United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 17-0660**
	)	**Issued: July 14, 2017**
U.S. POSTAL SERVICE, SOUTH SUBURBAN PROCESSING & DELIVERY CENTER, Bedford Park, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 1, 2017 appellant filed a timely appeal from a September 16, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated October 22, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

On appeal appellant contends that she submitted relevant and pertinent new evidence on reconsideration and, therefore, OWCP improperly denied her reconsideration request.[2]

FACTUAL HISTORY

On March 18, 2009 appellant, then a 54-year-old flat sorter operator, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in the shoulder, arm, and hand and numbness in her fingers due to repetitive employment duties. She did not stop work.

By letter dated April 1, 2009, OWCP informed appellant that further factual and medical information was needed to support her claim. Appellant was afforded 30 days to submit the necessary information.

In a letter received by OWCP on April 22, 2009, appellant described her 31 years of work with the employing establishment, which included assignments as a distribution clerk, letter sorting machine operator, and flat sorter operator. She alleged that the repetitive keying and throwing mail along with pushing, pulling, and lifting of heavy equipment contributed to her pain in her wrist, hands, right arm, and right upper shoulder.

On June 5, 2009 OWCP accepted appellant's claim for bilateral shoulder tendinitis, cervical tendinitis, bilateral carpal tunnel syndrome, and medial epicondylitis of the right elbow. On November 16, 2009 it accepted her claim for complex regional pain syndrome (CRPS) of both wrists and hands.

In a report dated November 27, 2013, Dr. Thomas A. McNally, Board-certified in orthopedic surgery, noted that appellant had sustained a work-related repetitive use injury on March 17, 2009. He related that appellant had flare ups of bilateral arm pain and paresthesias, right worse than left over the past several years. Dr. McNally related appellant's physical examination findings and reviewed appellant's diagnostic studies. He diagnosed cubital tunnel syndrome, cervical spondylosis with myelopathy, cervical spinal stenosis, and cervical disc degeneration. Dr. McNally related that he had discussed C6-7, C7-T1 anterior cervical discectomy and fusion with appellant.

On July 24, 2014 OWCP accepted appellant's claim for bilateral disorder of bursae and tendons in shoulder region, spinal enthesopathy, bilateral carpal tunnel syndrome, bilateral medial epicondylitis, bilateral reflex sympathetic dystrophy of the upper limb, and bilateral brachial neuritis or radiculitis.

On February 23, 2015 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, appellant submitted an April 19, 2015 report wherein Dr. Blair Rhode, a Board-certified orthopedic surgeon, diagnosed appellant with bilateral carpal tunnel syndrome, bilateral rotator cuff tendinopathy, reflex sympathetic dystrophy, and brachial neuritis.

[2] Appellant submitted additional evidence to OWCP after it rendered its September 16, 2016 decision. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 501.2(c)(1).

Dr. Rhode noted that she had reached maximum medical improvement. He applied Table 15-23, Table 15-5, and Table 15-26 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A, *Guides*), and determined that appellant had a left shoulder impairment of four percent, a right shoulder impairment of four percent, a left wrist carpal tunnel syndrome of three percent, and right wrist carpal tunnel syndrome of three percent. Dr. Rhode noted that this equaled a whole person impairment of eight percent.

On July 14, 2015 OWCP referred appellant's record to OWCP's medical adviser, for an evaluation of permanent impairment. In an August 6, 2015 report, the medical adviser noted that he could not use section 15.4f of the A.M.A., *Guides* to perform impairment ratings for carpal tunnel syndrome since the electromyogram was normal. Instead he used section 15.2 of the A.M.A., *Guides* for diagnosis of nonspecific wrist pain. Using Table 15-3, appellant's nonspecific wrist pain impairment indicated a class 1 grade C diagnosis, with a default value of 1 percent. The medical adviser noted a grade modifier of 1 for physical examination and a grade modifier of 0 for clinical studies. He noted a net adjustment of 1, which moved appellant's grade to a grade B, for zero percent permanent impairment.

With regard to appellant's impairment to her elbow, OWCP's medical adviser utilized section 15.2 of the A.M.A., *Guides.* He noted that appellant had medial epicondylitis, and that this condition is often self-limited, and that it appeared that appellant was not currently suffering from it. Therefore, using Table 15-4 of the A.M.A., *Guides*, the medical adviser determined that appellant's diagnosis was class 0 for a value of zero percent.

With regard to appellant's bilateral shoulder permanent impairment, OWCP's medical adviser noted that, pursuant to Table 15-5, appellant's diagnosis of partial thickness rotator cuff tear was a class 1 grade C diagnosis, with a default value of three percent. He determined that appellant had a functional history grade modifier of 3 and a physical examination grade modifier of 1 and a grade modifier of 2 for clinical studies. The medical adviser noted that this yielded an adjustment of plus 2, moving appellant's grade to E. Using Table 15-5, he determined that appellant's permanent impairment of each upper extremity was five percent.

