

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

G.H., Appellant)	
)	
and)	Docket No. 19-0847
)	Issued: September 13, 2019
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE,)	
Staten Island, NY, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 11, 2019 appellant filed a timely appeal from a February 4, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 1, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² 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.*

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 September 4, 2014 appellant, then a 59-year-old supervisory facility operations specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 27, 2014 he injured his back and both shoulders when he was attacked by a coworker while in the performance of duty. OWCP accepted the claim for bilateral shoulder impingement and a bilateral rotator cuff tear.

By decision dated February 13, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity and 5 percent permanent impairment of the right upper extremity. By decision dated June 16, 2017, an OWCP hearing representative vacated the February 13, 2017 decision and remanded the case for OWCP to apply the provisions of FECA Bulletin No. 17-06.³

Following further development, by decision dated September 12, 2017, OWCP granted appellant a schedule award for 10 percent permanent impairment of the left upper extremity and 5 percent permanent impairment of the right upper extremity.⁴ By decision dated December 7, 2017, an OWCP hearing representative vacated the September 12, 2017 decision and again remanded the case for further development in accordance with FECA Bulletin No. 17-06.

On February 1, 2018 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), recommended a second opinion examination to determine the extent of appellant's upper extremity impairment.

OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination.

In an April 10, 2018 impairment evaluation, Dr. Sultan diagnosed post-traumatic bilateral shoulder derangement superimposed on preexisting bilateral degenerative changes of the shoulders treated with a bilateral arthroscopy. He measured range of motion (ROM) of the bilateral shoulders, noting that he had obtained three separate measurements. Dr. Sultan found that appellant had six percent permanent impairment of each upper extremity due to his rotator cuff tear according to Table 15-5 on page 403 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ He indicated that he had based his ROM measurements on the protocols of the fifth edition of the A.M.A., *Guides*.

³ FECA Bulletin No. 17-06 (issued May 8, 2017).

⁴ OWCP initially issued the decision on September 6, 2017, but reissued the decision on September 12, 2017 as it had failed to include the relevant medical evidence with the decision.

⁵ A.M.A., *Guides* (6th ed. 2009).

On May 18, 2018 Dr. Garelick concurred with Dr. Sultan's finding of six percent permanent impairment of each upper extremity using the diagnosis-based impairment method. He found, however, that appellant had nine percent permanent impairment of each upper extremity due to loss of motion pursuant to Table 15-34 on page 475 of the A.M.A., *Guides*. Dr. Garelick noted that appellant had previously received a schedule award for 10 percent left upper extremity and 5 percent right upper extremity for his shoulder condition, and thus was entitled to an additional award for 4 percent permanent impairment of the right upper extremity.

By decision dated June 1, 2018, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the right upper extremity. The period of the award ran for 12.48 weeks from April 10 to July 6, 2018.

In a letter postmarked July 11, 2018, appellant requested a telephonic hearing before an OWCP hearing representative.

By decision dated August 14, 2018, OWCP denied appellant's request for a telephonic hearing as untimely under 5 U.S.C. § 8124(b).⁶

On October 1, 2018 appellant requested reconsideration. In a separate letter of even date, he again requested a telephonic hearing before an OWCP hearing representative. In an accompanying statement, he explained that he had recorded the examination with Dr. Sultan and obtained a professional transcription which established that Dr. Sultan had failed to obtain three ROM measurements of the shoulder. Appellant also contended that Dr. Sultan indicated that he had used the fifth edition of the A.M.A., *Guides*. He asserted that Dr. Sultan had not included all of his physical complaints in his report, citing the audio recording. Appellant noted that he did not treat patients. He submitted copies of Dr. Sultan's examination and Dr. Garelick's May 18, 2018 report.

On October 26, 2018 OWCP informed appellant that it had previously denied his request for a telephonic hearing as untimely and advised him to follow the appeal rights accompanying the June 1, 2018 decision.

By decision dated February 4, 2019, 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.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a

⁶ OWCP initially denied appellant's request for a telephonic hearing on August 3, 2018; however, it issued a corrected copy of its decision on August 14, 2018.

⁷ 5 U.S.C. § 8128(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.⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.⁹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

ANALYSIS

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).

By decision dated June 1, 2018, OWCP granted appellant a schedule award for an additional four percent permanent impairment of the right upper extremity. On October 1, 2018 appellant timely requested reconsideration. Initially, the Board finds that OWCP properly considered his correspondence as a request for reconsideration and not as claim for an increased schedule award.¹² 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).¹³

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. He contended that Dr. Sultan failed to obtain three ROM measurements as indicated in his report, noting that he had recorded the examination. Appellant further asserted that Dr. Sultan had referenced the fifth edition of the A.M.A., *Guides* in reaching his impairment rating. While Dr. Sultan indicated that he had used the fifth edition of the A.M.A., *Guides* in measuring ROM, he further indicated that he had obtained three separate ROM measurements. Dr. Garelick, the DMA, reviewed the measurements obtained by Dr. Sultan and applied the sixth edition of the A.M.A., *Guides* in rating appellant's impairment using the

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

⁹ *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 (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a); *see also A.P.*, Docket No 19-0224 (issued July 11, 2019).

¹¹ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

¹² *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

¹³ *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

ROM method. Thus, the Board finds that appellant has not advanced a relevant legal argument not previously considered by OWCP.¹⁴

Appellant further asserted that Dr. Sultan failed to include all his physical complaints in his report. His argument, however, is not relevant to the underlying issue of his entitlement to an additional schedule award, which is a medical issue that must be addressed by relevant and pertinent new medical evidence.¹⁵ Consequently, 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).¹⁶

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered relative to the issue of whether he is entitled to a greater schedule award. Appellant submitted copies of the reports of Dr. Sultan and Dr. Garelick, but this duplicated evidence already of record and thus failed to constitute relevant and pertinent new evidence.¹⁷ As he had not provided relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹⁸

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.¹⁹

CONCLUSION

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).

¹⁴ *P.W.*, Docket No. 17-1911 (issued June 6, 2018).

¹⁵ *T.W.*, Docket No. 18-1088 (issued February 14, 2019).

¹⁶ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁷ *See supra* note 15.

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

¹⁹ *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).

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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