United States Department of Labor
Employees' Compensation Appeals Board

M.Y., Appellant	)	
and	)	**Docket No. 15-1910**
	)	**Issued: August 25, 2016**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS-ALL OTHERS, Chicago, 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 September 22, 2015 appellant filed a timely appeal of an August 28, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from May 29, 2014, the date of the most recent OWCP merit decision, to the filing of the current 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 to review the merits of this claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 21, 2011 appellant, then a 48-year-old miscellaneous clerk and assistant, filed an occupational disease claim (Form CA-2) alleging that on July 2, 2010 he began experiencing tingling, numbness, and pain in his fingers on both hands and his left arm and developed carpal tunnel syndrome while in the performance of duty. He did not stop work.

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and trigger finger, acquired on the left. It also authorized left carpal tunnel surgery, which was performed on March 17, 2011, and right carpal tunnel syndrome and left ring trigger finger surgeries on April 21, 2011. Appellant received compensation benefits.

On August 17, 2011 appellant filed a claim for a schedule award (Form CA-7).

In a September 24, 2011 report, Dr. Donald Kucharzyk, a Board-certified orthopedic surgeon and osteopath, noted appellant's history of injury and treatment and provided results on examination. He diagnosed: left and right wrist/forearm carpal tunnel syndrome; left hand right ring trigger finger release, "S/P release." Dr. Kucharzyk opined that appellant had achieved maximum medical improvement and released him to full activity.

In a November 20, 2011 report, Dr. Kucharzyk noted that he last saw appellant on September 24, 2011, determined that he had reached maximal medical improvement, and discharged him from care. He reiterated that appellant had reached maximal medical improvement on September 24, 2011. Dr. Kucharzyk indicated that he was providing an impairment rating based upon the bilateral carpal tunnel syndrome and left trigger finger. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (hereinafter, A.M.A., *Guides*). Dr. Kucharzyk opined that appellant had one percent impairment to the right upper extremity and one percent impairment to the left upper extremity.

In a November 7, 2012 decision, OWCP granted a schedule award for a total of 6.24 weeks of compensation for one percent permanent impairment of the right arm and one percent permanent impairment of the left arm.

On November 26, 2012 appellant requested a hearing, which was held on March 20, 2013.

In an April 9, 2013 report, Dr. Aaron Anderson, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He utilized the A.M.A., *Guides*, (6th ed. 2009), and opined that appellant had six percent combined impairment of the hand, which equated to five percent upper extremity impairment and three percent whole person impairment.

By decision dated June 4, 2013, the hearing representative affirmed the prior decision. Appellant requested reconsideration.

In a June 25, 2013 report, Dr. Anderson noted that he utilized the A.M.A., *Guides*, referred to Table 15-23,[2] and explained that appellant had two percent default upper extremity impairment. He opined that appellant had three percent right upper extremity impairment and three percent left upper extremity impairment. Dr. Anderson explained that the combined rating was equal to six percent upper extremity impairment.

In an October 31, 2012 report, an OWCP medical adviser recommended a second opinion examination. He explained that appellant needed to be professionally evaluated by an orthopedic surgeon who documented a neurological examination including two-point discrimination.

On January 30, 2014 OWCP referred appellant for a second opinion examination with Dr. Allen Brecher, a Board-certified orthopedic surgeon. In a March 21, 2014 report, Dr. Brecher noted appellant's history of injury and treatment which included carpal tunnel and trigger finger releases. He utilized the A.M.A., *Guides*, Table 15-23, page 449, and determined that appellant had a class 1 for entrapment/compression neuropathy impairment. Dr. Brecher determined that appellant's functional history grade modifier adjustment was zero, the physical examination was zero, and the clinical studies were one. He determined that the *Quick*DASH score was 12.5, with a grade A. Dr. Brecher opined that the final upper extremity impairment was one percent for each side.

On April 15, 2014 OWCP forwarded a copy of Dr. Brecher's report to Dr. Anderson for his review and response. In a May 19, 2014 report, Dr. Anderson noted that when appellant was evaluated for an impairment rating in his office, he was determined to be at maximum medical improvement. He indicated that static two-point discrimination was intact at 56 millimeters in all digits. Dr. Anderson indicated that appellant received three percent impairment in both hands based upon his *Quick*DASH score of 47, which was moderate. He referred to Table 15-23 of the A.M.A., *Guides* and explained that the *Quick*DASH score was used to either raise or lower a default rating of two percent.[3] Dr. Anderson reported that, based upon a *Quick*DASH score of 12.5, the score would be lowered to one percent. He advised that at the time appellant was evaluated by his office, his rating was three percent to each hand.

OWCP forwarded Dr. Anderson's report on that date to OWCP's medical adviser. In a May 20, 2014 report, the medical adviser noted the history of injury and treatment and utilized the A.M.A., *Guides* to calculate impairment. For bilateral carpal tunnel syndrome, he referred to Table 15-23.[4] The medical adviser explained that the average of the three grade modifiers (test results, history, and physical examination) rounded to the nearest integer equaled one. He provided a default value of two for the upper extremity impairment. The medical adviser determined that the functional scale for the upper extremity impairment was normal. He explained that they adjusted the rating to the left by one value for final bilateral upper extremity impairment equal to one percent of each upper extremity. The medical adviser explained that the final right arm impairment was one percent and the final left arm impairment was one percent.

