

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim in accordance with 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 27, 2007 the employee, then a 57-year-old craft mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she sprained her lower back and left shoulder on August 23, 2007 when pulling a tray of mail while in the performance of duty. OWCP accepted her claim for lumbar strain on October 17, 2007. On November 20, 2007 it expanded its acceptance of the claim to include left rotator cuff sprain.

On December 17, 2007 the employee underwent authorized left subacromial decompression with repair of the rotator cuff tendon, bursectomy, and resection of the coracoacromial ligament.

On March 25, 2008 OWCP again expanded its acceptance of the claim to include disorders of the bursae and tendons of the left shoulder. On July 18, 2008 it also accepted aggravation of L5-S1 disc herniation, post-laminectomy syndrome L5-S1, lumbosacral spondylosis without myelopathy and post-laminectomy kyphosis.

On September 17, 2008 the employee underwent an authorized anterior discectomy and fusion at the L5-S1 level.

On March 11, 2010 the employee filed a separate traumatic injury claim (Form CA-1) alleging that on March 1, 2010 she felt pain in her right shoulder when reaching for a tray of mail while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx192 and, by decision dated June 22, 2010, accepted it for right rotator cuff sprain. On January 10, 2011 it administratively combined OWCP File No. xxxxxx192 with the present claim, OWCP File No. xxxxxx981, with the latter serving as the master file.

On December 16, 2011 and December 5, 2012 the employee underwent additional shoulder surgeries to repair left rotator cuff tears.

By decision dated March 19, 2013, OWCP granted the employee a schedule award for eight percent permanent impairment of her right upper extremity.

On April 11, 2013 the employee requested reconsideration of the March 19, 2013 decision. She asserted that her March 19, 2013 schedule award was based on an incorrect pay rate.

By decision dated April 23, 2013, OWCP denied the employee's request for reconsideration of the merits of her right upper extremity schedule award under 5 U.S.C. § 8128(a).

By decision dated May 16, 2013, OWCP granted the employee a schedule award for 21 percent permanent impairment of her left upper extremity based on loss of range of motion (ROM).

By decision dated September 6, 2013, OWCP affirmed the pay rate used in the March 19, 2013 right upper extremity schedule award decision.

On May 4, 2015 the employee requested reconsideration of the May 16, 2013 schedule award decision. She alleged that her physician had made a mathematical error in the calculation of the permanent impairment of her left upper extremity and that OWCP should have found that she had 22 percent permanent impairment of her left upper extremity based on his report.

By decision dated May 13, 2015, OWCP denied the employee's request for reconsideration of the merits of the left upper extremity schedule award.

The employee filed a claim for an additional schedule award (Form CA-7) on January 12, 2017. In a January 16, 2017 letter, she informed OWCP that she was requesting an additional schedule award for her spinal injuries and organ failure due to medications used to treat her accepted spine injuries.³

In a January 24, 2017 development letter, OWCP requested additional medical evidence in support of the employee's claim for an additional schedule award. It afforded her 30 days to respond.

On February 4, 2017 appellant requested an additional schedule award on behalf of the employee, her deceased mother. In support of this request, she provided a February 1, 2017 note from Dr. Juan S. Dinkins, an osteopath. Dr. Dinkins opined that the employee had 13 percent whole person impairment due to radiculopathy.

In a report dated June 13, 2017, Dr. Nathan Hammel, a Board-certified orthopedic surgeon and district medical adviser (DMA), reviewed Dr. Dinkins' report and the medical evidence of record. He found that the employee had no additional permanent impairment of a scheduled member or function of the body as there were no residual motor or sensory changes in her upper or lower extremities. Dr. Hammel noted that Dr. Dinkins did not apply the appropriate provisions of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)⁴ to his findings.

By decision dated August 8, 2017, OWCP denied the employee's claim for an additional schedule award.

On October 5, 2017 appellant requested reconsideration and argued that the DMA had reviewed an examination from an unqualified doctor and did not mention electromyography findings.

On January 19, 2018 OWCP referred the employee's medical records and a statement of accepted facts (SOAF) for a second opinion evaluation regarding the nature and extent of the employee's permanent impairment. The SOAF listed the employee's accepted conditions as lumbar strain/sprain, left shoulder rotator sprain, temporary aggravation of lumbar herniated disc at L5-S1, disorder, other affections of bursae tendons in the left shoulder. It further noted the employee's December 17, 2007, December 16, 2011, and November 26, 2012 left shoulder surgeries and September 17, 2009 lumbar spine surgery. The SOAF also indicated that the

³ On January 21, 2017 the employee passed away.

