

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

K.W., Appellant)	
)	
and)	Docket No. 19-0553
)	Issued: November 8, 2019
U.S. POSTAL SERVICE, GRIDLEY POST)	
OFFICE, Gridley, CA, Employer)	
)	

Appearances:
Norman F. Nivens, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 15, 2019, appellant through counsel, filed a timely appeal from a November 8, 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 July 12, 2018, to the filing of this

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.

appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

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

FACTUAL HISTORY

On November 30, 2015 appellant, then a 54-year-old postmaster, filed an occupational disease claim (Form CA-2) alleging that he sustained left shoulder pain and loss of range of motion due to factors of his federal employment. He first became aware of his left shoulder condition and realized it was related to factors of his federal employment on December 10, 2012. OWCP accepted the claim for soft tissue lesion of left shoulder region.⁴

In an August 3, 2017 report, Dr. Robert Vogel, a Board-certified orthopedic surgeon, utilized the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)⁵ and opined that appellant had 16 percent permanent impairment of the left upper extremity.

On August 23, 2017 and March 14, 2018 appellant filed schedule award claims (Form CA-7).

In support of his claim, OWCP received a March 2, 2018 report from Dr. Joel A. Weddington, a Board-certified orthopedic surgeon. Dr. Weddington utilized the sixth edition of the A.M.A., *Guides*,⁶ to rate appellant's permanent impairment due to loss of range of motion (ROM). Dr. Weddington provided one set of measurements, and found that appellant had 14 percent permanent impairment of the left upper extremity due to loss of ROM.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence on appeal. 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.*

⁴ The statement of accepted facts indicates that OWCP accepted a traumatic injury claim under OWCP File No. xxxxxx800 for a left shoulder injury which occurred on September 18, 2003 when appellant lifted a bucket of flats. OWCP File No. xxxxxx800 was accepted for left rotator cuff tear, other affections of left shoulder region, left shoulder tendinitis/bursitis. OWCP has not administratively combined OWCP File No. xxxxxx800 with OWCP File No. xxxxxx122.

⁵ A.M.A., *Guides* (5th ed. 2001).

⁶ A.M.A., *Guides* (6th ed. 2009).

OWCP referred appellant to Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 27, 2018, Dr. Auerbach noted appellant's two accepted left shoulder injuries and related that appellant had undergone five left shoulder surgical procedures. He reviewed a February 28, 2017 left shoulder magnetic resonance imaging (MRI) arthrogram report from Dr. Phillip Sheldon, a Board-certified radiologist which revealed:

“(1) Repaired supraspinatus tendon is intact. Mild subdeltoid bursitis. (2) Fibers of the distal aspect of the infraspinatus tendon are somewhat ill-defined. A portion of this is due to artifact from prior surgical procedure. Tendon is presumed to be intact as there is no extension of the joint fluid into this region. (3) Some fatty replacement identified in both infraspinatus muscle and teres minor muscle. No associated abnormalities in scapular notch. (4) Long head of biceps tendon not identified and presumed to be completely torn and retracted. (Note: Had a biceps tenodesis.) (5) Multiple hardware devices in the humeral head and a single device in the glenoid.”

Dr. Auerbach determined that appellant had 34 percent permanent impairment of the left upper extremity utilizing the A.M.A., *Guides*⁷ and the diagnosis-based impairment (DBI) method. In forming his DBI rating, he referred to Table 15-5 of the shoulder regional grid,⁸ and noted that appellant had undergone a left shoulder arthroplasty. Dr. Auerbach explained that appellant fell into a category of class 3C, which had a default permanent impairment rating of 40 percent. Applying the grade modifiers for functional history, physical examination, and clinical studies, he concluded that appellant had 34 percent permanent impairment of the left upper extremity. Dr. Auerbach also utilized the ROM method, provided three ROM measurements for appellant's left shoulder, and calculated 30 percent permanent impairment of the left upper extremity impairment due to loss of ROM. He explained that pursuant to Table 15-34 at page 475, averaging the three measurements for loss of ROM of the left shoulder, abduction at 47 degrees corresponded to 6 percent impairment, flexion at 45 degrees corresponded to 9 percent impairment, extension at 46 degrees corresponded to 10 percent impairment, adduction at 25 degrees corresponded to 1 percent impairment, internal rotation at 90 degrees corresponded to 0 percent impairment, and external rotation at 45 percent corresponded to 4 percent impairment, totaling 34 percent permanent impairment.

