

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

C.W., Appellant)	
)	
and)	Docket No. 19-0407
)	Issued: July 24, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Atlanta, GA, Employer)	
)	

Appearances:
Joanne Marie Wright, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 13, 2018 appellant, through her representative, filed a timely appeal from a November 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 17, 2017, 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 over 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 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 her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 20, 2006 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 15, 2006 she sustained injuries to her right shoulder and back as a result of a work-related motor vehicle accident. OWCP accepted her claim for neck strain, right shoulder strain, and right complete rotator cuff tear.³ On December 5, 2007 appellant underwent OWCP-approved right shoulder arthroscopic surgery.⁴

By decision dated September 17, 2008, OWCP granted a schedule award for a total of 23 percent permanent impairment of the right upper extremity.⁵ The award covered a 62.4-week period from June 17, 2008 through August 27, 2009.

Because the employing establishment was no longer able to accommodate appellant's work restrictions, OWCP paid wage-loss compensation for temporary total disability beginning September 14, 2013. It placed her on the periodic compensation rolls as of December 10, 2013.

Appellant retired from federal service, effective December 31, 2013. OWCP continued to pay her wage-loss compensation for temporary total disability through February 8, 2014, at which time she elected to receive a retirement annuity from the Office of Personnel Management.

On June 27, 2014 appellant filed a claim for an increased schedule award (Form CA-7).

Appellant submitted a June 24, 2014 impairment evaluation report by Dr. David Stokes, a Board-certified orthopedic surgeon. The report noted ROM findings of flexion 120 degrees, extension 50 degrees, abduction 120 degrees, adduction 40 degrees, internal rotation 70 degrees, and external rotation 85 degrees. Dr. Stokes referenced Table 15-34 of the sixth edition of the A.M.A., *Guides*⁶ and indicated that appellant had eight percent permanent impairment of the right upper extremity and five percent permanent whole person impairment.

³ The present claim was assigned OWCP File No. xxxxxx714. Under OWCP File No. xxxxxx696, appellant has an accepted occupational disease claim for right thumb tendinitis, which arose on or about July 21, 2001. Her claims have not been administratively combined.

⁴ Dr. David A. Stokes, a Board-certified orthopedic surgeon, performed a rotator cuff repair, subacromial decompression, and distal clavicle resection.

⁵ On October 28, 2004 OWCP previously granted appellant a schedule award for three percent permanent impairment of the right upper extremity under OWCP File No. xxxxxx696. The September 17, 2008 schedule award granted an additional 20 percent permanent impairment based on a combination of impairments due to loss of shoulder range of motion (ROM) (14 percent) and her December 5, 2007 distal clavicle resection (10 percent). Both the October 28, 2004 and September 17, 2008 schedule awards were calculated under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

⁶ A.M.A., *Guides* (6th ed. 2009).

In a July 9, 2014 report, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), concurred with Dr. Stokes' determination of 8 percent right upper extremity permanent impairment according to the ROM methodology and reported that since appellant was previously awarded 23 percent right upper extremity permanent impairment, she was not entitled to an additional schedule award.

In a decision dated July 30, 2014, OWCP denied appellant's claim for an increased schedule award.

On August 25, 2014 appellant requested a telephonic hearing, which was held on March 17, 2015.

OWCP received an April 14, 2015 impairment rating report by Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, who reviewed appellant's history and conducted an examination. Dr. Bishai reported ROM testing of her right shoulder of 80 degrees flexion, 10 degrees extension, 80 degrees abduction, 15 degrees adduction, 45 degrees external rotation, and 20 degrees internal rotation. He utilized Table 15-34 and determined that appellant had 24 percent permanent impairment of the right upper extremity due to his September 15, 2006 employment injury. Dr. Bishai noted that she had reached maximum medical improvement on February 26, 2015.

By decision dated June 3, 2015, an OWCP hearing representative set aside the July 30, 2014 decision and remanded the case for further development finding that appellant had submitted evidence warranting further medical review. She instructed OWCP to prepare an accurate and complete statement of accepted facts (SOAF) and refer it, along with appellant's medical reports, to another DMA for review as to whether appellant sustained additional permanent impairment as a result of her September 15, 2006 employment injury.

After further development of the medical evidence, OWCP issued a July 7, 2015 decision denying appellant's claim for an increased schedule award.⁷

Appellant again requested a hearing. By decision dated February 5, 2016, an OWCP hearing representative set aside the July 7, 2015 decision and remanded the case for OWCP to obtain a supplemental report from the DMA, explaining why his impairment rating differed from Dr. Bishai's.

In a March 23, 2016 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as the DMA, reviewed the SOAF and appellant's medical records. He utilized Table 15-5, *Shoulder Regional Grid* under the sixth edition of the A.M.A., *Guides*, and determined that she had 12 percent right upper extremity impairment due to the diagnosis of acromioclavicular joint injury or disease.

⁷ In a June 11, 2015 report, a DMA opined that appellant had 23 percent permanent impairment of the right upper extremity and was not entitled to increased schedule award.

By decision dated June 30, 2016, OWCP again denied appellant's claim for an increased schedule award based on the March 23, 2016 report of Dr. Berman.

