

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

V.O., Appellant	)	
	)	
and	)	Docket No. 19-0753
	)	Issued: September 9, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Tooele, UT, Employer	)	
	)	

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 22, 2019 appellant filed a timely appeal from a December 31, 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 August 13, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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 31, 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.*

## 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 15, 1990 appellant, then a 36-year-old part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 1990 she injured her head and back when a dog jumped a fence and knocked her over some shrubs while in the performance of duty. Under OWCP File No. xxxxxx632, OWCP accepted her claim for cervical sprain and cervical displacement (C5-6), and authorized a July 13, 1990 anterior cervical discectomy. Appellant subsequently resumed full-time work, in a limited-duty capacity. She sustained separate work-related neck injury on or about May 27, 1995, which OWCP accepted for C4-5 cervical disc displacement under OWCP File No. xxxxxx928. Appellant also has an accepted traumatic injury claim for back spasm and permanent aggravation of lumbar degenerative intervertebral disc (L4-5), which arose on October 26, 1998. OWCP assigned the latter claim OWCP File No. xxxxxx860, and also granted a July 14, 2000 schedule award for one percent permanent impairment of the left lower extremity.<sup>3</sup> Appellant accepted a disability retirement effective August 17, 2000.

Appellant continued to receive medical treatment for her accepted conditions. In an April 5, 2017 report, Dr. John D. Babson, a family practitioner, reviewed her history of injury and related her complaints of ongoing bilateral shoulder, elbow, and hip pain; bilateral knee pain; and bilateral foot pain. Upon examination of appellant's cervical spine, he observed tenderness to palpation of the mild bilateral trapezius. Examination of her lumbar spine revealed tenderness with flexion, extension, and rotation and paraspinal spasms. Dr. Babson referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)<sup>4</sup> and determined that appellant had 17 percent permanent impairment for her cervical spine and 13 percent permanent impairment for her lumbar spine.

In a June 16, 2017 impairment rating, Dr. Steven J. Beer, a Board-certified neurological surgeon, recounted appellant's history of complaints for ongoing bilateral shoulder, knee, foot, elbow, and hip pain following her May 11, 1990 employment injury. He reported that neurological examination showed equal muscle tone and strength to the bilateral upper and lower extremities. Dr. Beer diagnosed L4-5 fusion, L5 clinical radiculopathy, postlaminectomy syndrome, C4-5-6 fusion, C7 radiculopathy, C6-7 herniated disc, and left trapezius region subcutaneous lipoma. He reported that appellant had reached maximum medical improvement. Regarding appellant's carpal tunnel syndrome and ulnar neuropathy in both upper extremities, Dr. Beer referenced the A.M.A., *Guides* and determined that she had 9 percent permanent impairment of each upper extremity for a combined total of 17 percent upper extremity impairment for her ulnar nerve impairment. He also referenced *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*) for rating her spinal impairment and reported that she had 12 percent permanent impairment for mild motor and moderate loss of sensation at

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<sup>3</sup> OWCP combined the above-noted claims and designated OWCP File No. xxxxxx632 as the master file.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

C7. He reported that appellant had mild motor and moderate loss of sensation at L5, which resulted in 14 percent permanent impairment for a combined spinal impairment total of 24 percent. Dr. Beer calculated that she had a total upper extremity impairment of 37 percent permanent impairment.

In September and October 2017, OWCP expanded acceptance of the current claim (OWCP File No. xxxxxx632) to include cervical and lumbar radiculopathy, post-traumatic stress disorder, and major depressive disorder – fully resolved.

OWCP routed the case file and a statement of accepted facts (SOAF) to Dr. Kenechukwu Ugokwe, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), for review as to whether appellant sustained permanent impairment as a result of her accepted conditions. In a December 22, 2017 report, the DMA noted that he reviewed the SOAF and her history of injury. Utilizing the sixth edition of the A.M.A., *Guides*, Table 17-1, he noted that appellant was a class 3 impairment for her cervical spine due to two levels of fusion for a default rating of 19 percent permanent impairment. The DMA subtracted 2 percent permanent impairment due to grade modifiers for a total of 17 percent permanent impairment. Regarding appellant's lumbar spine, he determined that according to Table 17-4 she was a class 2 impairment for fused motion segment at L4-5 with no grade modifiers, resulting in 12 percent permanent impairment. The DMA calculated a total of 29 percent permanent impairment for her cervical and lumbar conditions. Regarding appellant's impairment for the bilateral upper and lower extremities, he utilized *The Guides Newsletter* and calculated 15 percent permanent impairment for L5 mild motor deficit and moderate loss of sensation, 10 percent permanent impairment for median nerve deficit and mild sensory deficit, and 2 percent permanent impairment for bilateral ulnar nerve defects for a total of 27 percent permanent impairment of the bilateral upper and lower extremities. The DMA explained that his impairment rating differed from Dr. Babson's December 11, 2017 report because the combined sensory and motor impairment could not exceed 9 for the upper extremities or 13 percent for the lower extremities.

