

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

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G.B., Appellant)	
)	
and)	
)	Docket No. 22-0249
)	Issued: September 14, 2022
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
New York, NY, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 3, 2021 appellant, through counsel, filed a timely appeal from an October 26, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Counsel did not appeal from September 1, 2021 OWCP merit decision. He identified only the October 26, 2021 nonmerit decision on the application for review (Form AB-1). As such, the September 1, 2021 merit decision is not properly before the Board on the current appeal. *See* 20 C.F.R. § 501.3; *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also M.M.*, Docket No. 20-0523 (issued August 25, 2020).

to the Federal Employees' Compensation Act (FECA)³ and 20 C.F.R. § 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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 March 12, 2009 appellant, then a 48-year-old management/program analyst, filed an occupational disease claim (Form CA-2) alleging that her accepted bilateral carpal tunnel syndrome⁵ had been aggravated by new factors of her federal employment. She noted that she first became aware of the aggravation of her condition and realized its relation to her federal employment on March 10, 2009. OWCP accepted the claim for bilateral carpal tunnel syndrome. It authorized right carpal tunnel surgery and right wrist/forearm tendon release, which was performed on December 16, 2010.

On February 16 and August 18, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a report dated March 8, 2017, Dr. Kumar S. Reddy, a Board-certified orthopedic surgeon, found no clinical findings consistent with carpal tunnel syndrome although appellant had symptoms and opined that appellant had reached maximum medical improvement. He provided a permanent impairment rating for the left wrist utilizing Table 15-3 (Wrist Regional Grid) on page 396 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ Dr. Reddy concluded that appellant had six percent permanent impairment of the right upper extremity and eight percent permanent impairment of the left upper extremity.

On August 29, 2017 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), for a schedule award impairment rating with Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the district medical adviser (DMA). In a September 8, 2017 report, Dr. Harris reviewed the medical record and SOAF. He disagreed with Dr. Reddy's March 8, 2018 impairment rating report, noting he did not document any upper extremity neurologic impairment. Dr. Harris applied Table 15-23, page 449 of the A.M.A., *Guides*, and applied a grade modifier 1

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the October 26, 2021 nonmerit decision and on appeal, OWCP received additional evidence and argument. 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.*

⁵ Appellant referred to a 1997 OWCP claim, which had been accepted for carpal tunnel syndrome under OWCP File No. xxxxxx382.

⁶ A.M.A., *Guides* (6th ed. 2009).

based on abnormal test findings and intermittent symptoms without sensory deficits. He found that appellant had a final upper extremity permanent impairment rating of two percent permanent impairment of each upper extremity due to carpal tunnel syndrome.

Dr. Reddy, in an October 23, 2017 supplemental report, found two percent permanent impairment of each upper extremity using Table 15-23, page 449.

By decision dated March 26, 2018, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity. The award ran for 12.48 weeks during the period March 8 through June 3, 2017.

On April 2, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 25, 2018. By decision dated September 10, 2018, OWCP's hearing representative affirmed the March 26, 2018 schedule award decision.

In an impairment rating dated October 22, 2018, Dr. Stewart A. Kaufman, a Board-certified orthopedic surgeon, determined that appellant had six percent permanent impairment of each upper extremity.

On November 1, 2018 OWCP authorized left carpal tunnel surgery, which occurred on December 18, 2018.

In a June 5, 2019 updated impairment rating, Dr. Kaufman reviewed an electromyogram (EMG) and, using Table 15-23, page 449, he opined that appellant had a grade modifier 2 for clinical studies (GMCS) due to conduction delay, a grade modifier of 2 for GMFH, and a grade modifier of 1 for GMPE, totaling 4 and averaging 1.3. He opined appellant had three percent permanent impairment of each upper extremity.

On July 8, 2019 appellant filed a Form CA-7 for an increased schedule award.

On October 25, 2019 OWCP referred appellant's case, along with a SOAF, for a schedule award impairment rating to Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as the DMA. In a report dated November 12, 2019, Dr. Slutsky disagreed with Dr. Kaufman's June 5, 2019 impairment rating, noting that appellant's preoperative diagnostic studies were normal and did not meet the criteria for carpal tunnel syndrome under the A.M.A., *Guides*. He noted that peripheral nerve compression was rated under Table 15-23, page 449 and could not be rated using either the diagnostic based impairment (DBI) or the range of motion (ROM) method. Thus, Dr. Slutsky concluded that appellant had a zero percent permanent impairment for bilateral carpal tunnel syndrome.

By decision dated December 17, 2019, OWCP denied appellant claim for an increased schedule award.

On December 24, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 1, 2020.

In a report dated April 14, 2020, Dr. Nathan Hammel, a Board-certified orthopedic surgeon, serving as a DMA, opined that there was no support for additional carpal tunnel release. He noted that the 2018 left carpal tunnel release surgery had been medically necessary.

By decision dated May 19, 2020, OWCP's hearing representative affirmed the right upper extremity permanent impairment rating. However, the hearing representative set aside the December 17, 2019 decision with regard to appellant's left upper extremity permanent impairment and remanded for further development of the medical evidence.

On May 20, 2020 OWCP referred appellant's case, along with a SOAF and 2016 EMG/nerve conduction velocity (NCV) study, for an updated schedule award impairment rating with Dr. Slutsky. In a supplemental report dated June 7, 2020, Dr. Slutsky reiterated his findings and opinion that appellant had zero percent permanent impairment in each upper extremity for the accepted bilateral carpal tunnel syndrome.

