

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

S.H., Appellant)	
)	
and)	Docket No. 19-1115
)	Issued: November 12, 2019
SOCIAL SECURITY ADMINISTRATION,)	
Richmond, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, 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 April 22, 2019 appellant, through counsel, filed a timely appeal from a February 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated January 3, 2019, which became final after 30 days of issuance and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees'

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 20 C.F.R. § 501.6(d); *see P.S.*, Docket No. 18-0718 (issued October 26, 2018).

Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 14, 2010 appellant, then a 48-year-old claims authorizer, filed an occupational disease claim (Form CA-2) alleging that she sustained right shoulder and arm strain causally related to factors of her federal employment. OWCP accepted the claim for rotator cuff syndrome and impingement syndrome of the right shoulder and dysthymic disorder. It assigned OWCP File No. xxxxxx521.

OWCP had previously accepted that appellant sustained right shoulder strain on May 4, 2009 under OWCP File No. xxxxxx115 and left shoulder sprain, a partial infraspinatus tear, tendinitis, and cervicalgia under OWCP File No. xxxxxx606. It combined the claims into OWCP File No. xxxxxx521.

On April 30, 2012 appellant underwent a right shoulder acromioplasty with a distal clavicle excision and labral repair. On February 24, 2014 she underwent a synovectomy, bursectomy, ligament release, biceps tendon release, acromioplasty, debridement of the rotator cuff, and removal of the anchor from the labrum. OWCP paid appellant wage-loss compensation for intermittent periods of temporary total disability.

In an impairment evaluation dated February 18, 2015, Dr. Michael E. Hebrard, a Board-certified physiatrist, found 26 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity due to a loss of shoulder motion pursuant to Table 15-34 on page 477 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).⁶

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the February 21, 2019 decision, OWCP received additional evidence. 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.*

⁵ Docket No. 18-1297 (issued January 3, 2019).

⁶ A.M.A., *Guides* (6th ed. 2009).

On April 28, 2017 appellant filed a schedule award claim (Form CA-7).

On June 7, 2017 OWCP referred appellant to Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent of any permanent impairment of the bilateral upper extremities. The accompanying statement of accepted facts described only appellant's right upper extremity condition and requested that Dr. Nijjar calculate the extent of her permanent impairment of the right upper extremity.

In a July 26, 2017 impairment evaluation, Dr. Nijjar measured normal range of motion (ROM) of the shoulder with some tenderness over the acromioclavicular (AC) joint, anterior acromion process, and biceps tendon. He diagnosed right shoulder impingement syndrome and a partial rotator cuff tear, degenerative arthritis of the AC joint after surgery, and a SLAP (superior labral lesion from anterior to posterior) lesion status postsurgical debridement and subacromial decompression of the right shoulder. Dr. Nijjar identified the diagnosis as AC joint disease after a distal clavicle resection or AC separation using Table 15-5 on page 403 of the A.M.A., *Guides*, which yielded a default impairment of 10 percent. He further found a default impairment rating of three percent due to appellant's SLAP lesion using Table 15-5 on page 404, which yielded four percent permanent impairment after application of grade modifiers, for a total right upper extremity permanent impairment of 14 percent.

On October 12, 2017 Dr. David H. Garelick, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), applied the A.M.A., *Guides* and FECA Bulletin No. 17-06⁷ to Dr. Nijjar's findings. He noted that Dr. Nijjar had identified the ROM as normal. Dr. Garelick concurred with Dr. Nijjar's finding of 10 percent right upper extremity impairment due to the distal clavicle resection using Table 15-5 on page 403. He found that appellant could not receive an impairment rating for both the labral lesion and the distal clavicle resection as the A.M.A., *Guides* indicated that shoulder impairments often occurred together and instructed the evaluator to select the most significant diagnosis. Dr. Garelick used the impairment rating for the distal clavicle resection and determined that appellant had 10 percent permanent impairment of the right upper extremity. He opined that appellant had reached maximum medical improvement on July 26, 2017.