In a June 22, 2018 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon and district medical adviser (DMA), found that the report of Dr. Auerbach was flawed because he indicated that appellant had a “shoulder replacement,” which was incorrect. He also found the reports of Dr. Weddington and Dr. Vogel were flawed because ROM was only measured once. The DMA referred to Table 15-5⁹ and found that based on the mid-range value for a full-thickness rotator cuff tear, and moving the award two places to the right, appellant would have seven percent left upper extremity impairment, based on the net adjustment formula. He indicated that he utilized

⁷ *Id.*

⁸ *Id.* at 405.

⁹ *Id.* at 403.

three sets of ROM measurements, referred to Table 15-34,¹⁰ and found that appellant was entitled to 10 percent impairment to the left upper extremity for loss of ROM. The DMA related that appellant had 110 degrees of flexion which corresponded with 3 percent impairment rating, 40 degrees of extension which corresponded with 1 percent impairment, 85 degrees of abduction which corresponded with 3 percent impairment, 30 degrees of adduction which corresponded with 1 percent impairment, 70 degrees of external rotation which corresponded with 0 percent impairment, and 55 degrees of internal rotation which corresponded with 2 percent impairment, totaling 10 percent permanent impairment. He noted that maximum medical improvement (MMI) was reached on August 3, 2017, the date of Dr. Vogel's rating.

By decision dated July 12, 2018, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity. It specifically noted that the weight of the medical evidence was given to the DMA, who correctly applied the A.M.A., *Guides*.

On August 10, 2018 counsel requested reconsideration. He discussed the medical evidence and argued that the DMA improperly rejected the report of the second opinion physician, Dr. Auerbach, because he indicated that appellant had a shoulder replacement. Counsel noted that appellant had several surgeries to his left shoulder joint to improve function. He argued that the rejection of the second opinion physician's report was not valid, and clarification should have been sought. No new medical evidence was submitted with his request.

By decision dated November 8, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

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 payment of compensation at any time on his or her own motion or on application.¹¹

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.¹²

¹⁰ *Id.* at 475.

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹³ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁴ 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.¹⁵

ANALYSIS

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

Initially, the Board finds that OWCP properly considered counsel's correspondence as a request for reconsideration and not as a claim for an increased schedule award.¹⁶ The underlying issue on reconsideration is whether the medical evidence demonstrates a greater permanent impairment. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹⁷

The Board finds that counsel raised a relevant legal argument in his request for reconsideration, which was not previously considered.

Counsel argued that the DMA rejected Dr. Auerbach's second opinion report without sufficient justification. He related that the DMA found that Dr. Auerbach had improperly rated appellant for left "shoulder replacement" under the DBI method because the DMA defined arthroplasty as total shoulder replacement. Counsel agreed that appellant had not undergone total shoulder replacement, but he alleged that the term "arthroplasty" encompassed other surgical procedures which involved surgical restoration of joint function either by repairing damaged structures or by inserting an artificial joint. He also argued that the DMA improperly rejected Dr. Auerbach's three sets of ROM measurements in determining appellant's permanent impairment utilizing the ROM method. Counsel argued that OWCP should have sought clarification from the second opinion physician, if the DMA found Dr. Auerbach's report insufficient.

¹³ *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 its 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.

¹⁴ *Id.* at § 10.608(a); *see also A.P.*, Docket No 19-0224 (issued July 11, 2019).

¹⁵ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

¹⁶ *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

¹⁷ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

The Board finds that appellant's request for reconsideration raised relevant arguments not previously considered or addressed by OWCP and are therefore sufficient to warrant reopening the claim for further merit review. Pursuant to 20 C.F.R. § 10.606(b)(3), appellant is entitled to a merit review of the claim. The case will be remanded to OWCP for an appropriate merit decision.¹⁸

CONCLUSION

The Board finds that appellant is entitled to a merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision.

Issued: November 8, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ The Board also notes that on remand OWCP should combine OWCP File No. xxxxxx122 with OWCP File No. xxxxxxx800.