

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

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V.R., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Chicago, IL, Employer )

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**Docket No. 19-1761  
Issued: April 15, 2020**

*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  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On August 19, 2019 appellant filed a timely appeal from a July 22, 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 January 9, 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 July 22, 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 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 June 6, 2013 appellant, then a 27-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that she injured her right upper arm due to factors of her federal employment. She noted that she first became aware of her condition and realized that it was caused or aggravated by her employment on May 30, 2013. On August 5, 2013 OWCP accepted appellant's claim for right shoulder rotator cuff strain. On June 24, 2014 it accepted appellant's recurrence claim for right shoulder rotator cuff and upper arm sprain. On August 19, 2014 OWCP expanded appellant's acceptance of the claim to include right shoulder adhesive capsulitis and right shoulder and upper arm subscapularis sprain.

In an October 31, 2016 letter, Dr. Harun Durudogan, D.O., a Board-certified orthopedic surgeon, indicated that appellant was injured on May 30, 2013. He noted that she first required a bursectomy, subacromial decompression, and distal clavicle resection. Appellant was then treated with injections and occupational therapy for her pain, numbness, and tingling. Physical therapy helped alleviate appellant's numbness and tingling, but she continued to experience shoulder pain. Dr. Durudogan indicated that appellant's shoulder pain was caused by the diagnosis of complex regional pain syndrome (CRPS), and that appellant had reached maximum medical improvement (MMI).

In a November 1, 2016 report, Dr. Durudogan noted that appellant continued to experience shoulder pain that radiated into her right arm. A physical examination of appellant's right shoulder revealed tenderness upon palpation of the glenohumeral joint region, the trapezius muscle, and the rhomboid muscles. Appellant's range of motion was abnormal and pain was elicited during a Neer impingement test, a crossed arm impingement test, and a Hawkins-Kennedy impingement test. A neurological examination revealed motor strength weakness in appellant's right shoulder. Dr. Durudogan diagnosed persistent neuropraxia right upper extremity CRPS.

On December 12, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a January 18, 2017 report, Dr. Arthur Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted that he reviewed appellant's medical records and a statement of accepted facts (SOAF). He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>3</sup> and determined that appellant had five percent right upper extremity permanent impairment due to residual problems with her partial thickness rotator cuff tear, which resulted from her May 30, 2013 accepted employment injury. The DMA also noted that appellant reached MMI on November 1, 2016, based on the opinion of Dr. Durudogan.

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

By decision dated February 13, 2017, OWCP granted appellant a schedule award for five percent permanent impairment of her right upper extremity.

In a February 20, 2017 letter, Dr. Durudogan opined that the five percent right upper extremity permanent impairment calculation was incorrect. He noted that a January 1, 2017 functional capacity evaluation (FCE) indicated that appellant's right arm suffered a 60 percent loss when lifting overhead, a 67 percent loss when lifting from desk or chair height, and a 60 percent loss when carrying. Dr. Durudogan also noted that she was right-hand dominant and had difficulty performing activities of daily living with the affected extremity secondary to intermittent pain, as her flare ups were unpredictable and she was intolerably sensitive to cold temperatures. He also noted that she could not alleviate her condition with traditional conservative methods.

On February 23, 2017 OWCP referred appellant for a second opinion examination by Dr. Steven Chandler, D.O., a Board-certified orthopedic surgeon.

On February 27, 2017 appellant requested an oral hearing before an OWCP hearing representative.

In a February 27, 2017 letter, appellant indicated that she disagreed with her award of five percent permanent impairment of her right upper extremity because her FCE, which demonstrated extreme loss of strength in her arm, was not taken into consideration. She also noted that it was not mentioned that she was right-hand dominant or that she had unpredictable pain flare ups.

In a March 13, 2017 second opinion report, Dr. Chandler noted that appellant presented with shoulder and neck pain. He reviewed her medical history and conducted a physical examination of her right shoulder, which revealed anterior and lateral pain and tenderness in the subacromial space, the supraspinatus tendons, the proximal biceps tendon, the glenohumeral joint, and the trapezius muscle. It additionally revealed decreased range of motion in its forward flexion, extension, abduction, and internal and external rotation. Dr. Chandler indicated that appellant's rotator cuff tendinitis and right upper extremity CRPS were due to her accepted May 30, 2013 employment injury. He noted that appellant still had residuals from her diagnoses, and that most of which were from her CRPS. Dr. Chandler opined that she was possibly partially disabled, and although she was still able to work, her limitations were permanent. He noted that appellant had weakness and decreased range of motion in her right upper extremity and therefore limited use.

On March 31, 2017 OWCP expanded its acceptance of the claim to include additional conditions of right shoulder CRPS, impingement syndrome, and tendinitis.