On February 16, 2017 appellant requested reconsideration. She argued that the A.M.A., *Guides* had amended its language in Section 15.2, page 387, and allowed for the use of ROM methodology as a stand-alone impairment rating for specific diagnoses. Appellant contended that Dr. Bishai accurately cited the appropriate methodology when he determined that she had 24 percent right upper extremity impairment due to loss of ROM.

OWCP routed appellant's claim, along with a SOAF and the medical records, to Dr. Herbert White, Jr., a Board-certified DMA in preventive and occupational medicine. In a March 14, 2017 report, Dr. White determined that, according to Table 15-5, *Shoulder Regional Grid* under the sixth edition of the A.M.A., *Guides*, she had 12 percent permanent right upper extremity impairment for diagnosis of distal clavicle resection. He pointed out the inconsistent findings between Dr. Stokes and Dr. Bishai regarding appellant's ROM testing. Dr. White explained that the ROM methodology could not be used since, according to page 407, when there are inconsistent findings for the upper extremities, the results are considered invalid and the ROM methodology could not be used to rate impairment.

By decision dated April 6, 2017, OWCP denied modification of its June 30, 2016 decision. It found that the weight of the medical evidence rested with the March 14, 2017 DMA report.

On July 9, 2017 appellant, through her representative, requested reconsideration. Appellant's representative alleged that OWCP did not fully develop the evidence prior to denying appellant's request for an increased schedule award based on Dr. Bishai's April 14, 2015 impairment rating report. She also noted her disagreement with Dr. White's opinion that the ROM methodology could not be utilized in this case due to inconsistent ROM findings.

By decision dated November 17, 2017, OWCP denied modification of its April 6, 2017 decision. It indicated that, contrary to appellant's representative's arguments, the ROM methodology was not applicable in this case. OWCP cited page 407 of the sixth edition of the A.M.A., *Guides* and noted that "the A.M.A., *Guides* themselves indicate that ROM should not be used when inconsistent findings exist."

On November 8, 2018 appellant, through her representative, requested reconsideration. Appellant's representative argued that OWCP's position regarding inconsistent ROM measurements was incorrect. She asserted that the A.M.A., *Guides* provides that, when ROM measurements are inconsistent, the measurements are negated, not the ROM methodology for rating impairment. The representative argued that the proper procedure would be referral of the case for a second-opinion examination.

By decision dated November 20, 2018, OWCP denied further merit review of appellant's claim under 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.⁸

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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ 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.¹²

ANALYSIS

The Board finds that OWCP erroneously denied reconsideration of the merits of appellant's claim.

In her November 8, 2018 reconsideration request, appellant's representative argued that OWCP's determination that the ROM methodology could not be used due to inconsistent ROM findings between Dr. Stokes and Dr. Bishai was incorrect. She contended that the A.M.A., *Guides* provides that, if ROM findings were inconsistent, then the measurements were negated, but not the ROM methodology. Furthermore, appellant's representative also argued that proper procedure for inconsistent ROM findings would be referral to a second-opinion examiner.

The Board finds that appellant has shown that OWCP erroneously applied or interpreted a specific point of law. In its most recent merit decision dated November 17, 2017, OWCP cited to page 407 of the sixth edition of the A.M.A., *Guides* for support of its determination that the ROM methodology should not be used for rating impairment when inconsistent findings exist. The Board notes that Section 15.3b, page 407, of the A.M.A., *Guides*¹³ explains how an evaluator should apply grade modifiers based on physical examination when determining permanent impairment for the upper extremities utilizing the diagnosis-based impairment method. It then

⁸ 5 U.S.C. § 8128(a).

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

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹³ A.M.A., *Guides* (6th ed. 2009), at 407, Section 15.3b.

refers to Section 15.7 for Range of Motion Impairment and notes the specific parameters for how to measure ROM for the upper extremity. Section 15.3b further provides: “If multiple previous evaluations have been documented and there is inconsistency in a rating class between the findings of 2 observers, or in the findings on separate occasions by the same observer, the results are considered invalid and cannot be used to rate impairment.”

The Board finds that appellant has shown that OWCP erroneously applied the A.M.A., *Guides* when it determined that the ROM methodology could not be utilized due to inconsistent findings. Thus, OWCP should have referred her case for further development. According to FECA Bulletin No. 17-06,¹⁴ if the medical evidence of record is insufficient for the DMA to render a rating on ROM where allowed, the DMA should advise as to the medical necessary to complete the rating. As appellant has shown that OWCP erroneously applied or interpreted a specific point of law, she was entitled to further merit review of her increased schedule award claim.¹⁵

Thus, the Board will remand the case to OWCP to properly consider appellant’s claim. Following such further development as deemed necessary it shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁴ *V.L.*, Docket No. 18-0760 (issued November 13, 2018); *A.G.*, Docket No. 18-0329 (issued July 26, 2018); FECA Bulletin No. 17-06 (May 8, 2017).

¹⁵ *See J.A.*, Docket No. 17-1306 (issued March 20, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2018 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: July 24, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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