United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 18-0152**
	)	**Issued: October 1, 2018**
DEPARTMENT OF THE NAVY, PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 26, 2017 appellant filed a timely appeal from an October 4, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 19, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

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).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 9, 2004 appellant, then a 35-year-old shipfitter, filed an occupational disease claim (Form CA-2) for bilateral hand tendinitis/tenosynovitis, which he attributed to using various tools at work. He identified September 23, 2003 both as the date he first became aware of his condition and when he first realized his bilateral hand condition was employment-related. Appellant did not stop work at the time he filed his Form CA-2.

On October 19, 2004 OWCP accepted appellant's claim for bilateral hand and wrist tendinitis/tenosynovitis. Approximately 12 years lapsed without any additional activity on appellant's accepted occupational disease claim.

Effective April 1, 2016, appellant resigned from his position as a supervisory shipfitter.

On June 16, 2016 appellant filed a claim for a schedule award (Form CA-7). At that time, the latest medical evidence of record dated back to September 8, 2004.

In a June 28, 2016 schedule award claim development letter, OWCP advised appellant that he needed to submit current medical evidence regarding the extent of any bilateral upper extremity permanent impairment. It further advised appellant to make arrangements with his treating physician for the submission of a narrative medical report, which included a final permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*) (A.M.A., *Guides*).[2] OWCP sent a similar development letter to appellant's previous treating physician, Dr. Mayo A. Noerdlinger, a Board-certified orthopedic surgeon. However, Dr. Noerdlinger was unable to provide the requested permanent impairment rating because he had not seen appellant in two years.

OWCP prepared a statement of accepted facts (SOAF) and referred appellant for a second opinion evaluation to ascertain whether he had any permanent impairment due to his accepted employment injury.

In a report dated September 19, 2016, Dr. Scott F. Corneal, an osteopath and Board-certified physiatrist and OWCP referral physician, noted that appellant's clinical examination was fairly benign with mild left forearm discomfort with resisted left wrist flexion and mild tenderness over the interspace between the thumb and index finger, bilaterally. He diagnosed bilateral hand discomfort and numbness and tingling in the hands at night. Dr. Corneal noted that appellant's symptoms were due to repetitive trauma to his hands from using air tools for many years. He found nine percent impairment for appellant's upper extremity injuries. Dr. Corneal referenced Table 15-2, Digit Regional Grid, A.M.A., *Guides* at page 391. He found one percent digit impairment, for a class 1 soft tissue injury. Dr. Corneal then converted the individual digit impairments to 10 percent hand impairment, which corresponded to 9 percent upper extremity permanent impairment. In an October 28, 2016 supplemental report, he

[2] A.M.A., *Guides* (6th ed. 2009).

clarified that appellant had 4.5 percent permanent impairment of each upper extremity, for a combined 9 percent permanent impairment of the upper extremities.

On December 4, 2016 OWCP's district medical adviser, Dr. David J. Slutsky,[3] reviewed the record, including Dr. Corneal's impairment rating. He disagreed with Dr. Corneal's impairment rating, and instead found zero percent bilateral upper extremity impairment. Dr. Slutsky rated appellant based on a diagnosis of tenosynovitis under Table 15-3, Wrist Regional Grid, A.M.A., *Guides* 395. The medical adviser noted that Dr. Corneal rated appellant using Table 15-2 for digit impairment with a grade modifier of 2 for functional history; however, he failed to provide a *Quick*DASH (Disabilities of the Arm, Shoulder, and Hand) score or document problems with activities of daily living to warrant this modifier. Dr. Slutsky further noted that Dr. Corneal apparently awarded one percent digit impairment for each finger and thumb, which was not supported by the medical evidence. He opined that appellant had zero percent permanent impairment of the right and left hand. The date of maximum medical improvement was September 19, 2016.

On December 7, 2016 OWCP referred Dr. Slutsky's report to Dr. Corneal for review and comment.

In a decision dated April 19, 2017, OWCP denied appellant's claim for a schedule award, finding that the evidence of record was insufficient to establish that he sustained permanent impairment to a scheduled member due to the accepted work injury.

On July 17, 2017 appellant requested reconsideration. In a statement dated July 12, 2017, appellant disagreed with both Dr. Corneal and Dr. Slutsky's impairment ratings. He reported working for the employing establishment for 28 years as a welder and shipfitter and noted that he was unable to continue to work in this field due to his work injury. Appellant indicated that during his career he spent many hours using pneumatic tools and first reported his injury in 2003. He noted that everyday tasks such as holding a steering wheel, grasping a tool, or holding a telephone caused pain. Appellant noted informing Dr. Corneal of pain in his fingers, thumbs, hands, and lower arms, when grasping and holding objects. He further explained that the pain limited his daily activities and job opportunities.

In a decision dated October 4, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain

[3] Dr. Slutsky is a Board-certified orthopedic surgeon.

[4] 5 U.S.C. § 8128(a).

review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[6]

ANALYSIS

OWCP denied appellant's claim for a schedule award because he had not established that he sustained permanent impairment to a scheduled member due to his accepted work injury. Thereafter, it denied appellant's request for reconsideration of the merits of the claim.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law as he did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument not previously considered. In a statement dated July 12, 2017, he disagreed with both Dr. Corneal and Dr. Slutsky, the medical adviser, regarding his impairment rating. Appellant indicated that he worked for the employing establishment for 28 years as a welder and shipfitter and was unable to continue to work in this field due to his work injury. He indicated that during his career he spent many hours using pneumatic tools. Appellant noted that he informed Dr. Corneal that he had pain in his fingers, thumbs, hands, and lower arms, and when grasping and holding objects, and that his pain limits his daily activities and job opportunities. This does not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant sustained permanent impairment to a scheduled member due to the accepted work injury. That is a medical issue that must be addressed by relevant and pertinent new medical evidence.[7] Appellant did not submit any pertinent new and relevant evidence in support of his claim.

On appeal appellant reiterated that he disagreed with OWCP's decisions dated April 19 and October 4, 2017 and believed they contained inaccurate statements. As explained, the Board does not have jurisdiction over the merits of the case.

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[5] 20 C.F.R. § 10.606(b)(3).

[6] *Id*. at § 10.608(b).

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2018
Washington, DC

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

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

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