

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

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 23, 2000 appellant, then a 37-year-old technician, filed a traumatic injury claim (Form CA-1) alleging that, while on break on June 21, 2000, she was walking to the employing establishment credit union located next door to the building where she worked. She stepped in a hole in the pavement, slipped and fell hitting her face and left side, and injured her left foot, knee, hand, hip, and face. Appellant amended her Form CA-1 on June 13, 2000 to include that she broke two teeth in the fall. By decisions dated October 18, 2000 and June 28, 2001, OWCP denied her claim, finding that she was not in the performance of duty at the time of her June 21, 2000 incident. Appellant appealed to the Board. By decision dated July 24, 2002, the Board remanded the case for further development regarding the location of the alleged incident and other factual aspects of appellant's claim.⁴

Following the Board's July 24, 2002 remand, by decision dated September 26, 2002, OWCP accepted appellant's claim for sprain/strain of the left foot, left hand, and the left shoulder or upper arm.

In a letter dated November 9, 2009, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It afforded her 30 days for response. By decision dated December 23, 2009, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 18, 2009. Appellant appealed the December 23, 2009 termination decision to the Board and, by decision dated June 6, 2012, the Board determined that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 20, 2009.

On April 1, 2014 appellant filed a schedule award claim (Form CA-7). In support of this claim, she submitted a March 7, 2014 note from her attending physician, Dr. Emmanuel P. Brown, an internist, opining that she had reached maximum medical improvement (MMI) and continued to require treatment of her chronic conditions.

In a report dated May 27, 2014, Dr. Stuart J. Goodman, a Board-certified neurologist, found significant decreased range of motion (ROM) of the left shoulder. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁵

³ Docket No. 01-1895 (issued July 24, 2002); Docket No. 11-1718 (issued June 6, 2012).

⁴ *Id.*

⁵ A.M.A., *Guides* 6th ed. (2009).

(A.M.A., *Guides*) and determined that appellant had three percent upper extremity permanent impairment due to the sensory peripheral nerve injury and five percent permanent impairment due to her left shoulder. Dr. Goodman reached a complete impairment rating of eight percent permanent impairment of the left upper extremity.

OWCP's district medical adviser (DMA) reviewed Dr. Goodman's report on May 20, 2015 and recommended a second opinion evaluation.

On June 17, 2015 OWCP referred appellant for a second opinion evaluation with Dr. D. Burke Haskins, a Board-certified orthopedic surgeon. In his March 29, 2016 report, Dr. Haskins noted that appellant had minimal active motion in her left shoulder, and that any attempt at passive motion in the left shoulder produced a ratcheting-type resistant response with tremulous motions. He reported no atrophy of the parascapular musculature, left forearm, or arm. Dr. Haskins diagnosed left cervical neuritis or radiculitis and left shoulder strain causally related to appellant's accepted employment injury. He found the remainder of her accepted conditions had resolved. Dr. Haskins also noted that appellant's physical examination suggested symptom magnification or functional overlay. He applied the A.M.A., *Guides* and found that her left shoulder had one percent permanent impairment. Dr. Haskins further found three percent permanent impairment of the left upper extremity due to left brachial neuritis or radiculitis. He combined these impairment ratings to reach four percent permanent impairment of the left upper extremity.

The DMA reviewed appellant's claim on April 26, 2016 and determined that she had one percent permanent impairment due to left shoulder strain and one percent permanent impairment due to brachial neuritis based on the diagnosis-based impairment (DBI) methodology of the A.M.A., *Guides*. He applied the Combined Values Chart of the A.M.A., *Guides* and calculated a combined two percent permanent impairment of the left upper extremity.

By decision dated July 7, 2016, OWCP granted appellant a schedule award for two percent permanent impairment of the left upper extremity.

On July 15, 2016 counsel requested an oral hearing before an OWCP hearing representative. During the oral hearing on March 22, 2017, appellant testified that her left arm was limp and paralyzed. She asserted that she was in pain all of the time. Counsel contended that appellant had significant decrease in motion with severe sensory motor problems.

By decision dated June 6, 2017, OWCP's hearing representative found that appellant had no more than two percent permanent impairment of her left upper extremity for which she had previously received a schedule award. She based this finding on the DMA's impairment rating which relied on the DBI methodology of rating impairment of a left shoulder strain and residual brachial neuritis.

On July 20, 2017 counsel requested reconsideration of the June 6, 2017 merit decision contending that *T.H.*⁶ and FECA Bulletin No. 17-06⁷ required OWCP to issue a new schedule award decision finding of a greater impairment rating.

By decision dated October 17, 2017, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a). It found that based on a reading of FECA Bulletin No. 17-06 counsel's argument was insufficient to warrant merit review as he failed to submit both new legal argument and relevant new evidence in support of the July 20, 2017 request for reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ 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.⁹ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁰ When a claimant failed to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.¹¹

When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at 20 C.F.R. § 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹²

⁶ Docket No. 14-0943 (issued November 25, 2016).

⁷ FECA Bulletin No. 17-06 (May 8, 2017).

⁸ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(b).