On August 2, 2017 OWCP conducted an oral hearing. By decision dated September 14, 2017, an OWCP hearing representative set aside the February 13, 2017 decision and remanded the case for further development of the medical evidence.

OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion examination. In a November 28, 2017 second opinion report, Dr. Brecher indicated that he reviewed appellant's medical records and an updated SOAF. He conducted a physical examination of appellant's right shoulder which revealed a flexion of 130 degrees, abduction of 100 degrees, internal rotation of 50 degrees, external rotation of 80 degrees, extension of 50 degrees, and adduction of 40 degrees. Dr. Brecher indicated that he could not provide a

permanent impairment rating for appellant's CRPS because he found no physical findings which would allow a rating pursuant to the sixth edition of the A.M.A., *Guides* definition of CRPS. He applied the A.M.A., *Guides* and determined that appellant had eight percent permanent impairment of the right upper extremity. Dr. Brecher noted that she had reached MMI on November 1, 2016.

In a December 21, 2017 report, OWCP's DMA Dr. Michael Katz, a Board-certified orthopedic surgeon, indicated that he reviewed the SOAF and appellant's medical records. He applied the A.M.A., *Guides* and determined that appellant had 11 percent right upper extremity permanent impairment based upon loss of range of motion, which was greater than her diagnosis-based permanent impairment of 5 percent. Dr. Katz explained that his impairment rating was higher than Dr. Brecher's because he had failed to assign impairment for appellant's right shoulder extension loss. He found that appellant reached MMI on November 28, 2017, the date of Dr. Brecher's examination.

On January 9, 2018 OWCP granted appellant a schedule award for an additional six percent permanent impairment of her right upper extremity.

Appellant continued to submit medical reports, work restrictions, and diagnostic test results.

OWCP referred appellant to Dr. Theodore Suchy, D.O., a Board-certified orthopedic surgeon, for another second opinion evaluation. In a report dated October 25, 2018, Dr. Suchy noted appellant's physical examination findings, including that she had normal range of motion of the right shoulder and that her grip strength on the right was 11/8/9 compared to 56/42/55 on the left. He concluded that appellant had sustained a right shoulder strain with rotator cuff tendinitis which subsequently developed into a complex regional pain syndrome, which was chronic and debilitating, as a result of her accepted employment injury.

On November 21, 2018 appellant requested reconsideration. In an accompanying statement, she noted that Dr. Suchy's report provided new medical information, specifically that while her left grip strength measurements were greater than her right grip measurements. Appellant stated that this was the first time her grip strength was ever tested, and that she had never been compensated for her loss of strength.

In a letter dated March 27, 2019, appellant argued that, while Dr. Brecher's report indicated that she could not be rated for her CRPS, both Dr. Chandler and Dr. Suchy determined that appellant had CRPS, and she should therefore be compensated for the permanent impairment due to that condition. In an April 7, 2019 letter, she again argued that she should be compensated for her CRPS, as it was an accepted medical condition.

By decision dated July 22, 2019, OWCP denied appellant's reconsideration request, finding that she failed to raise substantive legal questions or submit 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 own motion or on application.<sup>4</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>5</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>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</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>8</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).

The Board has held that the reopening of a case may be predicated solely on a legal premise not previously considered, where the legal contention has a reasonable color of validity.<sup>9</sup>

In a letter accompanying her November 21, 2018 reconsideration request, appellant argued that the October 25, 2017 report from Dr. Suchy, OWCP's second opinion physician, supported a finding that she had loss of right hand grip strength, which had not been taken into consideration when determining her schedule award. She also noted that Dr. Suchy supported a finding that she had permanent residuals of her accepted CRPS condition for which she had not received a schedule award. As Dr. Suchy was OWCP's second opinion physician, it was necessary for OWCP to

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<sup>4</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>5</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>6</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>7</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>9</sup> *E.R.*, Docket No. 18-0446 (issued November 6, 2019).

resolve all issues presented by his evaluation.<sup>10</sup> Therefore, appellant has advanced a new and relevant legal argument not previously considered by OWCP.

As appellant has advanced a new and relevant legal argument not previously considered by OWCP, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.<sup>11</sup> Following such further development as deemed necessary, OWCP shall 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).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 22, 2019 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: April 15, 2020  
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> As OWCP undertook development of the evidence by referring appellant to the second opinion examiner it had the duty to secure an appropriate report addressing the relevant issues. *D.M.*, Docket No. 17-1832 (issued March 14, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

<sup>11</sup> *See T.P.*, Docket No. 18-0608 (issued August 2, 2018); *see also L.K.*, Docket No. 15-0659 (issued September 15, 2016); *see also T.L.*, Docket No. 16-0536 (issued July 6, 2016).