

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

S.M., Appellant	)	
	)	
and	)	<b>Docket No. 21-0392</b>
	)	<b>Issued: August 12, 2021</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
East Saint Louis, IL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
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 January 26, 2021 appellant, through counsel, filed a timely appeal from a December 31, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated September 3, 2020, which became final after 30 days of issuance, and is not subject to further review.<sup>2</sup> As there was no merit decision by OWCP issued within 180 days of the filing of this appeal, pursuant to the Federal Employees'

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<sup>1</sup> 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.

<sup>2</sup> 20 C.F.R. § 501.6(d). *See G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>4</sup>

### **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**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 14, 2006 appellant, then a 37-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he pulled a back muscle under his left shoulder blade when he picked up a tray of mail when loading his long life vehicle while in the performance of duty. He stopped work on January 3, 2007. OWCP accepted appellant's claim for thoracic and cervical sprains and subsequently expanded acceptance of his claim to include cervical disc herniation at C4-5 and C5-6.<sup>6</sup> It paid him wage-loss compensation on the supplemental rolls beginning on January 3, 2007 and placed him on the periodic rolls, effective June 10, 2007. On August 7, 2007 appellant returned to full-duty work.

On June 15, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a December 29, 2014 report, Dr. Neil Allen, a Board-certified internist and neurologist, reviewed appellant's history and noted diagnoses of neck and thoracic sprain, and displacement of cervical intervertebral disc without myelopathy. Upon examination of appellant's cervical spine, he observed tenderness through the upper trapezius and serratus anterior and a golf-ball-sized area of edema noted to the left anterolateral aspect of the cervical spine, C6-T1. Neurovascular examination revealed soft touch and sharp/dull intact for the C5-T1 levels bilaterally, except for the C7 dermatome on the left, which showed reduced soft touch. Dr. Allen referred to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the December 31, 2020 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>5</sup> Docket No. 20-0469 (issued September 3, 2020); Docket No. 18-1047 (issued February 13, 2019).

<sup>6</sup> A December 18, 2006 cervical spine magnetic resonance imaging (MRI) scan revealed a large hard disc/osteophyte complex at the C3-4 level on the left with left foraminal narrowing, small, right-sided C4-5 hard disc/osteophyte complex with mild right foraminal narrowing, and hard disc/osteophyte complex at C6-7 on the left and mild left foraminal narrowing.

(A.M.A., *Guides*)<sup>7</sup> and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 1 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), the class of diagnosis (CDX) for mild motor deficit at C7 resulted in a class 1 impairment, with a default value of five. He assigned a grade modifier for functional history (GMFH) of 2 and a grade modifier for clinical studies (GMCS) of 2. Dr. Allen utilized the net adjustment formula  $(GMFH - CDX) + (GMCS - CDX) = (2 - 1) + (2 - 1) = +2$ , which resulted in nine percent permanent impairment of the left upper extremity. He also determined that, under Table 1 of *The Guides Newsletter*, appellant had mild sensory deficit at C7, which fell under a CDX of class 1 impairment with a default value of five. Dr. Allen assigned a GMFH of 2 and a GMCS of 2. He applied the net adjustment formula,  $(2-1) + (2-1)$ , resulting in a net adjustment of +2, which equaled five percent permanent impairment of the left upper extremity. Dr. Allen further reported that appellant had no motor or sensory deficits at the C5, C6, and C8 spinal levels, which translated to zero percent permanent impairment. He concluded that appellant had 14 percent permanent impairment of the bilateral upper extremities due to both sensory and motor deficits at C7.

In a July 20, 2015 report, Dr. Michael Hellman, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), disagreed with Dr. Allen's impairment rating. He explained that, while Dr. Allen's impairment rating was based on appellant's sensory and motor deficits in the left C7 distribution, this condition was not an accepted work-related condition and was not a preexisting condition. Dr. Hellman indicated that his impairment rating would be based on the work-related C5 and C6 deficits. He utilized the DBI method and reported that, under Table 1 of *The Guides Newsletter*, appellant had class 0 impairment for normal sensory and motor examination on the right and left at the C4-6 and C5-6 levels. Dr. Hellman concluded that appellant had zero percent permanent impairment of the bilateral upper extremities. He reported a date of maximum medical improvement (MMI) of December 29, 2014, the date of Dr. Allen's impairment rating report.

By decision dated October 28, 2015, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of his accepted November 14, 2006 employment injury.

On November 4, 2015 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 12, 2016. In a September 21, 2016 decision, OWCP's hearing representative affirmed the October 28, 2015 decision.

On May 10, 2017 appellant, through counsel, requested reconsideration.

In April 30 and May 30, 2017 addendum reports, Dr. Allen disputed the DMA's finding that appellant's claim was not accepted for C7 disc pathology. He indicated that a December 18, 2006 MRI scan also showed disc pathology at the C3-4, C4-5, and C6-7 levels. Dr. Allen further reported that the mechanism of injury at the C7 level was the same as the accepted conditions. He

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<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

maintained that his December 29, 2014 impairment rating report was accurate and represented appellant's functional loss due to his November 14, 2006 employment injury.

