

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

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**D.P., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, FEDERAL AIR )  
MARSHAL SERVICE, Irvine, CA, Employer )**

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**Docket No. 19-0964  
Issued: October 2, 2019**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On April 2, 2019 appellant filed a timely appeal from an October 23, 2018 merit decision and a December 4, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the December 4, 2018 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.*

## ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish permanent impairment of his left shoulder, warranting a schedule award; and (2) 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 October 29, 2008 appellant, then a 37-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on October 20, 2008 he dislocated his left shoulder while participating in a work training exercise while in the performance of duty. By decision dated January 23, 2009, OWCP accepted the claim for closed dislocation of left shoulder. Acceptance of the claim was later expanded to include sprain of the left shoulder.

Appellant sought continued treatment with Dr. Ramnik Singh, Board-certified in sports medicine, through April 7, 2009. In an April 7, 2009 report, Dr. Singh diagnosed left shoulder dislocation, impingement syndrome, and sprain/strain. He noted that appellant had participated in a work conditioning program.

On June 23, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated July 7, 2017, OWCP advised appellant of the deficiencies of his claim and requested that he submit a medical report from his physician assessing his permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> and establishing the date on which he reached maximum medical improvement (MMI). Appellant was afforded 30 days to submit the requested information. The record reflects that the July 7, 2017 letter was returned as undeliverable. On May 7, 2018 appellant notified OWCP of a change of address. On July 30, 2018 OWCP reissued the development letter to the updated address of record. It did not receive a response from appellant.

By decision dated October 23, 2018, OWCP denied appellant's claim for a schedule award finding that the evidence of record was insufficient to establish permanent impairment of his left shoulder.

On November 13, 2018 appellant requested reconsideration of OWCP's decision. In an accompanying statement, dated November 6, 2018, he reported that he had moved after he filed his schedule claim in early 2017 and that OWCP's letters were sent to his previous address. Appellant reported that he was scheduled to see his attending physician on November 13, 2018 for an evaluation. No further evidence was received.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

By decision dated December 4, 2018, OWCP denied appellant's request for reconsideration of its October 23, 2018 decision. It found that he had not submitted new and relevant evidence or argument in support of his request for reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>5</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.<sup>6</sup>

It is the claimant's burden of proof to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.<sup>7</sup> OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>8</sup> The evaluation of permanent impairment should include a detailed report that provides history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated.<sup>9</sup> This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his left shoulder, warranting a schedule award.

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404. *See also M.B.*, Docket No. 19-0540 (issued August 8, 2019).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (March 2017); *see also* Part 3 -- *Medical, Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>7</sup> *T.O.*, Docket No. 18-0659; *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>8</sup> FECA Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

<sup>9</sup> *Id.* at Chapter 2.808.6.

<sup>10</sup> *B.R.*, Docket No. 18-0277 (issued August 27, 2018).

In a development letter dated July 7, 2017, OWCP informed appellant of the type of evidence necessary to establish his schedule award claim and specifically requested that he submit a report which included a permanent impairment evaluation from his attending physician in accordance with the sixth edition of the A.M.A., *Guides*. On July 30, 2018 it resent the July 7, 2017 development letter after appellant wrote to OWCP and advised of his new address. Appellant did not submit a response to the development letter prior to the issuance of OWCP's October 23, 2018 decision.

Appellant has not submitted medical evidence to establish that he sustained a permanent impairment causally related to his accepted left shoulder condition. As previously noted, it is appellant's burden of proof to establish a permanent impairment of a scheduled member or function of the body.<sup>11</sup> The medical evidence must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>12</sup> As appellant has not submitted medical evidence sufficient to establish permanent impairment of his left shoulder causally related to the accepted October 20, 2008 employment injury, the Board finds that he has not met his burden of proof to establish his claim.<sup>13</sup>

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.

### **LEGAL PRECEDENT -- ISSUE 2**

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.<sup>14</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>15</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>16</sup> If the request is timely, but fails to meet at least one

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<sup>11</sup> *Supra* note 7.

<sup>12</sup> *See B.V.*, Docket No. 17-0656 (issued March 13, 2018).

<sup>13</sup> *See M.G.*, Docket No. 17-1831 (issued February 6, 2018).

<sup>14</sup> 20 C.F.R. § 10.606(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>15</sup> 20 C.F.R. § 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.

<sup>16</sup> *Id.* at § 10.608(a); *see also D.P.*, Docket No. 19-0001 (issued June 13, 2019); *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

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).<sup>18</sup>

In his request for reconsideration, appellant 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. He submitted a November 6, 2018 statement in which he discussed his change of address. The Board finds that, although appellant offered a new legal argument, it has no reasonable color of validity as it did not contain any basis upon which OWCP could grant a schedule award.<sup>19</sup> OWCP reissued the July 7, 2017 development letter on July 30, 2018 as soon as appellant advised OWCP of his new address. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>20</sup>

The underlying issue is whether appellant has submitted sufficient evidence to establish permanent impairment related to his accepted injury. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant has not submitted such evidence in this case. In his request for reconsideration appellant noted that he was scheduled for an evaluation with his attending physician on November 13, 2018, and that the physician would be submitting a report on his behalf. OWCP did not, however, receive such a medical report. In this case, appellant failed to submit relevant and pertinent new evidence addressing permanent impairment of a scheduled member.<sup>21</sup> As such, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met 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.<sup>22</sup>

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<sup>17</sup> *Id.* at § 10.608(b); *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>18</sup> *B.H.*, Docket No. 17-1069 (issued June 6, 2018).

<sup>19</sup> *T.W.*, Docket No. 18-1088 (issued February 14, 2019).

<sup>20</sup> *See Y.C.*, Docket No. 17-1212 (issued April 11, 2018).

<sup>21</sup> *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

<sup>22</sup> *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his left shoulder, warranting a schedule award. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 4 and October 23, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 2, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board