

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

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B.W., Appellant)	
)	
and)	Docket No. 19-1558
)	Issued: April 16, 2020
DEPARTMENT OF HEALTH & HUMAN)	
SERVICES, OFFICE OF FEDERAL)	
ASSISTANCE MANAGEMENT, Rockville, MD,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 15, 2019 appellant filed a timely appeal from a February 28, 2019 nonmerit decision of the Office of Workers' Compensation Program (OWCP).¹ As more than 180 days elapsed from OWCP's last merit decision, dated January 2, 2019, to the filing of this appeal,

¹ The Board notes that, during the pendency of this appeal, OWCP issued an August 19, 2019 decision, which denied modification of the January 2, 2019 schedule award decision that is the subject of the current appeal. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626. See *S.C.*, Docket No. 18-0517 (issued February 25, 2020); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's August 19, 2019 decision is set aside as null and void.

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 claim.³

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 August 3, 2016 appellant, then a 55-year-old grants management specialist, filed an occupational disease claim (Form CA-2) alleging that factors of her federal employment, including typing and casing of letters, caused trigger finger and de Quervain tendinitis of the left hand. She first realized her condition and that it was caused or aggravated by her employment on May 11, 2015. Appellant retired from the employing establishment effective January 1, 2016.⁴

On October 4, 2016 OWCP accepted appellant's claim for left index trigger finger. On December 8, 2016 appellant underwent an OWCP authorized left carpal tunnel release, left index trigger finger release, and left wrist first dorsal extensor compartment release, which was performed by Dr. Jonathan Pribaz, a Board-certified orthopedic surgeon. On January 17, 2018 she filed a claim for a schedule award (Form CA-7).

In a December 21, 2017 report, Dr. Angela Jones, a Board-certified orthopedic surgeon and OWCP second opinion physician, reviewed a statement of accepted facts (SOAF)⁵ and the medical file and noted examination findings of the left trigger finger, which included stiffness and soreness, and decreased range of motion. Regarding appellant's current claim, Dr. Jones opined that appellant had reached maximum medical improvement (MMI) on September 1, 2017, a year following her surgery. She indicated that her impairment evaluation was based on the singular diagnosis of trigger digit. Dr. Jones opined, under the sixth edition of the American Medical

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 28, 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.*

⁴ Under OWCP File No. xxxxx076, date of injury July 14, 1995, appellant has an accepted occupational disease claim for bilateral carpal tunnel, sprain of the radial collateral ligament of the bilateral elbow and forearm, and sprain of the acromioclavicular bilateral shoulder and upper arm. OWCP File No. xxxxx076 was administratively combined with OWCP File No. xxxxx433 which served as the master case file. Under OWCP File No. xxxxx433, date of injury of September 15, 1995, appellant has an accepted occupational claim for bilateral carpal tunnel, sprain of the radial collateral ligament of the bilateral elbow and forearm, sprain of the acromioclavicular bilateral shoulder and upper arm, and unspecified mononeuritis of bilateral upper limb. Appellant has received schedule awards for a total 25 percent left upper extremity and total 25 percent right upper extremity impairment under this master file.

⁵ The SOAF reviewed by Dr. Jones is not of record.

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ the range of motion (ROM) methodology for an index finger impairment involving each of the joints was used, as it resulted in the higher impairment rating over the diagnosis-based impairment (DBI) methodology. She provided her calculations, cited to tables within the A.M.A., *Guides*, and opined that appellant had 14 percent combined left digit impairment which converted to 3 percent upper extremity impairment utilizing the ROM methodology.

In a January 5, 2018 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed a SOAF dated December 6, 2017,⁷ the medical file and Dr. Jones' December 21, 2017 report. Applying Dr. Jones' examination findings to the A.M.A., *Guides*, the DMA calculated eight percent impairment of the index digit for residual problems status post release of trigger digit which converted to one percent upper extremity impairment under the DBI methodology. Under the ROM methodology, the DMA calculated 20 percent impairment of the index digit which converted to 4 percent upper extremity impairment. He indicated that as the ROM methodology produced the higher impairment rating, it would be used. The DMA opined that appellant reached MMI December 21, 2017, when she was evaluated by Dr. Jones. He further explained the differences between his impairment calculation and that of Dr. Jones. The DMA indicated that as appellant was previously awarded 45 percent permanent impairment of the left upper extremity and was entitled to an additional 4 percent impairment for the index digit, she had a combined 49 percent total left upper extremity impairment.

