

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

L.M., Appellant)	
)	
and)	Docket No. 22-0902
)	Issued: September 19, 2022
DEPARTMENT OF DEFENSE, DEFENSE)	
FINANCE ACCOUNTING SERVICE,)	
Indianapolis, IN, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 27, 2022 appellant, through counsel, filed a timely appeal from a May 5, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated March 1, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

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 5 U.S.C. § 8101 *et seq.*

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 June 25, 2017 appellant, then a 48-year-old lead accounting technician, filed a traumatic injury claim (Form CA-1) alleging that on June 7, 2017 she twisted her right ankle and fell as she was descending stairs at the base exchange while in the performance of duty. She injured her right arm, forehead, left knee, and right foot and ankle. Appellant stopped work on June 7, 2017 and returned to full-duty work on August 1, 2017. OWCP accepted her claim for displaced fracture of the olecranon process and displaced fracture of the head of the right radius and authorized surgery.

In a report dated September 3, 2019, Dr. Nathan Everding, a Board-certified orthopedic surgeon, determined that appellant had reached maximum medical improvement (MMI) and applied state workers' compensation guidelines to his findings on physical examination determining that she had 25 percent permanent impairment of the right upper extremity.

On November 21, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On November 26, 2019 OWCP informed appellant that all permanent impairment determinations must be completed in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ It noted that Dr. Everding had not properly calculated her impairment as he utilized state guidelines. OWCP afforded appellant 30 days to submit medical evidence comporting with the A.M.A., *Guides*.

In a report dated December 11, 2019, Dr. Everding explained that he had calculated appellant's permanent impairment based on state guidelines. He again found that she had reached MMI and listed appellant's range of motion as flexion/extension of 20 to 125 degrees, supination of 40 degrees, and pronation of 55 degrees.

On December 26, 2019 OWCP routed Dr. Everding's September 3 and December 11, 2019 reports, a statement of accepted facts (SOAF), and the case record to Dr. David I. Krohn, a Board-certified orthopedic surgeon, serving as a district medical adviser (DMA), for review and a determination of permanent impairment of the right upper extremity in accordance with the A.M.A., *Guides*.

In a January 21, 2020 report, Dr. Krohn reviewed the SOAF and the medical record, including the September 3 and December 11, 2019 reports from Dr. Everding. He found that Dr. Everding improperly applied state guidelines to his findings on physical examination in calculating appellant's right upper extremity permanent impairment rating of 25 percent. The DMA applied the A.M.A., *Guides* to Dr. Everding's findings and determined that utilizing the diagnosis-based impairment (DBI) method, based on the diagnosis of elbow fracture. The DMA

³ A.M.A., *Guides* (6th ed. 2009).

referred to Table 15-4 (Elbow Regional Grid), page 399, and determined that the default grade of three should be increased with the net adjustment formula, page 411 of the A.M.A., *Guides*, to reflect five percent permanent impairment of the right upper extremity. He then applied the range of motion (ROM) method, Table 15-33, page 474 of the A.M.A., *Guides* and determined that appellant had eight percent permanent impairment of the right upper extremity due to three percent impairment of flexion, two percent impairment of extension, one percent impairment of pronation, and two percent impairment of supination.

On March 12, 2020 OWCP referred appellant, a series of questions, and a statement of accepted facts to Dr. Govindlal Bhanusali, an orthopedic surgeon, for an impartial medical examination (IME) scheduled on April 22, 2020 to resolve a conflict of medical opinion evidence between Dr. Everding, and the DMA regarding the extent of her permanent impairment for schedule award purposes.

In a letter dated April 21, 2020, OWCP informed appellant that the IME scheduled with Dr. Bhanusali for April 22, 2020 was temporarily delayed due to the COVID-19 pandemic.

By decision dated March 1, 2021, OWCP granted appellant a schedule award for eight percent permanent impairment of the right upper extremity. The period of the award ran for 24.96 weeks from September 3, 2019 through February 24, 2020. OWCP noted that Dr. Everding had inappropriately applied state guidelines rather than the A.M.A., *Guides* to reach a greater impairment rating and that the weight of the medical evidence was in the opinion of the DMA, as he had properly applied the A.M.A., *Guides*.

On March 5, 2021 OWCP initiated the process to reschedule the IME in an effort to resolve the conflict between appellant's attending physician and the DMA.

In an April 9, 2021 memorandum to file, OWCP afforded the weight of the medical evidence to the DMA and found that no conflict in the medical opinion existed.

On February 8, 2022 appellant, through counsel, requested reconsideration. She contended that she was entitled to greater than eight percent permanent impairment of the right upper extremity. Counsel asserted that OWCP had properly found a conflict of medical opinion evidence between the DMA and Dr. Everding and referred appellant for an IME with Dr. Bhanusali. Appellant was unable to attend or reschedule this appointment. Rather than resolving the existing conflict of medical opinion evidence, he asserted that OWCP improperly issued the March 1, 2021 decision for eight percent permanent impairment of the right upper extremity.

By decision dated May 5, 2022, 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. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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

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).

Appellant has not submitted evidence in support of her reconsideration request. Consequently, she is not entitled to a review of the merits of the claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

In support of her request for reconsideration, appellant contends that OWCP failed to resolve an existing conflict of medical opinion evidence between the DMA and Dr. Everding

⁴ 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).

⁵ 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).

⁶ *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 (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). *Id.* at Chapter 2.1602.4b.

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

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

⁹ *See M.K.*, Docket No. 21-1399 (issued July 14, 2022); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

regarding the extent of her permanent impairment for schedule award purposes. These arguments were previously addressed by OWCP and do not advance a new and relevant legal argument.¹⁰

Appellant, therefore, has not demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, 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.¹¹

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).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁰ The submission of evidence or argument that repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case. *S.E.*, Docket No. 17-0222 (issued December 21, 2018); *T.H.* Docket Nos. 17-1578 & 17-1651 (issued April 26, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *D.G.*, Docket No. 19-1348 (issued December 2, 2019); *S.H.*, Docket No. 19-1115 (issued November 12, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).