

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 1, 2015 appellant, then a 64-year-old medical records technician, filed an occupational disease claim (Form CA-2) alleging that her federal work duties, which she had performed for over 20 years, had caused bilateral rotator cuff conditions. She stopped work on May 12, 2015 and returned to modified sedentary duties on June 1, 2015. Dr. Stuart Fromm, a Board-certified orthopedic surgeon, performed arthroscopic repair of a full-thickness rotator cuff tear on the right on May 14, 2015.

Following an initial denial on September 2, 2015, on October 21, 2015 OWCP accepted appellant's claim for complete rotator cuff tears of the right and left shoulders.

On June 22, 2016 appellant filed a claim for a schedule award (Form CA-7). By development letter dated July 5, 2016, OWCP informed her of the evidence needed to establish her schedule award claim. It afforded appellant 30 days to submit the necessary evidence. No additional evidence was received.

By decisions dated August 12 and November 3, 2016, OWCP denied appellant's schedule award claim because she had not submitted competent medical evidence to indicate that she had a permanent impairment.

Appellant thereafter requested reconsideration on November 30, 2016 and submitted an October 19, 2016 report in which Dr. Trevor R. Anderson, a Board-certified physiatrist, advised that based on limited right shoulder range of motion, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ appellant had 13 percent right upper extremity permanent impairment. In a February 21, 2017 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Anderson's report and advised that he had correctly assessed appellant's right upper extremity permanent impairment. Dr. Katz concurred that appellant had 13 percent permanent impairment of the right upper extremity, with October 19, 2016 as the date of maximum medical improvement.

By decision dated April 10, 2017, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity, for a total of 40.56 weeks. The award ran from October 19, 2016 to July 29, 2017.

On July 17, 2017 appellant requested reconsideration. She generally maintained that she was entitled to a greater award.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated September 18, 2017, OWCP denied appellant's July 17, 2017 request for reconsideration without reviewing the merits of her claim. It found that she neither raised substantive legal questions nor submitted new and relevant evidence.

On December 26, 2017 appellant again requested reconsideration. Medical evidence submitted in support of her reconsideration request included a November 19, 2017 emergency department report in which Angela Frederick, a nurse practitioner, described a complaint of right arm pain and numbness. Ms. Frederick diagnosed ulnar neuropathy of the right arm. In a November 27, 2017 treatment note, Dr. Fromm noted appellant's complaint of right arm and hand numbness. He recommended electrodiagnostic testing including an electromyography and nerve conduction velocity (EMG/NCV) studies. Dr. Anderson performed right upper extremity EMG/NCV studies on December 28, 2017. He concluded that the study was consistent with median neuropathy at the wrist. Dr. Aaron D. Dykstra, a Board-certified orthopedic surgeon, saw appellant on January 15, 2018 for a complaint of bilateral hand pain. He noted the EMG/NCV findings and diagnosed primary osteoarthritis of the left first carpometacarpal joint and bilateral carpal tunnel syndrome. Dr. Dykstra recommended a left upper extremity EMG/NCV.

A January 15, 2018 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated a full-thickness rotator cuff tear and significant degenerative changes. Dr. Fromm reviewed the MRI scan that day. He recommended arthroscopic rotator cuff repair. On February 7, 2018 Dr. Fromm performed left shoulder arthroscopic rotator cuff repair.

By letter dated March 16, 2018, appellant noted the recent left shoulder surgery. She also indicated that she had been diagnosed with bilateral carpal tunnel syndrome.

By decision dated May 9, 2018, OWCP denied appellant's December 17, 2017 request for reconsideration without reviewing the merits of her claim. It found that she neither raised substantive legal questions nor included new and relevant evidence with regard to the extent of her right shoulder impairment or the April 10, 2017 schedule award decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *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 (iFECS). *Id.* at Chapter 2.1602.4b.

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.⁷ When a timely application 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.⁸

ANALYSIS

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

The Board first finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an increased schedule award as appellant did not claim a new award based on a new rating of permanent impairment for her right shoulder.⁹ The issue presented on appeal, therefore, 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 her claim.

With her December 26, 2017 reconsideration request, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁰

While appellant submitted new medical evidence, none of it pertained to her right shoulder, for which she received a schedule award on April 10, 2017. Rather, the medical evidence submitted pertained to her accepted left shoulder rotator cuff tear and a new diagnosis of bilateral carpal tunnel syndrome, which had not been accepted by OWCP. The underlying issue is whether appellant has submitted sufficient evidence to establish entitlement to an increased schedule award for her right shoulder impairment. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but in this case appellant did not submit relevant and pertinent new evidence with her reconsideration request.¹¹

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

⁹ *See A.C.*, Docket No. 13-1810 (issued January 6, 2014).

¹⁰ *See J.B.*, Docket No. 17-0628 (issued June 28, 2017).

¹¹ *See G.T.*, Docket No. 18-0158 (issued May 11, 2018).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 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