[2] A.M.A., *Guides* 449.

[3] *Id.*

[4] *Id.*

He indicated that these were the same impairments assigned by Dr. Brecher for bilateral carpal tunnel syndrome.

The medical adviser explained that there was no impairment for the left ring trigger finger as there were no residuals at maximum medical improvement. He explained that Dr. Anderson did not document performing a physical examination or taking an appropriate functional history. The medical adviser also advised that the *Quick*DASH score improved between Dr. Anderson's and Dr. Brecher's examinations. He also noted that Dr. Anderson provided no examination or rating for the left hand for trigger finger and determined that Dr. Brecher's examination was more appropriate for rating impairment. The medical adviser determined that the date of maximum medical improvement was March 21, 2014, the date of Dr. Brecher's examination. He noted that appellant's accepted conditions had stabilized and no further treatment was planned.

By decision dated May 29, 2014, OWCP denied modification of the June 4, 2013 decision.

On May 6, 2015 appellant requested reconsideration. In a letter also dated May 6, 2015, appellant indicated that he disagreed with the May 29, 2014 decision. Appellant addressed each medical report and offered his opinion as to why his schedule award should be higher. He argued that Dr. Kucharzyk did not examine him in person and his findings were based on prior notes. Appellant asserted that Dr. Kucharzyk did not perform a *Quick*DASH, which could have raised the default rating to two percent. He further argued that the report of Dr. Anderson and his findings supported a three percent rating to both hands based upon the *Quick*DASH score of 47. Appellant explained that this was moderate based upon the A.M.A., *Guides.* Additionally, he noted that in his May 19, 2014 report Dr. Anderson indicated that he had reached maximum medical improvement. Appellant noted that Dr. Anderson's report showed that his static two point discrimination was intact at five to six millimeters in all digits. He argued that there was a two-and-a-half-year delay from Dr. Kucharzyk's report and that Dr. Bremer's report would be lower. Appellant argued that at the time of Dr. Anderson's examination, his impairment was three percent to each hand and Dr. Kucharzyk would have found the same thing, if he had performed the *Quick*DASH on November 20, 2011. He argued that if OWCP had not waited two and a half years to seek a resolution on his case, his additional impairment of one percent to each arm would have been granted. Appellant further noted that Dr. Anderson was a fellowship trained hand, elbow, shoulder, and microvascular surgeon as well as a Board-certified orthopedic surgeon. He indicated that Dr. Brecher's report should not be the only report that was given consideration. Appellant referred to and resubmitted the reports of Dr. Anderson dated June 25, 2013 and May 19, 2014.

By decision dated August 28, 2015, OWCP denied appellant's request for reconsideration without conducting a review of the merits on the grounds that the evidence submitted was not sufficient to warrant review of the May 29, 2014 decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[5] OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[6]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[7]

ANALYSIS

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on May 6, 2015. The underlying issue on reconsideration was whether appellant was entitled to receive a schedule award for more than one percent permanent impairment to each arm, for which he previously received a schedule award. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he had proven an increased schedule award.

On reconsideration appellant made several arguments asserting that Dr. Anderson's reports supported a greater impairment. He argued that Dr. Kucharzyk did not examine him in person and his findings were based on prior notes. This argument is not supported, as the record contains Dr. Kucharzyk's reports which note that he examined appellant on September 24, 2011. Furthermore, appellant noted that, in his May 19, 2014 report, Dr. Anderson indicated that he had reached maximum medical improvement. However, the matter of whether appellant had reached maximum medical improvement is not in dispute. These assertions do not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.

Appellant also argued that Dr. Kucharzyk did not perform a *Quick*DASH, which could have raised the impairment rating. He further argued that Dr. Anderson supported a three percent rating to both hands based upon a *Quick*DASH score. Appellant noted his interpretation

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b)(3).

[7] *Id*. at § 10.608(b).

of Dr. Anderson's findings and argued that there was a two-and-a-half-year delay from Dr. Kucharzyk's report and explained that Dr. Bremer's report would be lower. He further argued at the time of Dr. Anderson's examination, his impairment was three percent to each hand and Dr. Kucharzyk would have found the same thing, if he had performed the *Quick*DASH on November 20, 2011. Appellant asserted that if OWCP had not delayed in resolving the matter, additional impairment of one percent to arm would have been granted. He further noted that Dr. Anderson was more qualified than other physicians involved in his claim. Appellant indicated that Dr. Brecher's report should not be the only report that was given consideration. The Board notes that the underlying issue in this claim, the extent of appellant's permanent impairment, is a medical question and must be established by medical evidence from a physician.[8] Appellant's lay opinion is irrelevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[9] Thus, these assertions by appellant do not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

Appellant also has not submitted relevant new medical evidence. He resubmitted the June 25, 2013 and May 19, 2014 reports from Dr. Anderson. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[10]

As appellant has not met one of three regulatory criteria for reopening a claim for a merit review, OWCP properly denied his request for reconsideration.

On appeal appellant argues the merits of the claim asserting that Dr. Anderson's opinion should be given more weight and he believed appellant should receive a larger schedule award. However, as explained, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[8] *See R.S.*, 58 ECAB 362 (2007).

[9] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[10] *D.K.*, 59 ECAB 141 (2007).

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2016
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