

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 December 1, 2016 appellant, then a 60-year-old aircraft electrician, filed an occupational disease claim (Form CA-2) alleging that he has sustained a neck injury due to performing the repetitive duties of his federal employment. OWCP accepted his claim for aggravation and acceleration of multi-level cervical disc degeneration at C3-4, C4-5, C5-6, and C6-7. On December 21, 2016 appellant underwent OWCP-authorized anterior cervical discectomy surgery at C3-4 and C4-5.

On June 23, 2017 appellant filed a claim for a schedule award (Form CA-7) due to his accepted employment condition.

In August 2017, OWCP referred appellant for a second opinion examination to Dr. Robert M. Moore, a Board-certified orthopedic surgeon. It requested that Dr. Moore evaluate appellant's permanent impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In an October 30, 2017 report, Dr. Moore detailed his physical examination findings and referenced October 17, 2017 electromyogram and nerve conduction velocity (EMG/NCV) testing of the upper extremities which showed normal results. He determined that appellant did not have a permanent impairment of the upper extremities under the standards of the sixth of the A.M.A., *Guides*.

OWCP then referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, who served as a district medical adviser (DMA). On November 8, 2017 the DMA advised that he agreed with Dr. Moore's assessment that appellant did not have permanent impairment of the upper extremities under the standards of the sixth edition of the A.M.A., *Guides*.

By decision dated November 13, 2017, OWCP denied appellant's schedule award claim, finding that he had not met his burden of proof to establish employment-related permanent impairment of a scheduled member or function of the body. It noted that Dr. Moore and the DMA found that appellant had no such permanent impairment and concluded that "the claim is denied because the requirements have not been met for entitlement to a schedule award."

On November 13, 2018 appellant requested reconsideration of the November 13, 2017 decision. In an accompanying November 9, 2018 letter, he discussed his neck and shoulder conditions and the limitations he experienced due to these conditions.

Appellant submitted reports, dated between November 2015 and December 2017, from Dr. Richard A. Bloomfield, a Board-certified family practitioner. Dr. Bloomfield opined that

³ A.M.A., *Guides* (6th ed. 2009).

appellant had employment-related neck and bilateral shoulder pain. In reports, dated between January and November 2018, Drs. Mark Rouff, John Norbury, and Hannah Florida, all of whom were Board-certified in physical medicine and rehabilitation, addressed appellant's neck and shoulder complaints. The reports collectively contained such diagnoses as cervical spondylosis without myelopathy, cervical dystonia, cervicgia, bilateral carpal tunnel syndrome, and degenerative joint disease of both shoulders.

Appellant also submitted treatment reports, dated between December 2016 and October 2018, from several attending physician assistants, including Breanna Acero, Laura Buennemeyer, and Susan Evers, as well as periodic session reports, dated between December 2017 and December 2018, from James Tracy and Katie Knight, his attending physical therapists. In addition, he submitted diagnostic testing reports, dated between March 2017 and April 2018, including reports of magnetic resonance imaging (MRI) scans of the cervical spine and of x-ray-testing of the shoulders.

By decision dated February 20, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 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. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁴

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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.⁵ If it determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁶ 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.⁷

To be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.⁸ Timeliness is determined by the document "received date" as recorded in the integrated Federal Employees' Compensation System (iFECS).⁹

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁷ *Id.* at § 10.608(b); *L.S.*, Docket No. 18-0858 (issued November 19, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *Id.* at § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹⁰

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

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).

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that he is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).¹³

In support of his request for reconsideration, appellant submitted medical reports, dated between November 2015 and November 2018, from Drs. Bloomfield, Rouff, Norbury, and Florida, and diagnostic testing reports, dated between March 2017 and April 2018. These reports do not contain an evaluation of permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. While appellant submitted new medical evidence in support of his reconsideration request, it was not relevant because it did not address the underlying issue of the present case, *i.e.*, whether he submitted sufficient medical evidence to establish employment-related permanent impairment of a scheduled member or function of the body. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Therefore, appellant's submission of this new medical evidence does not require reopening his case for review on the merits.

The Board notes that several of the medical reports appellant submitted in connection with his reconsideration request had previously been submitted and considered by OWCP. However, the resubmission of this evidence also does not require reopening of his case for review on the merits as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁵

Appellant also submitted reports, dated between December 2016 and December 2018, of attending physician assistants Acero, Buennemeyer, and Evers, and physical therapists, Tracy

¹⁰ *Id.* See also *M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹¹ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹² *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ See *supra* note 5.

¹⁴ See *supra* note 12.

¹⁵ See *supra* note 11.

and Knight. However, physician assistants and physical therapists are not considered physicians as defined under FECA and the reports of such nonphysicians do not constitute probative medical evidence.¹⁶ The Board thus finds that these reports are also insufficient to constitute a basis for reopening the case for a merit review. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁷

The Board therefore 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.¹⁸

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).

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-0829 (issued August 20, 2013). *See* 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁷ *See supra* note 5.

¹⁸ *See supra* notes 5 through 7.