In a May 14, 2018 supplemental report, the DMA clarified that Dr. Beer had assigned an impairment rating of 30 percent permanent impairment of the bilateral extremities, but he assigned 29 percent permanent impairment. He also noted that while Dr. Beer determined that appellant had 13 percent permanent impairment of the lumbar spine, he opined that she had 12 percent permanent impairment of the lumbar spine.

On May 15, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated August 13, 2018, OWCP granted appellant a schedule award for 17 percent permanent impairment of the upper extremity and 12 percent permanent impairment of the lower extremity. It noted that because she was previously paid for 1 percent permanent impairment of the lower extremity, she was only entitled to an additional 11 percent permanent impairment. The award ran for 84.72 weeks from June 16, 2017 to January 30, 2019.

On October 9, 2018 appellant requested reconsideration. She requested that OWCP review the 37 percent permanent impairment submitted by Dr. Beer and consider all the injuries that she sustained on the job.

Appellant submitted an August 22, 2018 letter by Dr. Beer who indicated that he was clarifying which conditions were affected by her May 11, 1990 employment injury because a portion of her permanent impairment rating had been denied. Dr. Beer described the May 11, 1990 employment incident and the subsequent medical treatment that she had received, including numerous surgeries. For appellant's cervical condition, he referenced Table 17-4, and assigned class 3 due to her previous 2-level cervical fusion at C4-5-6, decreased cervical range of motion (ROM), and C7 distribution radiculopathy with triceps weakness. For her lumbar condition, Dr. Beer also determined that she was a class 2 for decreased lumbar ROM and pain, persistent L5 distribution lower extremity radicular pain as well as numbness and tingling, and combined 1 level lumbar fusion. He assigned grade modifiers and concluded that appellant had 17 percent permanent impairment for her cervical condition and 13 percent permanent impairment for her lumbar condition for a combined 30 percent permanent impairment. Dr. Beer reported that, by including the previous impairment ratings for ulnar and median nerve dysfunction, the total impairment was 37 percent.

By decision dated December 31, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review.

### **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.<sup>5</sup>

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>6</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>7</sup> If it chooses to grant reconsideration, it reopens

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<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> *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.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS**

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

In her October 9, 2018 reconsideration request, appellant requested that OWCP review Dr. Beer's 37 percent impairment rating and submitted an August 22, 2018 report, which was not previously reviewed by OWCP. Dr. Beer indicated that he was asked to clarify which conditions were affected by her May 11, 1990 employment injury for purposes of her impairment rating. He referenced specific tables of the A.M.A., *Guides* and provided grade modifiers regarding appellant's impairment rating for her accepted lumbar and cervical injuries. Dr. Beer concluded that she had 17 percent permanent impairment for her cervical condition and 13 percent permanent impairment for her lumbar condition for a combined 30 percent permanent impairment. He further explained that if OWCP included the previous impairment ratings for ulnar and median nerve dysfunction, the total impairment was 37 percent.

The Board finds that Dr. Beer's August 22, 2018 report constitutes the submission of new medical records into evidence.<sup>10</sup> Moreover, as Dr. Beer addressed the issue of whether appellant sustained more than 17 percent upper extremity impairment and 12 percent lower extremity impairment due to her accepted May 11, 1990 employment injury, it is also relevant to the underlying issue in this claim.<sup>11</sup>

The Board finds, therefore, that appellant met the remaining above-noted requirement of 20 C.F.R. § 10.606(b)(3) in her October 9, 2018 reconsideration request. The case will be remanded for OWCP to properly conduct a merit review of the claim and issue an appropriate merit decision.

### **CONCLUSION**

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

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<sup>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *E.R.*, Docket No. 17-1055 (issued August 17, 2017).

<sup>11</sup> *See K.J.*, Docket No. 19-0146 (issued July 10, 2019); *see also E.R.*, Docket No. 17-1055 (issued August 17, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 31, 2018 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: September 9, 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