

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

<p>B.F., Appellant</p> <p>and</p> <p>DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Spokane, WA, Employer</p>)))))))))))))	<p>Docket No. 21-1088 Issued: February 14, 2022</p>
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 12, 2021 appellant filed a timely appeal from a February 17, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 5, 2020, 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.

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).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 22, 2018 appellant, then a 54-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he fractured his right forearm when he was pulled off his horse while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx467, for a strain of unspecified muscle, fascia, and tendons at the right shoulder and upper arm and a displaced transverse fracture of the shaft of the right radius. On August 3, 2018 appellant underwent an OWCP-authorized subacromial decompression and rotator cuff repair of the right shoulder. He stopped work on May 23, 2018 and returned to work on October 23, 2018.

OWCP previously accepted that appellant sustained a right distal radius fracture on December 21, 2003, assigned OWCP File No. xxxxxx782.

By decision dated August 23, 2005, issued under OWCP File No. xxxxxx782, it granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity.

In an October 26, 2019 impairment evaluation, Dr. Miguel Schmitz, a Board-certified orthopedic surgeon, found that appellant had five percent permanent impairment due to his right rotator cuff tear using 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*).² He further found two percent permanent impairment due to his forearm fracture using Table 15-4 on page 399, for a combined impairment of seven percent permanent impairment of the right upper extremity.

On November 6, 2019 appellant filed a claim for a schedule award (Form CA-7) under OWCP File No. xxxxxx467.

On December 19, 2019 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), concurred with Dr. Schmitz' finding of seven percent permanent impairment of the right upper extremity. He noted that appellant had previously received a schedule award for 13 percent permanent impairment of the right upper extremity, and thus found that he had not sustained an increased impairment.

By decision dated February 7, 2020, OWCP denied appellant's request for an increased schedule award.

On March 3, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated April 24, 2020, Dr. Schmitz advised that he had initially rated the extent of appellant's permanent impairment considering only his right shoulder and right forearm injury. He noted that appellant also had a history of a right distal radius fracture which was treated with an open reduction and internal fixation. Dr. Schmitz provided range of motion (ROM) measurements for the right wrist and indicated that he had a moderate deficit in shoulder motion and some loss of forearm motion. He found five percent permanent impairment of the right upper

² A.M.A., *Guides* (6th ed. 2009).

extremity due to the rotator cuff tear under Table 15-5, two percent permanent impairment due to the right bone forearm fracture using Table 15-4, and nine percent permanent impairment due to post-traumatic osteoarthritis of the distal radius according to Table 15-3 on page 397. Dr. Schmitz combined the impairment ratings to find 16 percent permanent impairment of the right upper extremity.

Following a preliminary review, by decision dated May 27, 2020, OWCP's hearing representative vacated the February 7, 2020 decision. The hearing representative remanded the case for OWCP to combine OWCP File Nos. xxxxxx782 and xxxxxx467, compare a rating due to loss of ROM with the diagnosis-based impairment (DBI) method, and refer the case for the DMA to review Dr. Schmitz' April 24, 2020 report.

On June 19, 2020 Dr. Harris advised that appellant had previously received a schedule award for 13 percent permanent impairment and thus was not entitled to an increased impairment. He asserted that rating the impairment using the ROM method was not applicable. Dr. Harris further indicated that he had not been provided with an impairment evaluation to review.

By decision dated August 5, 2020, OWCP denied appellant's claim for an increased schedule award.

On December 1, 2020 appellant requested reconsideration. In an accompanying statement dated November 23, 2020, he asserted that Dr. Harris had failed to review Dr. Schmitz' April 24, 2020 report finding 16 percent permanent impairment of the right upper extremity. Appellant noted that the hearing representative had remanded the case for OWCP to consider all evidence, including Dr. Schmitz' April 24, 2020 report.

By decision dated February 17, 2021, OWCP denied appellant's request for further review of the merits 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 compensation at any time on his own motion or on application.³

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.⁴

³ 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).

⁴ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, 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

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration, appellant contended that Dr. Harris, the DMA, failed to review the April 24, 2020 impairment evaluation from Dr. Schmitz in concluding that he had no more than the previously awarded 13 percent permanent impairment of the right upper extremity. He noted that OWCP's hearing representative had instructed OWCP to consider Dr. Schmitz' April 24, 2020 report on remand. In his June 19, 2020 report, Dr. Harris asserted that he had not been provided with an impairment evaluation to review. The Board thus finds that appellant's argument is new and relevant to the underlying issue of the extent of appellant's permanent impairment of the right upper extremity.⁸ The legal argument requires reopening of his claim for merit review pursuant to the second prong of 20 C.F.R. § 10.606(b).⁹

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall therefore be remanded to OWCP for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.¹⁰

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original 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.

⁶ *Id.* at § 10.608(a); *see also* *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *K.N.*, Docket No. 20-1188 (issued July 20, 2021); *J.H.*, Docket No. 20-1312 (issued April 26, 2021).

⁹ *K.N.*, *id.*

¹⁰ *V.S.*, Docket No. 20-0502 (issued December 31, 2020).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2021 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: February 14, 2022
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