⁴ A.M.A., *Guides*, 6th ed. (2009).

employee had received a schedule award for 21 percent permanent impairment of the left upper extremity.

In a February 2, 2018 report, Dr. Martin G. Mendelssohn, a Board-certified orthopedic surgeon serving as OWCP's referral physician, noted his review of the employee's medical records and SOAF. He found that the employee had no additional permanent impairment due to her accepted back conditions.

On February 27, 2018 DMA Dr. Hammel again reviewed the medical evidence of record and found that the employee had no additional permanent impairment of a scheduled member or function of the body due to her accepted conditions.

By decision dated March 12, 2018, OWCP denied modification of the August 8, 2017 denial of an additional schedule award.

On May 24, 2018 appellant requested reconsideration of the March 12, 2018 decision. She submitted additional medical records dated March through October 2016 addressing the employee's accepted employment-related conditions as well as chronic obstructive pulmonary disease, chronic kidney disease, liver cirrhosis, diabetes, congestive heart failure, gastric ulcer, osteoarthritis, right foot pain hypertension, edema, obesity, chronic back pain, failed back syndrome, and right knee pain. Appellant also submitted medical records from Amanda Furline, a family nurse practitioner, dated July 5, and December 29, 2016 and Syretta Perkins, a family nurse practitioner, dated May 5, 2016. She provided previously submitted documentation from the employee regarding her prior schedule award claims. Additionally, appellant submitted a copy of the employee's February 22, 2002 surgical report for micro-lumbar discectomy at L5-S1. She also provided an x-ray report regarding the employee's left wrist.

In a May 14, 2018 report, Dr. Demond White, a family practitioner, discussed the employee's medical history and diagnoses.

By decision dated August 7, 2018, OWCP denied modification of its March 12, 2018 decision. It found that the evidence submitted did not address permanent impairment as a result of the accepted employment injuries.

On December 14, 2018 appellant again requested reconsideration of OWCP's denial of an additional schedule award. An appeal request form requesting reconsideration of the March 12, 2018 decision included the following handwritten notation, "Error of fact in its own procedure in FECA Bulletin No. 17-06 (issued May 8, 2017). Dr. Dinkins properly used [diagnosis-based impairment (DBI)] method of evaluation of 13 percent whole body -- SOAF was incomplete." The appeal request form requesting reconsideration of the August 7, 2018 decision included the following handwritten notation, "Error of fact in its own procedure in FECA Bulletin No. 17-06 (issued May 8, 2017). Please review FECA bulletin and provide accurate decision. SOAF is incomplete." In support of this request, appellant provided a copy of FECA Bulletin No. 17-06. She annotated portions of the bulletin to highlight language, including the requirement that both diagnosis-based and ROM impairments be calculated in determining the impairment of upper extremities and that schedule award compensation should be based on the greater of these two impairment ratings.

By decision dated January 7, 2019, OWCP denied appellant's request for reconsideration of the merits of the additional schedule award claim.

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.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits. 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.⁸

When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at 20 C.F.R. § 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.⁹

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the claim.¹⁰

In support of her request for reconsideration, appellant contended that the employee's request for a schedule award should have included evaluation of the permanent impairment of her upper extremities as required under FECA Bulletin No. 17-06 (issued May 8, 2017). She further contended that the SOAF was incomplete and argued that Dr. Dinkins' impairment rating of 13

⁵ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁶ 20 C.F.R. § 10.606(b)(3); *L.D.*, *id.*; *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *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.

⁸ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

⁹ *T.B.*, Docket No. 18-0033 (issued May 23, 2018); *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ Preliminarily, the Board notes that OWCP did not receive any medical evidence of permanent impairment along with appellant's December 14, 2018 reconsideration request. The Board will therefore consider this to be a request for reconsideration as opposed to a claim for an increased schedule award. See *B.R.*, Docket No. 19-0372 (issued February 20, 2020); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Candace A. Karkoff*, 56 ECAB 622 (2005).

percent whole person impairment was correct under the DBI methodology. Appellant provided a copy of FECA Bulletin 17-06, with handwritten annotations. The Board finds that her legal arguments are new and relevant to the underlying issues in the employee's additional schedule award claims.

As appellant has advanced new and relevant legal arguments, she is entitled to a review of the merits of the claim under section 10.606(b)(3) of OWCP's regulations.¹¹ Following any further development as deemed necessary, OWCP shall issue an appropriate merit decision regarding the employee's additional schedule award claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the claim.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 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: October 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).