By decision dated August 10, 2017, OWCP denied modification of the September 21, 2016 decision.

On September 8, 2017 appellant, through counsel, requested reconsideration. In a November 17, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed the November 17, 2017 decision to the Board. By decision dated February 13, 2019, the Board affirmed the November 17, 2017 decision finding that appellant's reconsideration request did not meet any of the regulatory requirements under 20 C.F.R. § 10.606(b)(3) sufficient to require further review of the merits of his claim.<sup>8</sup>

On May 14, 2019 appellant, through counsel, requested reconsideration.<sup>9</sup>

Appellant submitted an undated report by Dr. Allen who noted his disagreement with the determination that appellant was not eligible for any impairment at the C7 level. He alleged that this finding contradicted FECA Transmittal No. 17-02, which states that a rated impairment should reflect the total loss for the scheduled member at the time of the rating examination. Accordingly, Dr. Allen asserted that appellant was eligible for schedule award compensation related to the C7 spinal nerve impairment as calculated on December 29, 2014.

A May 8, 2019 cervical spine MRI scan revealed congenital narrowing of the cervical spinal canal with superimposed spondylosis causing mild-to-moderate central canal stenosis at C3-4, C4-5, and C6-7, mild mass effect on the cervical spinal cord at the C3-4 and C4-5 levels, and significant neural foraminal stenosis at C3-4 bilaterally, C4-5 bilaterally, C5-6 on the left, and C6-7 bilaterally.<sup>10</sup>

By decision dated August 1, 2019, OWCP denied modification of its prior decision.

Appellant again appealed to the Board. In a September 3, 2020 decision, the Board affirmed the August 1, 2019 decision finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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<sup>8</sup> *Supra* note 4.

<sup>9</sup> Although appellant claimed to be filing a request for reconsideration from the Board's February 13, 2019 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Although the February 13, 2019 Board decision was the last merit decision, the August 10, 2017 OWCP decision is the appropriate subject of possible modification by OWCP.

<sup>10</sup> In a June 19, 2019 letter, appellant requested to expand the acceptance of his claim to include additional conditions of congenital narrowing of the cervical spinal canal with superimposed spondylosis causing mild-to-moderate central canal stenosis at C3-4, C4-5, and C6-7, and significant neural foraminal stenosis at C3-4 bilaterally, C4-5 bilaterally, C5-6 on the left, and C6-7 bilaterally.

On December 28, 2020 appellant, through counsel, requested reconsideration<sup>11</sup> and indicated that he was submitting a new medical report from Dr. Allen.

Appellant submitted a December 10, 2020 addendum report from Dr. Allen. The first page of the report is partially illegible. Dr. Allen asserted that, according to FECA Transmittal No. 17-02, appellant's spinal nerve impairment at the left C7 level should be included in appellant's permanent impairment calculation. He included his original December 29, 2014 impairment rating, which indicated that under Table 1 of *The Guides Newsletter* appellant had 14 percent permanent impairment of the bilateral upper extremities due to sensory and motor deficits at C7.

By decision dated December 31, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that his reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

### **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 or her own motion or on application.<sup>12</sup>

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.<sup>13</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>14</sup> If it chooses to grant reconsideration, it reopens

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<sup>11</sup> Although appellant claimed to be filing a request for reconsideration from the Board's September 3, 2020 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Although the September 3, 2020 Board decision was the last merit decision, the August 1, 2019 OWCP decision is the appropriate subject of possible modification by OWCP.

<sup>12</sup> 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).

<sup>13</sup> 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>14</sup> *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.

and reviews the case on its merits.<sup>15</sup> 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.<sup>16</sup>

### ANALYSIS

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

On December 28, 2020 OWCP received appellant's timely request for reconsideration. It previously denied his claim because the medical evidence of record was insufficient to establish permanent impairment of scheduled member or function of the body, warranting a schedule award. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding his schedule award claim to warrant a merit review pursuant to 5 U.S.C. § 8128(a).<sup>17</sup>

In his December 28, 2020 reconsideration request, counsel did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>18</sup>

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With his reconsideration request, appellant submitted a December 10, 2020 addendum report from Dr. Allen with a partially illegible first page. Dr. Allen asserted that appellant's spinal nerve impairment at the left C7 level should be included in appellant's permanent impairment calculation and included his original December 29, 2014 impairment rating report. The Board notes that this report was substantially similar to Dr. Allen's December 29, 2014 report. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the merits of a case.<sup>19</sup> Thus, he is not entitled to a review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>20</sup>

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<sup>15</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>16</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>17</sup> *See H.T.*, Docket No. 20-1318 (issued April 27, 2021).

<sup>18</sup> *Supra* note 12.

<sup>19</sup> *H.A.*, Docket No. 18-1253 (issued April 23, 2020); *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>20</sup> *Supra* note 12; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>21</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 31, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2021  
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

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<sup>21</sup> *H.T.*, Docket No. 20-0799 (issued November 6, 2020); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).