¹² *T.B.*, Docket No. 18-0033 (issued May 23, 2018); *Annette Louise*, 54 ECAB 783 (2003).

The Board has also held that the reopening of a case may be predicated solely on a legal premise not previously considered, where the legal contention has a reasonable color of validity.¹³

In *T.H.*,¹⁴ the Board held that OWCP had inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. The Board determined that no consistent interpretation had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁵ The Board noted that the purpose of the use of uniform standards was to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁶ The Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁷ In order to ensure a consistent result and equal justice under the law for cases involving upper extremity impairment, the Board directed OWCP to utilize a consistent method for calculating permanent impairment for upper extremities to be applied uniformly. In compliance with the Board's directives, OWCP promulgated FECA Bulletin No. 17-06.¹⁸

¹³ See *M.R.*, Docket No. 18-0164 (issued May 23, 2018) (finding that in determining the timeliness of the claim, OWCP failed to consider the new legal argument of when the claimant was aware or should have been aware of the causal relationship between the employment and the compensable injury); *J.A.*, Docket No. 17-1306 (issued May 20, 2018) (finding that OWCP erroneously applied a specific point of law, by failing to convert the claimant's traumatic injury claim to an occupational disease claim); *J.K.*, Docket No. 17-1215 (issued January 10, 2018) (finding that OWCP repeatedly failed to address and consider the claimant's argument that his employment exposure was a specially assigned duty in his emotional condition claim); *P.W.*, Docket No. 16-0418 (issued August 4, 2017) (finding that in determining timeliness OWCP failed to address the new relevant legal argument that the claimant continued to be exposed to factors of employment); *T.L.*, Docket No. 16-0536 (issued June 6, 2016) (finding that OWCP failed to consider relevant new legal arguments and remanding for consideration of these argument on the merits); *but see M.E.*, 58 ECAB 694 (2007) (when a request for reconsideration does not meet at least one of the three requirements enumerated under OWCP's regulations, OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

¹⁴ *Supra* note 6.

¹⁵ *C.S.*, Docket No. 17-1871 (issued January 23, 2018); *T.H.*, *supra* note 6.

¹⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁷ *Supra* note 6.

¹⁸ *Supra* note 7.

With regard to reconsideration requests following schedule award decisions, FECA Bulletin No. 17-06 provides in relevant part:

“OWCP ... will not revisit prior cases unless a request for reconsideration is received that contains *new legal argument and relevant medical evidence* that addresses the necessary criteria outlined in this Bulletin. In accordance with existing procedure, where the original decision for which review is sought used the Sixth Edition and in the event that the recalculation results in a lesser impairment due to mathematical or other error, an overpayment will be declared.”¹⁹ (Emphasis added.)

ANALYSIS

The Board finds that OWCP improperly denied appellant’s request for reconsideration of the merits of his claim.

In support of the July 20, 2017 request for reconsideration, counsel contended that based on the Board’s decision in *T.H.*,²⁰ OWCP was required to further develop the evidence and issue a new decision.

OWCP denied the July 20, 2017 request for reconsideration finding that FECA Bulletin No. 17-06 required both a “new legal argument” and “relevant medical evidence” prior to reopening a schedule award claim for consideration of the merits based on a request for reconsideration. The Board finds that the dual requirement of FECA Bulletin No. 17-06 improperly expands the requirements for merit review under 5 U.S.C. § 8128(a) beyond that which is defined by OWCP’s regulation, 20 C.F.R. § 10.606(b)(3), and prior Board precedent. 20 C.F.R. § 10.606(b)(3) explicitly requires that a claimant either: contend that OWCP erroneously applied or interpreted a specific point of law; to advance a relevant legal argument not previously considered by OWCP; or to submit relevant and pertinent new evidence not previously considered by OWCP. The regulation does not require and the Board has never held that a claimant is required to establish more than one element of this regulation to warrant review of the merits of his or her claim. Furthermore, the Board has frequently directed OWCP to reopen a claimant’s claim for consideration of the merits when the request for reconsideration met one of the standards for obtaining merit review of his or her case, including only a new legal argument.²¹

The Board finds that appellant’s new legal argument that appellant’s upper extremity schedule award should be evaluated both on ROM and DBI methods is relevant to the facts of her claim as appellant’s physician discussed her loss of ROM in the left shoulder, is in keeping with Board precedent in *T.H., et al*, and maintains the goals described by the Board in *T.H.*,²² to ensure that OWCP provide consistent results and equal justice under the law for all claimants. As such,

¹⁹ *Supra* note 7.

²⁰ *Supra* note 6.

²¹ *Supra* note 13.

²² *Supra* note 6.

the Board finds that the dual requirement for granting reconsideration requests described in FECA Bulletin No. 17-06 is an unwarranted and unsupported restriction on requests for reconsideration under 5 U.S.C. § 8128(a). The Board further finds that OWCP's refusal to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion.²³

For these reasons, the Board will set aside OWCP's October 17, 2017 decision and remand the case for a merit review. After such further development as deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 6, 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

²³ *Supra* note 22.