United States Department of Labor
Employees' Compensation Appeals Board

G.E., Appellant	)	
and	)	**Docket No. 17-0594**
	)	**Issued: September 14, 2017**
DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Window Rock, AZ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 23, 2017 appellant filed a timely appeal from an August 4, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of July 8, 2016 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.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the August 4, 2016 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

On January 7, 2014 appellant, then a 57-year-old medical director, filed a traumatic injury claim (Form CA-1) alleging that on January 2, 2014 he slipped on ice and fell onto his right side when leaving work. He stopped work on January 3, 2014. OWCP accepted appellant's claim for right distal radius and ulnar fracture.

On February 7, 2014 appellant underwent authorized right wrist open reduction internal fixation surgery.

In a March 10, 2014 telephone call note (Form CA-110), OWCP confirmed with the employing establishment that appellant elected continuation of pay from January 3 to February 16, 2014 and currently wanted to stay on sick leave instead of receiving benefits through OWCP.

Appellant continued to receive medical treatment and undergo physical therapy. In a July 31, 2014 work capacity evaluation form, Dr. Edmund Rowland, a Board-certified orthopedic hand surgeon, diagnosed right distal radius and ulnar fracture. He checked a box marked "yes" that appellant was capable of performing his usual job and indicated that he would need time off to continue physical therapy. Dr. Rowland noted that appellant had reached maximum medical improvement (MMI).

By decision dated August 6, 2014, OWCP terminated appellant's entitlement to wage-loss compensation benefits. It found that because the medical evidence of record established that he was capable of returning to full duty, appellant was no longer disabled from his date-of-injury position.

On April 23, 2015 appellant filed a claim for schedule award (Form CA-7).

In support of appellant's request for a schedule award, OWCP received a November 20, 2014 report from Dr. David L. Reinhard, Board-certified in physical medicine and rehabilitation. Dr. Reinhard described that on January 2, 2014 appellant fractured his right distal radius as a result of a work-related fall and underwent closed reduction surgery. He reviewed appellant's history and conducted an examination. Dr. Reinhard observed restricted range of motion (ROM) of the right wrist with some pain with palpation over the distal radius. He also reported decreased right hand grip strength and some atrophy in the right forearm. Dr. Reinhard diagnosed comminuted distal right radius fracture, status post open reduction and internal fixation, and status post slip-and-fall injury at work leading to the right distal radius and ulnar styloid fractures. He determined that, according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2009), Table 15-32, page 473, using the ROM method of impairment rating, appellant had zero percent impairment for 60 degrees of flexion of the right wrist, three percent impairment for 40 degrees of right wrist extension, two percent impairment for 13 degrees of right radial deviation, and two percent impairment for the 23 degrees of ulnar deviation for a total of seven percent right upper extremity permanent impairment. Dr. Reinhard noted that this impairment was also equivalent to four percent whole person impairment.

Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, reviewed appellant's claim including Dr. Reinhard's impairment rating in a May 13, 2015 report.

He disagreed with Dr. Reinhard's findings and explained that Dr. Reinhard used the ROM method with invalid ROM measurements, but the preferred method was the diagnosis-based impairment (DBI) method. Dr. Slutsky reported that appellant was a class one diagnosis for right wrist fracture. He assigned net adjustment factors of one for functional history, one for physical examination, and two for clinical studies, for a total net adjustment calculation of one. Dr. Slutsky concluded that appellant had a total of four percent right upper extremity permanent impairment. He indicated that appellant had a date of MMI of November 20, 2014.

By letter dated June 22, 2015, OWCP informed appellant that it was enclosing a copy of Dr. Slutsky's May 13, 2015 report and requested additional evidence to support his schedule award claim. Appellant was afforded 30 days to submit the additional evidence.

In a letter dated July 15, 2015, appellant asserted that OWCP lowered his disability rating from seven percent to four percent by dismissing parts of Dr. Reinhard's report as "invalid." He noted that OWCP did not examine him in order to obtain the data that would be considered "valid" and in order to make a valid and accurate rating. Appellant alleged that it was inappropriate and indicated that he had been a medical doctor for 34 years, as well as a medical director for 28 years. He also reported that Dr. Reinhard clearly stated that he used ROM methodology because of his significant loss of ROM.

On July 23, 2015 OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity. The award ran for 12.48 weeks for the period November 20, 2014 through February 15, 2015.

Appellant continued to submit various medical reports to OWCP. In a May 18, 2016 report, Dr. Rowland noted the January 2, 2014 employment injury and described the medical treatment appellant received. He related that appellant complained of wrist pain with occasional crepitation and loss of motion. Upon examination of appellant's right shoulder, Dr. Rowland observed full ROM with no crepitation and no acromioclavicular (AC) instability. Examination of appellant's elbow showed ulnohumeral crepitation, full flexion, and extension to within 5 or 10 degrees. Dr. Rowland indicated that examination of appellant's right wrist revealed a loss of 10 or 20 degrees of flexion, extension, and tenosynovial crepitation over the flexors. He diagnosed complication of internal fixation device, pain in the right elbow, right wrist, and right shoulder, and primary osteoarthritis of the right elbow. Dr. Rowland provided x-ray examination reports of appellant's right upper extremity.

