

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
A.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Boston, MA, Employer)
_____)

Docket No. 16-1333
Issued: February 21, 2017

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 14, 2016 appellant filed a timely appeal from a December 17, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from, the date of the last OWCP merit decision, dated May 1, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal after the December 17, 2015 decision was issued. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On July 5, 2011 appellant, a 62-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1), alleging that he sustained an injury to his right shoulder as a result of working on a mail jam on that date. OWCP accepted the claim for right rotator cuff tear and shoulder impingement syndrome and authorized right shoulder surgery, which appellant underwent on September 27, 2011.

OWCP referred appellant to Dr. Medhat A. Kader, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his accepted conditions. In a February 3, 2012 report, Dr. Kader found that appellant had not yet reached maximum medical improvement and released him to modified duty with restrictions.

On August 1, 2012 appellant filed a claim for a recurrence of disability (Form CA-2a). By decision dated September 12, 2012, OWCP accepted appellant's claim for a recurrence of total disability on July 26, 2012.

On October 28, 2013 appellant filed a claim for a schedule award (Form CA-7) and submitted a February 20, 2014 report from Dr. Jack Goldstein, a Board-certified orthopedic surgeon, who opined that appellant had 10 percent permanent impairment of the right upper extremity.

In a July 3, 2014 report, OWCP's medical adviser reviewed the evidence of record and concluded that appellant had six percent permanent impairment of the right upper extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (here after A.M.A., *Guides*) (2009).

By decision dated May 1, 2015, OWCP granted appellant a schedule award for six percent permanent impairment of the right upper extremity for 18.72 weeks and a fraction of a day for the period October 17, 2013 to February 25, 2014.

On November 16, 2015 appellant requested reconsideration and submitted a narrative statement reiterating his claim that he was entitled to a schedule award for 10 percent permanent impairment to the right upper extremity based on Dr. Goldstein's February 20, 2014 report and expressed his willingness to see another doctor for a new impairment rating. Appellant also resubmitted a February 3, 2012 second opinion report from Dr. Kader.

By decision dated December 17, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review

an award for or against compensation.³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP 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.⁵ 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 within one year of the date of that decision.⁶ 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.⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

In support of his reconsideration request, appellant submitted a narrative statement reiterating his claim that he was entitled to a schedule award for 10 percent permanent impairment to the right upper extremity based on Dr. Goldstein's February 20, 2014 report and expressed his willingness to see another doctor for a new impairment rating. The Board finds that these are not legal arguments and were previously considered by OWCP in its May 1, 2015 schedule award decision. Evidence or argument which repeats or duplicates evidence or argument already to the case record does not constitute a basis for reopening a case.¹⁰

Appellant also resubmitted the February 3, 2012 second opinion report from Dr. Kader. The Board has held that material which is duplicative of that already contained in the case record

³ *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁴ *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *See P.O.*, Docket No. 14-1675 (issued December 3, 2015). *See also Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁹ *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ *See supra* note 8.

does not constitute a basis for reopening a case.¹¹ Therefore, this evidence is not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

The Board finds that appellant did not meet any of the necessary requirements and is not entitled to further merit review.¹²

On appeal, appellant argues the merits of his claim. As noted above, the Board only has jurisdiction over OWCP's December 17, 2015 nonmerit decision which denied his request for reconsideration and is therefore precluded from conducting a merit review.

A claimant 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.¹³

CONCLUSION

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

¹¹ See *supra* note 8.

¹² See *L.H.*, 59 ECAB 253 (2007).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*. Chapter 2808.9b (March 2013). In addition, OWCP's procedure provides that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his condition or increased exposure. *Id.* at Chapter 2.808.9c.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 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