By decision dated November 7, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right arm. The period of the award ran for 31.2 weeks from October 15, 2017 to a fraction of a day on May 21, 2018.⁸

On November 14, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

A telephonic hearing was held on April 2, 2018. Counsel questioned why OWCP had not provided a left upper extremity rating. He further asserted that OWCP should consider the impairment determination based on ROM from Dr. Hebrard.

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

⁸ OWCP adjusted the beginning date of the schedule award to October 15, 2017 as appellant had received wage-loss compensation for total disability through October 14, 2017.

By decision dated May 3, 2018, OWCP's hearing representative affirmed the November 7, 2017 decision. He noted that OWCP should consider expanding the acceptance of appellant's claim to include a right shoulder labral tear based on Dr. Nijjar's opinion. The hearing representative also "recommend[ed]" that OWCP develop the issue of whether she had a permanent impairment of the left upper extremity.

Appellant appealed to the Board. By decision dated January 3, 2019, the Board affirmed the May 3, 2018 decision.⁹ The Board found that the opinion of the DMA constituted the weight of the evidence and established that appellant had no more than 10 percent permanent impairment of the right upper extremity. The Board found that Dr. Hebrard's ROM findings were stale as performed more than two years prior to Dr. Nijjar's second opinion evaluation.

On February 12, 2019 appellant, through counsel, requested reconsideration. He resubmitted the February 18, 2015 impairment evaluation from Dr. Hebrard. Counsel asserted that OWCP had failed to adjudicate the extent of appellant's left upper extremity impairment.

By decision dated February 21, 2019, OWCP denied appellant's request for reconsideration of the merits of her 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 compensation at any time on his own motion or on application.¹⁰

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.¹¹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² If it chooses to grant reconsideration, it reopens

⁹ *Supra* note 5.

¹⁰ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *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 § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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). Chapter 2.1602.4b.

and reviews the case on its merits.¹³ 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.¹⁴

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).

By decision dated May 3, 2018, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity. By decision dated January 3, 2019, the Board affirmed the May 3, 2018 decision. On February 12, 2019 appellant filed a timely request for reconsideration of the May 3, 2018 decision. Initially, the Board finds that OWCP properly considered her correspondence as a request for reconsideration and not as claim for an increased schedule award as she did not submit any evidence showing increased permanent impairment or additional exposure.¹⁵ The underlying issue on reconsideration is whether the medical evidence demonstrates a greater permanent impairment. Thus, the Board must determine whether appellant has presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹⁶

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. On reconsideration counsel contended that OWCP erred in failing to determine whether appellant had a permanent impairment of the left upper extremity.¹⁷ The sole and relevant issue before the Board, however, is the extent of her permanent impairment of the right upper extremity. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸ Thus, the Board finds that appellant has not advanced a relevant legal argument not previously considered by OWCP.¹⁹ Consequently, appellant is 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).²⁰

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered relevant to the issue of whether she is entitled to a greater

¹³ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁵ *See A.A.*, Docket No. 19-0939 (issued August 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

¹⁶ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

¹⁷ The Board notes that OWCP's hearing representative, in the May 3, 2018 decision, recommended that OWCP further develop the issue of whether appellant has a permanent impairment of the left upper extremity.

¹⁸ *L.C.*, Docket No. 18-0787 (issued September 26, 2019).

¹⁹ *P.W.*, Docket No. 17-1911 (issued June 6, 2018).

²⁰ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

schedule award of the right upper extremity. Appellant resubmitted Dr. Hebrard's February 18, 2015 impairment evaluation. However, the submission of evidence, which duplicates evidence already in the case record, does not constitute a basis for reopening a case for further merit review.²¹ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under section 10.606(b)(3).²²

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²³

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 February 21, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 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

²¹ *T.W.*, Docket No. 19-0786 (issued September 18, 2019); *M.C.*, Docket No. 18-0841 (issued September 13, 2019).

²² *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

²³ *See L.A.*, Docket No. 18-1226 (issue December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).