

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

T.R., estate of C.R., Appellant)	
)	
)	
and)	Docket No. 19-0659
)	Issued: December 18, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
JAMES A. HALEY VETERANS MEDICAL)	
CENTER, Tampa, FL, Employer)	
)	

Appearances:
Victor Walker, for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 1, 2019 appellant, through her representative, filed a timely appeal from a December 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 17, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 16, 2013 the employee, then a 59-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained injury to his knees, shoulders, and neck when he stood up from his chair and fell while in the performance of duty. On May 30, 2013 OWCP accepted the employee's claim for torn meniscus of right knee, right shoulder rotator cuff tear, and cervical disc syndrome with radiculopathy.

In a report dated April 20, 2016, Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, indicated that the employee previously underwent arthroscopic right knee surgery and arthroscopic right shoulder surgery, but continued to have pain in his right knee and shoulder. He noted that the symptoms and physical findings of his right knee and shoulder residuals from the accepted employment-related injuries caused the employee difficulty in performing activities of daily living as well as required employment activities. After an objective physical examination of the employee's knees, shoulders, and cervical spine, and review of multiple diagnostic studies, Dr. Bishai diagnosed internal derangement of right knee joint, torn meniscus of right knee joint, internal derangement of right shoulder joint, and right rotator cuff tear. He opined that the employee reached maximum medical improvement (MMI) on April 20, 2016, and thereafter evaluated permanent impairment of the employee's right shoulder and right knee.

For the right shoulder impairment rating, Dr. Bishai used the stand alone range of motion (ROM) method in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He indicated that he used Table 15-34 on page 475 of the A.M.A., *Guides* to calculate the impairment rating for the employee's right shoulder. Dr. Bishai related the employee's right shoulder range of motion to be: flexion 70 degrees, equaling 9 percent upper extremity impairment; extension 10 degrees, equaling 2 percent upper extremity impairment; abduction 70 degrees, equaling 6 percent upper extremity impairment; adduction 15 degrees, equaling 1 percent upper extremity impairment; internal rotation 20 degrees, equaling 4 percent upper extremity impairment; and external rotation 45 degrees, equaling 2 percent upper extremity impairment. He noted that the total impairment rating for the right shoulder was calculated by adding and not combining the different impairments for the range of motion movements, and that he had arrived at a 24 percent permanent impairment of the right upper extremity. For the right knee impairment rating, Dr. Bishai used the stand alone ROM method using Table 16-23 on page 549 of the A.M.A., *Guides*. He calculated the employee's right knee range of motion to be the following: extension of 175 degrees, due to flexion contracture of the soft tissues, equaled 10 percent lower extremity impairment; and flexion of 100 degrees equaled 10 percent lower extremity impairment. Dr. Bishai indicated that the total impairment

³ A.M.A., *Guides* (6th ed. 2009).

rating for the right knee was calculated by adding and not combining the impairment ratings, which revealed a total permanent impairment rating of 20 percent for the right lower extremity.

On June 2, 2016 the employee filed a claim for a schedule award (Form CA-7).

On August 11, 2016 OWCP expanded the employee's accepted conditions to include left meniscus tear, internal derangement of left hip joint, and internal derangement of left knee joint.

On August 17, 2016 OWCP routed a statement of accepted facts (SOAF) and medical record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's district medical adviser (DMA) for review and determination regarding whether the employee sustained permanent impairment based on the sixth edition of the A.M.A., *Guides* and the date of MMI.

In a report dated August 18, 2016, Dr. Katz reviewed the SOAF, case record, and Dr. Bishai's April 20, 2016 impairment rating evaluation. He noted that OWCP preferred to rate impairment using the diagnosis-based impairment (DBI), as opposed to the range of motion method for both the right shoulder and right knee. As a result, Dr. Katz opined that Dr. Bishai's impairment evaluation could not be considered as probative for the purpose of recommending a schedule award. He also related that the medical records lacked sufficient detail to permit assignment of an impairment rating on the basis of records review. Dr. Katz recommended that a second opinion impairment evaluation be obtained.

