

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

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**K.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
New York, NY, Employer**

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**Docket No. 16-1672  
Issued: January 6, 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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 15, 2016 appellant filed a timely appeal from a June 23, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the date OWCP issued its latest decision on January 19, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant submitted additional evidence with her August 15, 2016 appeal. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

## FACTUAL HISTORY

On September 15, 2011 appellant, then a 50-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on September 12, 2011 while lifting heavy flat trays of mail. She stopped work on September 15, 2011 and returned on September 20, 2011. OWCP accepted the claim for right rotator cuff tear.<sup>3</sup> On April 24, 2012 appellant underwent OWCP-approved arthroscopic surgery to repair her torn right rotator cuff.

Appellant had previously sustained injuries to her left upper extremity on November 15, 2007 (File No. xxxxxx038) and October 28, 2010 (File No. xxxxxx176). Her accepted conditions include left wrist ganglion cyst, left wrist tenosynovitis, and left rotator cuff tear. On July 2, 2010 appellant had undergone left shoulder surgery. OWCP subsequently granted a schedule award for nine percent permanent impairment of the left upper extremity.

On May 21, 2013 appellant filed a claim for a schedule award (Form CA-7) with respect to her right upper extremity. In a December 12, 2012 report, her orthopedic surgeon, Dr. Steven Sclafani, noted that she was status post rotator cuff repair on April 24, 2012. He also reported that appellant had finished therapy about a month ago and was doing okay, but still had some pain, weakness, and some loss of motion of the right shoulder. Dr. Sclafani found that she had residual loss of motion. He concluded that appellant had “25 percent schedule loss [of] use of the arm in Guidelines with the Workers’ Compensation Guidelines of June of 1996.”

On August 5, 2013 OWCP advised appellant that Dr. Sclafani’s December 12, 2012 report was insufficient to establish her entitlement to a schedule award. It afforded her 30 days to submit an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009).

By decision dated September 11, 2013, OWCP denied appellant’s claim for a schedule award. It found the evidence of record was insufficient to establish that appellant sustained permanent impairment to a scheduled member due to her accepted work injury.

On December 19, 2013 OWCP received appellant’s reconsideration request along with an August 21, 2013 report from Dr. Sclafani. Dr. Sclafani reiterated that appellant had 25 percent schedule loss of her right arm due to residual loss of motion and some atrophy of the deltoid. He also found four to five percent upper extremity impairment due to residuals of appellant’s full-thickness rotator cuff tear, which represented class 1 impairment.

OWCP referred appellant’s medical file and a statement of accepted facts, on January 7, 2014, to its district medical adviser (DMA), for an impairment rating. The DMA suspected that appellant’s physician was unfamiliar with the A.M.A., *Guides* (6<sup>th</sup> ed. 2009), and therefore, recommended referral to an orthopedic surgeon familiar with the sixth edition of the A.M.A., *Guides*.

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<sup>3</sup> In its March 13, 2012 claim acceptance letter, OWCP noted that appellant had also been diagnosed with carpal tunnel syndrome and lumbar radiculopathy. It advised her that those conditions were not accepted because the record did not support that they were either caused or aggravated by the accepted employment incident.

On January 31, 2014 OWCP referred the DMA's January 7, 2014 report to Dr. Scalfani for review and offered him the opportunity to explain how he arrived at four to five percent right upper extremity impairment based on application of the A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

By decision dated February 21, 2014, OWCP denied modification of its prior decision. It found that appellant had failed to provide a permanent impairment from a qualified physician based on the sixth edition of the A.M.A., *Guides*.

OWCP received appellant's January 16, 2015 request for reconsideration, along with an October 18, 2014 medical report from Dr. David Weiss, an osteopath, specializing in pain medicine and Board-certified in family practice. With respect to appellant's right upper extremity, Dr. Weiss found a combined 13 percent permanent impairment due to right carpal tunnel syndrome (6 percent) and right rotator cuff tear (7 percent).

On April 16, 2015 a DMA reviewed appellant's medical file for schedule award entitlement and concurred with Dr. Weiss' seven percent impairment rating due to appellant's accepted right rotator cuff tear.

By decision dated July 1, 2015, OWCP issued a schedule award for seven percent permanent impairment of the right upper extremity. The award ran for 21.84 weeks for the period October 18, 2014 through March 19, 2015.

In a July 8, 2015 letter, appellant, through counsel, requested an oral hearing with OWCP's Branch of Hearings and Review. A video hearing was held on November 20, 2015. Counsel argued that OWCP's medical adviser failed to consider appellant's condition of right carpal tunnel syndrome.

By decision dated January 19, 2016, the hearing representative affirmed OWCP's July 1, 2015 decision. He found that there was no medical evidence of record regarding a right carpal tunnel syndrome condition other than Dr. Weiss' statement and, thus, there was insufficient evidence to establish such condition.

On May 2, 2016 OWCP received appellant's April 22, 2016 request for reconsideration. In her April 22, 2016 letter, appellant suggested that Dr. Weiss had not taken the time to do an accurate examination. She indicated there were disparities between the percentages she received for her left shoulder and the pain she continues to experience with her right shoulder. Appellant also indicated that she would get a second opinion evaluation from Dr. Carol V.R. De Costa, a Board-certified physiatrist, and forward the results once a report was completed.<sup>4</sup> No additional evidence was submitted.

By decision dated June 23, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review. It found that her request neither raised substantive legal questions nor included relevant and pertinent new evidence.

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<sup>4</sup> The record includes previous reports from Dr. De Costa dating back to September 13, 2011.

## LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>5</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>6</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>7</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain 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 new evidence not previously considered by OWCP.<sup>8</sup> When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

## ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. The underlying issue on reconsideration is whether appellant has greater than seven percent permanent impairment of the right upper extremity. Her request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Rather, appellant claimed that Dr. Weiss had not taken the time to perform an accurate examination and that she would get a second opinion evaluation from Dr. De Costa and forward the results once a report was completed. Her statement, absent medical evidence regarding this issue, does not constitute relevant and pertinent new evidence to substantiate her allegation. Furthermore, appellant did not advance a relevant legal argument not previously considered by OWCP. She therefore has not met any of the regulatory requirements and OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).<sup>10</sup>

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<sup>5</sup> This section provides in pertinent part: “[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.” 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> *Id.* § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>8</sup> 20 C.F.R. § 10.606(b)(3).

<sup>9</sup> *Id.* § 10.608(a), (b).

<sup>10</sup> *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).

On appeal, appellant argues that OWCP accepted bilateral carpal tunnel syndrome under claim number xxxxx038. To the contrary, the record indicates that OWCP accepted her November 15, 2007 traumatic injury claim for left wrist ganglion cyst and left wrist tenosynovitis (xxxxxx038).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board