According to a May 24, 2016 telephone memorandum call (Form CA-110), OWCP discussed appellant's July 23, 2015 schedule award decision with appellant and advised that, if he disagreed with the schedule award, he needed to exercise one of the afforded appeal rights.

On May 24, 2016 OWCP received information that appellant had retired from federal service.

On July 7, 2016 OWCP received a June 24, 2016 report by Dr. David Schneider, a Board-certified orthopedic surgeon, which noted appellant's continued problems with his right elbow. Dr. Schneider noted that appellant had a previous radial head fracture from 1978 and described the continued treatment that appellant had received. He indicated that, following appellant's work injury, appellant suffered a wrist fracture, but his elbow also became problematic. Dr. Schneider provided examination findings and diagnosed tear of the right rotator

cuff, post-traumatic osteoarthritis of the right elbow, and symptomatic right elbow. He recommended a right total elbow arthroplasty.

On July 7, 2016 appellant requested authorization for elbow surgery. OWCP granted authorization for appellant's surgery.

On July 8, 2016 OWCP expanded acceptance of appellant's claim to include aggravation of right elbow osteoarthritis and ulnar humeral joint derangement and unspecified injury of the right rotator cuff muscle or tendon.

On July 13, 2016 appellant requested reconsideration of the July 23, 2015 schedule award decision. He asserted that OWCP's medical adviser decided to downgrade his impairment and had not adequately measured his ROM. Appellant also alleged that the medical adviser only evaluated parts of his impairment. He described that his elbow had deteriorated to the extent that it was useless and he had to undergo surgery. Appellant further asserted that his shoulder was likely to continue to deteriorate because of lack of stability caused by the loss of musculature and strength.

Appellant submitted a July 6, 2016 right shoulder magnetic resonance imaging scan report by Dr. Paul Hsieh, a Board-certified diagnostic radiologist, who noted mild supraspinatus tendinosis, with no rotator cuff tear, faint, ill-defined marrow edema in the mild humerus head, and degenerative changes at the AC joint and glenohumeral joint.

OWCP also received a July 11, 2016 operative report, which indicated that appellant had undergone elbow surgery by Dr. Rowland.

By decision dated August 4, 2016, OWCP denied further merit review of appellant's claim. It found that appellant's reconsideration request failed to raise a substantive legal question and he failed to submit relevant and pertinent new evidence sufficient to warrant merit review 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 payment of 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] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[5] If the request is timely but fails to meet at least one of the requirements for

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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

reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[6]

Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding an increased permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award.[7]

ANALYSIS

The Board has duly considered the matter and finds that this case is not in posture for decision. On July 23, 2015 OWCP granted appellant a schedule award for four percent permanent impairment of the right upper extremity based on the May 13, 2015 report of OWCP's medical adviser.

Following this decision, appellant submitted a May 18, 2016 report by Dr. Rowland and a June 24, 2016 report by Dr. Schneider. These reports addressed appellant's continued problems with his right elbow and described the medical treatment that appellant had received. On July 8, 2016 OWCP accepted the additional conditions of aggravation of right elbow osteoarthritis and ulnar humeral joint derangement and unspecified injury of the right rotator cuff muscle or tendon.

By letter received by OWCP on July 13, 2016, appellant requested reconsideration of the July 23, 2015 schedule award decision. He asserted that OWCP's medical examiner had improperly dismissed his treating physician's impairment rating based on ROM findings and had only considered portions of his impairment rating. Appellant also alleged that his right upper extremity impairment had worsened.

By decision dated August 4, 2016, OWCP declined to reopen appellant's claim for consideration of the merits pursuant to 5 U.S.C. § 8128(a). The Board finds, however, that appellant was not seeking reconsideration of the previous schedule award determination. Rather, appellant submitted new evidence and argument showing increased impairment of the right upper extremity.[8]

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 impairment.[9] OWCP's procedures further provide that if a claimant is seeking an increased schedule award due to increased impairment and/or additional exposure, but not contesting the decision or prior award, this should not be treated as a reconsideration request and OWCP should

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

[7] *See B.K.*, 59 ECAB 228 (2007).

[8] *J.F.*, Docket No. 13-112 (issued November 6, 2013).

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

develop the issue of entitlement to an additional award.[10] As the evidence of record establishes that OWCP had accepted additional right upper extremity conditions following the July 23, 2015 schedule award and the medical evidence reflects greater impairment, appellant's July 13, 2016 request for reconsideration should have been treated as a request for an additional schedule award. Accordingly, the Board finds that OWCP improperly denied appellant's request for reconsideration and failed to issue an appropriate decision regarding appellant's claim for an increased schedule award.[11] On remand, OWCP should issue a *de novo* decision regarding appellant's claim for an increased schedule award.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 14, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[10] The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (February 2016).

[11] *D.S.*, Docket No. 17-0407 (issued May 24, 2017); *E.T.*, Docket No. 13-1691 (issued September 25, 2013).