OWCP had not accepted a median neuropathy. The Board, however, finds that OWCP improperly denied reconsideration.

In denying appellant's request for a review of his claim on the merits, OWCP found Dr. Allen's November 9, 2016 report was irrelevant, as it addressed a condition not explicitly accepted by OWCP. However, the standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.⁹ Also, it is axiomatic that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.¹⁰

The Board finds that appellant submitted medical evidence directly addressing the deficiencies of the claim as identified in OWCP's July 14, 2016 merit decision. Dr. Allen's November 9, 2016 report addresses OWCP's contention that median nerve neuropathy should not have been considered in calculating the appropriate percentage of permanent impairment. The Board finds that the report constitutes pertinent new, and relevant evidence not previously considered by OWCP.¹¹ Therefore, the submission of this evidence requires reopening of appellant's claim for merit review.¹²

The case shall be remanded to OWCP. After any further development deemed necessary, it shall conduct a merit review of appellant's claim, pursuant to 5 U.S.C. § 8128(a), and issue an appropriate merit decision.

CONCLUSION

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

⁹ *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *C.K.*, Docket No. 16-1294 (issued January 13, 2017); *P.W.*, Docket No. 16-0684 (issued October 3, 2016); *J.C.*, Docket No. 15-1780 (issued March 17, 2016); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹¹ 20 C.F.R. § 10.606(b)(3).

¹² *See D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

additional development, including a merit review of appellant's claim and issuance of a merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2017 is set aside, and the case remanded for additional development consistent with this opinion.¹³

Issued: December 14, 2017
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ Colleen Duffy Kiko, Judge, participated in the original decision but was no longer a member of the Board effective December 11, 2017.