OWCP's medical adviser used section 15.5 of the A.M.A., *Guides* for appellant's CRPS, and determined that as appellant was not exhibiting symptoms of CRPS, pursuant to Table 15-26 of the A.M.A., *Guides,* appellant had a class 0 diagnosis, with a value of zero percent. He disagreed with Dr. Rhode's impairment finding. The medical adviser noted that his rating assumed positive nerve conduction velocity/electromyogram results for carpal tunnel syndrome, and that the report clearly indicated that appellant did not have any conduction delays.

By decision dated October 22, 2015, OWCP issued a schedule award for five percent permanent impairment of appellant's right upper extremity and five percent permanent impairment of appellant's left upper extremity.

On September 12, 2016 appellant requested reconsideration of the October 22, 2015 decision. In support of her reconsideration request, appellant submitted an August 19, 2016 report, wherein Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, indicated that he reexamined and reevaluated appellant on August 11, 2016. Dr. Chmell noted that he reviewed the October 22, 2015 decision and that it was incorrect and incomplete. He indicated that a

glaring deficiency was that appellant had not been evaluated for an impairment to her upper extremities based on her employment-related injury to her cervical spine. Dr. Chmell noted that appellant had an accepted employment-related injury to her cervical spine and that her electromyogram documented cervical radiculopathy and that her magnetic resonance imaging scan documented multilevel disc protrusion with nerve root impingement. He noted that at the C6-7 level she had an impingement on the spinal cord with myelomalacia. Dr. Chmell noted that appellant has moderate-to-severe foraminal stenosis bilaterally at C4-5, C5-6, and C6-7. He noted that these changes were on her cervical spine and as they affect her upper extremities, in and of themselves, total more than five percent of each upper extremity. Dr. Chmell recommended and requested an authorization to perform a proper evaluation of appellant's upper extremity impairment to include all diagnoses that are employment related.

Appellant also resubmitted Dr. Rhode's April 19, 2015 report.

By decision dated September 16, 2016, OWCP denied appellant's request for reconsideration without reviewing the merits of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[3] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[4] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[5]

ANALYSIS

By decision dated October 22, 2015, OWCP issued a schedule award for five percent permanent impairment of each upper extremity.

On September 12, 2016 appellant filed a timely request for reconsideration of the October 22, 2015 decision. In support of her reconsideration request, appellant submitted an August 19, 2016 report, wherein Dr. Chmell opined that OWCP's October 22, 2015 decision was incorrect. Dr. Chmell noted a deficit in that she had not been evaluated for an impairment to her upper extremities based on her employment-related injury to her cervical spine, and noted that appellant should receive a greater impairment based on the impairment to her upper extremities due to her cervical conditions. He thus attempted to provide a legal argument in support of appellant's schedule award claim. However, Dr. Chmell's argument has no color of legal validity.[6] OWCP has not accepted that the cervical conditions he diagnosed as causing

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(3).

[5] *Id.* at § 10.608(b).

[6] *See R.J.*, Docket No. 07-527 (issued June 8, 2007).

appellant's permanent impairment, C4-7 foraminal stenosis, and C6-7 impingement with myelomalacia are employment related.[7] While it has accepted appellant's claim for cervical tendinitis, there is no medical evidence of record that this condition caused her any permanent impairment of her upper extremities. The Board has held that a claimant may request a schedule award or increased schedule award at any time based on evidence of new exposure or medical evidence showing the progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.[8] Dr. Chmell's August 19, 2016 report is found to lack relevancy to the issue of increased impairment and this does not require merit review for purposes of an increased schedule award. Appellant's September 12, 2016 request for reconsideration did not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).[9]

The Board also notes that appellant did not submit any new and relevant pertinent evidence in support of her claim. Appellant resubmitted Dr. Rhode's April 19, 2015 report, but this evidence was duplicative of his prior report. Evidence or argument which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[10] Appellant did not submit any new and relevant pertinent medical evidence establishing permanent impairment of more than five percent bilateral upper extremity impairment.

As appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[7] *Thomas J. Englehart,* 50 ECAB 319 (1999). Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine. In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a schedule or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.

[8] *Cresenciano Martinez,* 51 ECAB 322 (2000); *Thankamma Matthews,* 44 ECAB 765 (1993).

[9] *See P.M.*, Docket No. 16-1841 (issued March 3, 2017).

[10] *See S.E.*, Docket No. 16-1077 (issued October 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board