On June 15, 2020 OWCP requested clarification from Dr. Slutsky. In a June 7, 2020 addendum report, Dr. Slutsky reviewed a 2016 EMG/NCV study, which he noted was a preoperative study of both hands and which was within normal limits. Thus, he again opined that appellant had zero percent permanent impairment in each upper extremity for the accepted bilateral carpal tunnel syndrome.

In an August 30, 2020 supplemental report, Dr. Slutsky reviewed an April 14, 2020 report from Dr. Hammel and the May 19, 2020 hearing representative decision. He noted that Dr. Hammel made no mention of an impairment rating in his report and there was no new additional information clarifying why appellant had previously received two percent impairment rating. Thus, Dr. Slutsky concluded that appellant had zero percent permanent impairment in each upper extremity due to the accepted bilateral carpal tunnel syndrome.

By decision dated September 23, 2020, OWCP denied appellant's claim for an increased schedule award.

On September 29, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. OWCP's hearing representative conducted a preliminary review and issued a November 20, 2020 decision vacating the September 23, 2020 decision and remanding the case to OWCP for further development. The hearing representative determined that the only issue requiring a *de novo* decision was appellant's left upper extremity permanent impairment as appellant's right upper extremity permanent impairment had been affirmed in the May 19, 2020 hearing representative's decision.

On January 4, 2021 OWCP referred appellant's case, along with a SOAF and 2016 EMG/NCV study, to Dr. Slutsky for clarification regarding appellant's left upper extremity permanent impairment.

In a report dated March 23, 2021, Dr. Slutsky reviewed Dr. Reddy's reports from March 8 to October 23, 2017, noting that Dr. Reddy failed to explain the reasons for his impairment rating and did not provide any grade modifies or perform a net calculation. He explained that the EMG/NCV study conducted prior to the December 18, 2018 left carpal tunnel release was a preoperative study of both hands. As the study was within normal limits, there was no ratable

impairment according to the A.M.A., *Guides*. Dr. Slutsky reiterated his opinion that appellant had zero percent permanent impairment in each upper extremity due to the accepted bilateral carpal tunnel syndrome.

By decision dated April 2, 2021, OWCP denied appellant's claim for an increased schedule award for permanent impairment of the left upper extremity.

On April 8, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 7, 2021.

In a July 23, 2021 report, Dr. Marc Levinson, a Board-certified physiatrist, provided examination range of motion (ROM) findings. Appellant's physical examination findings demonstrated decreased pain and sensory light touch to the bilateral median distribution, left hand thenar atrophy, and unremarkable test of the left-hand examination. Dr. Levinson diagnosed bilateral hand carpal tunnel syndrome, bilateral hand tenosynovitis, bilateral wrist strain, and bilateral hand overuse syndrome, which he found causally related to her employment injury. He found appellant to be 50 percent temporarily impaired.

By decision dated September 1, 2021, OWCP's hearing representative affirmed the April 2, 2021 decision.

In a report dated September 3, 2021, Dr. Levinson corrected the date appellant had carpal tunnel release surgery from 2016 to 2010.

In a report dated September 3, 2021, Dr. Kate Nellans, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, right thumb trigger finger, and right de Quervain's tenosynovitis. She noted that appellant had right carpal tunnel release surgery in 2010 and left carpal tunnel release surgery in 2018. On physical examination Dr. Nellans reported full painless bilateral full elbow, wrist and fingers minus the right thumb motion, positive Finkelstein's test, weakly positive bilateral Phalen's test over wrist median nerve, and positive Tinel's sign over ulnar nerve at the wrist.

On October 15, 2021 appellant, through counsel, requested reconsideration.

By decision dated October 26, 2021, OWCP denied appellant's request for reconsideration of the merits of her 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 payment of compensation at any time on his own motion or on application.⁷

⁷ 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).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

ANALYSIS

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

OWCP previously denied appellant's claim for an increased schedule award because the medical evidence of record was insufficient to establish greater than two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity for which she previously received schedule award compensation. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding her schedule award claim to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹²

In counsel's October 15, 2021 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹³

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With her reconsideration request, appellant submitted a September 3, 2021 report from Dr. Levinson correcting the date of her right carpal tunnel release surgery and a September 3, 2021 report from Dr. Nellans providing physical examination findings,

⁸ 20 C.F.R. § 10.606(b)(3); *see also* *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

⁹ *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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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 2.1602.4(b).

¹⁰ *Id.* at § 10.608(a); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

¹¹ *Id.* at § 10.608(b); *K.S.*, Docket No. 18-1022 (issued October 24, 2018).

¹² *See* *A.M.*, Docket No. 21-1413 (issued March 28, 2022); *S.M.*, Docket No. 21-0392 (issued August 12, 2012); *H.T.*, Docket No. 20-1318 (issued April 27, 2021).

¹³ *S.W.*, Docket No. 22-0338 (issued July 8, 2022).

noting her medical history, and diagnosing bilateral carpal tunnel syndrome, right thumb trigger finger, and right de Quervain's tenosynovitis. The underlying issue in the present case, however, is whether appellant has established permanent impairment greater than two percent permanent impairment of the left upper extremity. 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 As the evidence submitted on reconsideration does not address permanent impairment, appellant is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁵

The Board, accordingly, finds that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁶

CONCLUSION

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

¹⁴ *A.M.*, Docket No. 20-1417 (issued July 30, 2021); *E.J.*, Docket No. 19-1509 (issued January 9, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁵ *T.H.*, Docket No. 18-1809 (issued May 23, 2019); *JohnnyL. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

¹⁶ *See D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board