

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the prior decision of the Board are incorporated herein by reference. The relevant facts are as follows.

On January 20, 2016 appellant, then a 62-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2016 he strained his right shoulder when he lifted his arm to place mail in a mailbox. OWCP accepted the claim on February 17, 2016 for right shoulder rotator cuff tear.³ Subsequently, it authorized appellant's right shoulder arthroscopic surgery, which was performed on February 23, 2016.

In an August 2, 2016 report, Dr. James E. Rafferty, a treating physician Board-certified in occupational medicine, noted that appellant was employed as a city mail carrier and that he had previously undergone arthroscopic surgery to repair his right shoulder rotator cuff. He reviewed appellant's medical history, detailed examination findings, and noted that appellant had a permanent impairment of his right shoulder based on his diagnosis of right rotator cuff tear. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (A.M.A., *Guides*), and citing to the applicable tables and figures, Dr. Rafferty calculated four percent permanent impairment of appellant's right upper extremity.

On August 26, 2016 appellant filed a claim for a schedule award (Form CA-7).

On October 31, 2016 Dr. Morley Slutsky, a Board-certified occupational medicine physician and district medical adviser (DMA), reviewed medical records including Dr. Rafferty's report. He noted that appellant had previously received a schedule award for 23 percent right upper extremity permanent impairment.⁵ Dr. Slutsky found that the date of maximum medical improvement (MMI) to be the date of Dr. Rafferty's report, August 2, 2016. Using the A.M.A., *Guides*, he found five percent permanent impairment of the right upper extremity based on a diagnosis of right shoulder partial thickness tear, with residual dysfunction.⁶

² Docket No. 17-0394 (issued June 1, 2017).

³ On June 14, 2004 appellant, then a 50-year-old modified letter carrier, filed an occupational disease claim (Form CA-2) alleging that on June 2, 2004 he first realized that his right shoulder pain was caused by his repetitive work duties. OWCP assigned that claim OWCP File No. xxxxxx252 and on July 26, 2004 accepted the claim for right shoulder cuff tear and right shoulder osteoarthritis. By decision dated June 7, 2005, it granted appellant a schedule award for 23 percent permanent impairment of the right upper extremity.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ The record contains an impairment rating by Dr. Pete M. Kuhn, a Board-certified orthopedic surgeon, under OWCP File No. xxxxxx252. He used the fifth edition of the A.M.A., *Guides* to calculate 12 percent right upper extremity permanent impairment using range of motion findings.

⁶ A.M.A., *Guides* 402, Table 15-2.

In an addendum dated November 8, 2016, Dr. Slutsky noted that appellant had previously been granted a schedule award for 23 percent permanent impairment, of which 12 percent was for permanent impairment of the right shoulder.

By decision dated November 16, 2016, OWCP noted that appellant had previously been granted a schedule award for 23 percent permanent impairment of the right upper extremity. It found that the medical evidence he submitted was insufficient to warrant an increased schedule award.

On December 12, 2016 appellant appealed to the Board. By decision dated June 1, 2017, the Board set aside OWCP's November 16, 2016 decision denying his claim for an additional schedule award and remanded the case. The Board noted that the record before it was incomplete as it did not contain OWCP's decision granting appellant 23 percent permanent impairment for the right upper extremity or all of the medical evidence used in calculation of the impairment rating. The Board requested that OWCP combine his current claim with his previously accepted claim under OWCP File No. xxxxxx252 and conduct further development as deemed necessary.⁷

Following the Board's remand, OWCP referred appellant for a second opinion evaluation with Dr. Mark Rangitsch, a Board-certified orthopedic surgeon, to determine whether appellant was entitled to an increased schedule award. In a report dated August 21, 2017, Dr. Rangitsch, based upon a review of medical evidence, a statement of accepted facts, and physical examination, diagnosed a right rotator cuff tear. Using the sixth edition of the A.M.A., *Guides* he determined that appellant had six percent right upper extremity permanent impairment.

OWCP referred the evidence of record to the DMA, Dr. Slutsky, who reviewed the relevant medical evidence on October 7, 2017 and opined that appellant had 12 percent right upper extremity permanent impairment. Dr. Slutsky found that the date of MMI was August 21, 2017, the date of Dr. Rangitsch's report.

By decision dated October 31 2017, OWCP denied modification of its prior decision, finding that the evidence submitted was insufficient to warrant an increased schedule award.

On November 13, 2017 appellant requested reconsideration. He contended that OWCP erred in consolidating OWCP File Nos. xxxxxx252 and xxxxxx516 as they were separate cases and he was entitled to schedule awards for each claim. In support of his claim appellant resubmitted Dr. Rangitsch's August 21, 2017 report and Dr. Slutsky's October 7, 2017 report.

By decision dated December 12, 2017, OWCP denied merit review of appellant's claim. It found that he submitted no new evidence or relevant argument in support of his request for reconsideration.

⁷ *Supra* note 2.

LEGAL PRECEDENT

Section 8128 (a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ 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.¹⁰

To require OWCP to reopen a case for merit review, OWCP's 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.¹¹ When a timely request for reconsideration fails to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.¹²

ANALYSIS

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).

In his timely request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. He also did not advance a new and relevant legal argument. Appellant asserts that he was entitled to a schedule award for both of his individual workers' compensation claims and that the claims should not have been combined. The underlying issue in this case is whether he has met his burden of proof to establish entitlement to an increased schedule award for right upper extremity permanent impairment. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.¹³

The Board finds that, although appellant has made a new legal argument on appeal, it has no reasonable color of validity as it has no bearing on the underlying issue.¹⁴ Appellant's request for reconsideration, therefore, did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Id.* at § 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. *Id.* at Chapter 2.1602.4b.

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

¹² *Id.* at § 10.608(b).

¹³ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁴ *A.M.*, Docket No. 18-1033 (issued January 8, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With regard to the third requirement, in support of his reconsideration request, appellant resubmitted Dr. Rangitsch's August 21, 2017 report and Dr. Slutsky's October 7, 2017 report. The Board finds that, as these reports were duplicative of evidence of record and previously considered by OWCP, they did not constitute relevant and pertinent new evidence.¹⁵ A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence, however, in this case, appellant failed to submit relevant and pertinent new medical evidence addressing the underlying issue of increased permanent impairment of the right upper extremity.¹⁶ Therefore, the Board finds that he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board finds that, as appellant did not satisfy any of the three requirements under 20 C.F.R. § 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

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).

¹⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *See A.R.*, Docket No. 17-1504 (issued May 25, 2018).

¹⁶ *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2017 is affirmed.

Issued: February 14, 2019
Washington, DC

Christopher J. Godfrey, 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