In a letter dated November 3, 2016, appellant's representative notified OWCP that the employee passed away on October 28, 2016 due to a condition unrelated to his employment injury.

In a letter dated December 19, 2016, OWCP advised the representative that a second opinion physical evaluation could not be performed because of the employee's death. As a result, a review of the medical records on file was going to be performed by the second opinion examiner.

In a report dated December 23, 2016, Dr. Young D. Oh, a Board-certified orthopedic surgeon serving as the second opinion examiner, reviewed the SOAF and medical record. He concluded that the employee did not have permanent partial impairment to the upper and lower extremities due to the accepted April 16, 2013 employment injury. Dr. Oh also determined the employee's date of MMI to be three months following the April 16, 2013 employment injury, and any treatment rendered after this time period was for preexisting pathology which was then aggravated by the April 16, 2013 employment injury, but not caused by it.

On August 3, 2017 OWCP referred the SOAF and case file to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, to determine the employee's impairment rating based on the sixth edition of the A.M.A., *Guides*. In his October 18, 2017 report, Dr. Harris indicated that there was insufficient information contained within the case file to make a determination relative to permanent impairment. He noted that in Dr. Oh's December 23, 2016 report, there was no documentation of the employee's residual subjective complaints, objective findings on examination, or explanation as to impairment rating. Dr. Harris related that even though Dr. Oh opined that the employee's condition had not resulted from the accepted employment injury, the employee still had permanent impairment in the upper and lower extremities and was entitled to an impairment rating according to FECA. He requested that additional information be obtained from Dr. Oh regarding the employee's subjective complaints,

objective findings on examination, and explanation as to impairment rating. Dr. Harris indicated that once this information had been obtained, he would review the case file and make a determination of impairment rating.

By decision dated November 17, 2017, OWCP denied the employee's claim for schedule award finding that the evidence of record was insufficient to establish that the employee sustained permanent impairment of a scheduled member or function of the body due to his accepted April 13, 2013 employment injury.

On June 19, 2018 appellant, through her representative, requested reconsideration of OWCP's November 17, 2017 decision. The representative argued that Dr. Oh's report was not entitled to the weight of the medical evidence as he had incorrectly opined that there was no documentation of record regarding the employee's residual subjective complaints, objective findings on examination, or an impairment rating based upon the A.M.A., *Guides*. He also noted the claims examiner's recitation of the DMA's conclusion that the employee did have permanent impairment of his upper and lower extremities, the representative therefore alleged that OWCP had not obtained a proper second opinion evaluation to determine appellant's entitlement to a schedule award.

By decision dated December 3, 2018, OWCP denied appellant's request for reconsideration.

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 review of the merits of his or her claim upon submitting a written request for reconsideration, which sets forth arguments and contains evidence which either: (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.⁵

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which reconsideration is sought.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *Y.H.*, Docket No. 19-0835 (issued October 4, 2019).

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.⁸

ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law or constituted relevant and pertinent new evidence not previously considered. She did, however, raise a new and relevant legal argument. The Board thus finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

In her timely request for reconsideration, appellant's representative advanced a new and relevant legal argument. The representative asserts that the employee had permanent impairment of his accepted right upper extremity and right lower extremity, warranting a schedule award. He asserted that OWCP improperly accorded Dr. Oh's opinion the weight of the medical evidence as he did not fully evaluate the medical evidence of record regarding the employee's subjective and objective physical examination findings, made prior to his death. The representative further noted that the DMA, Dr. Harris, acknowledged that the employee had permanent impairment, which was ratable for purposes of a schedule award; however, OWCP did not properly continue to develop the claim.

As appellant has advanced new and relevant legal arguments not previously considered by OWCP, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.⁹ Following such further development as deemed necessary, OWCP shall issue a merit decision on the claim.

CONCLUSION

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

⁸ *Id.*

⁹ *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 18, 2019
Washington, DC

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

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

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