

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

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<b>B.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0273</b>
	)	<b>Issued: December 31, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Los Angeles, CA, Employer</b>	)	
_____	)	

*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 November 19, 2018 appellant filed a timely appeal from a September 18, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 24, 2018, 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 over the merits of this case.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the September 18, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## 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).

## FACTUAL HISTORY

On May 3, 2015 appellant, then a 61-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a left shoulder condition due to factors of her federal employment including years of carrying a satchel on her shoulders as well as repetitive overhead reaching, pulling, and grasping. She noted that she first became aware of her work-related condition on March 3, 2015. On the reverse side of the claim form, the employing establishment indicated that appellant last worked on February 27, 2014 and was receiving FECA benefits under a prior claim.<sup>3</sup>

By decision dated June 30, 2015, OWCP accepted appellant's claim for left shoulder cumulative trauma with impingement syndrome, left bicipital tenosynovitis, left tendinosis of the supraspinatus tendon, and left partial tear of the supraspinatus tendon.

On June 13, 2016 appellant underwent OWCP-approved left shoulder arthroscopic surgery.

The Office of Personnel Management approved appellant's disability retirement effective July 18, 2016.

On August 9, 2017 appellant filed a claim for a schedule award (Form CA-7).

Appellant was examined by Dr. Charles Xeller, a Board-certified orthopedist, on July 15, 2017, for a schedule award evaluation. Dr. Xeller noted that she had reached maximum medical improvement on November 14, 2016. Pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>4</sup> he calculated five percent permanent impairment of the left upper extremity under the diagnosis-based impairment (DBI) method, Table 15-5, Shoulder Regional Grid, page 403. Dr. Xeller rated appellant based on a diagnosis of full-thickness rotator cuff tear.

In an August 24, 2017 letter, OWCP requested that Dr. Xeller provide an upper extremity impairment rating under both the DBI method and range of motion (ROM) method.

In a report dated September 23, 2017, Dr. Xeller measured ROM for the left shoulder three times and found average flexion of 108 degrees, extension of 35 degrees, abduction of 120 degrees, adduction of 15 degrees, external rotation of 45 degrees, and internal rotation of 35 degrees. He noted that pursuant to the A.M.A., *Guides* left upper extremity impairment was 14 percent using

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<sup>3</sup> Appellant has an accepted occupational disease claim for a right shoulder condition, which arose on or about June 24, 2013. OWCP assigned that claim OWCP File No. xxxxxx112. Appellant's claims have not been administratively combined.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

the ROM method and 7 percent using the DBI method based on a diagnosis of full-thickness rotator cuff tear.

On November 1, 2017 OWCP forwarded the case record, including Dr. Xeller's impairment ratings, to a district medical adviser (DMA) for review and a determination regarding whether appellant sustained permanent impairment of the left upper extremity in accordance with the A.M.A., *Guides*. In a November 4, 2017 report, the DMA reviewed the case file and Dr. Xeller's July 15 and September 23, 2017 reports. The DMA used the DBI method to calculate six percent left upper extremity impairment pursuant to Table 15-5, page 401-05 of the A.M.A., *Guides*. He opined that, pursuant to the A.M.A., *Guides*, the ROM measurements provided by Dr. Xeller could not be used because they were essentially equal to the opposite side. The DMA found that Dr. Xeller incorrectly applied the A.M.A., *Guides* to the findings on examination.

By decision dated November 15, 2017, OWCP granted appellant a schedule award for six percent permanent impairment of the left arm. The period of the award ran from July 15 to November 23, 2017. OWCP indicated that the weight of the medical evidence rested with the DMA who used the DBI method to calculate appellant's permanent impairment.

On February 22, 2018 appellant requested reconsideration. She submitted a December 16, 2017 report from Dr. Xeller who measured ROM for the left shoulder three times and found average flexion of 108 degrees, extension of 33 degrees, abduction of 120 degrees, adduction of 15 degrees, external rotation of 40 degrees, and internal rotation of 35 degrees. Dr. Xeller noted that pursuant to the A.M.A., *Guides* left shoulder impairment was 12 percent using the ROM motion method and 7 percent using the DBI method.

In a March 28, 2018 report, the DMA reviewed the case file and Dr. Xeller's December 16, 2017 report. He noted that the ROM figures provided by Dr. Xeller from July 15, 2017 varied significantly from the ROM measurements from September 23 and December 16, 2017. The DMA noted that Chapter 15, page 407 of the A.M.A., *Guides* provided that, if multiple previous evaluations had been documented and there was inconsistency in a rating claim between the findings of two observers or in the findings on separate occasions by the same observer, the results were considered invalid and could not be used to rate impairment. He confirmed his final rating using the DBI method of six percent permanent impairment of the left upper extremity.

By decision dated April 24, 2018, OWCP denied modification of the November 15, 2017 decision.

On June 28, 2018 appellant requested reconsideration.

In support thereof, appellant submitted a September 23, 2017 report from Dr. Xeller, previously of record. Also submitted was a new May 12, 2018 functional capacity evaluation (FCE), which noted ROM, grip, and pinch strength and a May 12, 2018 report, Dr. Xeller. In his report, Dr. Xeller provided updated ROM measurements for the bilateral shoulders for flexion, extension, abduction, adduction, internal rotation, and external rotation. He performed each ROM measurement three times. Dr. Xeller opined that appellant had 10 percent upper extremity permanent impairment based on the updated examination findings.

By decision dated September 18, 2018, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his or her own motion or on application.<sup>5</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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>6</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>9</sup>

### **ANALYSIS**

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

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law nor did she advance a new and relevant legal argument not previously considered. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence, including a May 12, 2018 FCE, which noted ROM, grip, and

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<sup>5</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

pinch strength and a May 12, 2018 report from Dr. Xeller. In his report, Dr. Xeller addressed the relevant issue of a schedule award by providing updated ROM measurements for the bilateral shoulders for flexion, extension, abduction, adduction, internal rotation, and external rotation. He noted performing each ROM measurement three times. Dr. Xeller also provided a new impairment rating based on these measurements and opined that appellant had 10 percent upper extremity permanent impairment based on the updated examination findings.

The latest FCE and Dr. Xeller's May 12, 2018 report constitute relevant and pertinent new evidence not previously considered by OWCP. This additional information directly addressed the basis upon which OWCP calculated appellant's schedule award and denied an increased schedule award.<sup>10</sup> Appellant's request for reconsideration met one of the standards for obtaining merit review of her case.<sup>11</sup> Accordingly, she is entitled to a merit review.

The Board will therefore set aside OWCP's September 18, 2018 decision and remand the case for an appropriate merit decision on appellant's claim.

### **CONCLUSION**

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

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<sup>10</sup> The Board has held that, in support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she need only submit relevant and pertinent evidence not previously considered by OWCP. See *M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>11</sup> *M.C.*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 18, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 31, 2019  
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