On March 8, 2018 OWCP requested a clarification report from the DMA regarding his comments that OWCP previously awarded appellant a total of 45 percent permanent impairment to the left upper extremity. It advised that appellant was previously awarded a total of 25 percent permanent impairment for the left upper extremity. An attached amended March 8, 2018 SOAF noted the history of appellant's employment injuries. It indicated that in OWCP File No. xxxxxx433, appellant had been awarded 20 percent permanent impairment for the left upper extremity and 20 percent permanent impairment for the right upper extremity with subsequent awards for an additional 5 percent impairment for the right upper extremity and 5 percent impairment for the left upper extremity.

In a March 10, 2018 supplemental report, the DMA reviewed the amended March 8, 2018 SOAF. He opined that, as appellant previously received 25 percent permanent impairment to the left upper extremity and was entitled to an increase impairment of 4 percent, she had 29 percent total left upper extremity permanent impairment.

By decision dated January 2, 2019, OWCP granted appellant an additional schedule award for four percent permanent impairment of the left upper extremity affording the weight of the medical evidence to the DMA. It indicated that this represented 49 percent total impairment minus 45 percent impairment previously awarded. The award ran for 1.84 weeks for the period December 21, 2017 through January 2, 2018.

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ The SOAF sent to Dr. Harris is not in the current record.

On January 7, 2019 appellant requested reconsideration. In a January 7, 2019 letter, she contended that Dr. Jones' report did not address all her permanent conditions concerning her left upper extremity. Appellant indicated that Dr. David Weiss, a Board-certified orthopedic surgeon and osteopath, provided a comprehensive report of her permanent medical conditions in his August 21, 2018 medical report.

In a January 22, 2019 letter, appellant requested that OWCP expand the acceptance of her case to include all the medical conditions identified in Dr. Weiss' August 21, 2018 report. She addressed several issues she had concerning the case development of OWCP File No. xxxxxx433. Appellant also indicated that her carpal tunnel surgery had failed and that she needed further medical treatment.

By decision dated February 28, 2019, OWCP denied further merit review of appellant's claim. It found that her request for reconsideration neither raised substantive legal questions nor included new and relevant evidence.

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 or her own motion or on application.⁸

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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ If the request is timely, but fails to meet at least one of the

⁸ 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).

⁹ 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).

¹⁰ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally 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). *Id.* at Chapter 2.1602.4b.

¹¹ *Id.* at § 10.608(a); *see D.L.*, Docket No. 18-0449 (issued October 23, 2019); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹²

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 January 7, 2019 reconsideration request, appellant contended that Dr. Jones' report failed to address all of her permanent medical conditions concerning her left upper extremity. She also requested, in a January 22, 2019 letter, that OWCP evaluate her left upper extremity permanent impairment including all the medical conditions identified in Dr. Weiss' August 21, 2018 medical report. As appellant seeks to have all of her conditions reviewed in the determination of the schedule award, that the Board finds that OWCP should combine the current File No. xxxxxx331 with File No. xxxxxx433 so that all her left upper extremity accepted conditions are considered in her schedule award rating, the Board finds that this is a relevant legal argument made for the first time on reconsideration, under criteria number two under 20 C.F.R. § 10.606(b)(3).¹³

OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files.¹⁴ For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.

Appellant requested that OWCP take into account all of the accepted conditions of her left upper extremity, and, as such OWCP should combine the current File No. xxxxxx331 with File No. xxxxxx433 (which included File No. xxxxxx076). As appellant advanced a legal argument relevant to her claim which had not previously been considered by OWCP, such argument warrants further consideration by a merit review of her claim.¹⁵

The Board will therefore remand the case to OWCP to combine this claim with Master File No. xxxxxx433. Following this and such other further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹² *Id.* at § 10.608(b); *G.D.*, Docket No. 19-0815 (issued January 16, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹³ *See L.S.*, Docket No. 18-0858 (issued November 19, 2019).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c) (February 2000); *J.C.*, Docket No. 18-0649 (issued August 9, 2019).

¹⁵ *See Q.M.*, Docket No. 18-0345 (issued May 17, 2019); *D.M.*, Docket No. 16-1754 (issued January 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: April 16, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board