United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 20-1224**
	)	**Issued: June 8, 2021**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY STATION, Oakland, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 14, 2020 appellant filed a timely appeal from a January 10, 2020 merit decision and an April 20, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish greater than 10 percent permanent impairment of the right upper extremity, for which he received schedule award compensation; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On January 15, 1980 appellant, then a 32-year-old warehouseman, filed a traumatic injury claim (Form CA-1) alleging that on January 11, 1980 he injured his right hand while in the performance of duty. OWCP accepted the claim for right carpal tunnel syndrome.

An electromyogram (EMG) performed on April 18, 1980 yielded values within normal limits, but suggesting a mild median nerve injury. A nerve conduction velocity (NCV) study of the same date was normal. The test failed to confirm carpal tunnel syndrome, but showed possible distal median neuropathy.

On May 27, 1980 Dr. James Damon, a Board-certified orthopedic surgeon, performed a right carpal tunnel release.

On September 8, 1982 a district medial adviser (DMA) found that appellant had five percent permanent impairment due to sensitivity of the median nerve of the right thumb and five percent impairment due to loss of grip strength resulting from pain and discomfort, for a total right upper extremity impairment of 10 percent.

By decision dated November 26, 1982, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity.[3] The period of the award ran for 31.20 weeks from July 16, 1982 to February 19, 1983.

In a report dated October 4, 2018, Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, discussed appellant's history of a January 11, 1980 employment injury. On examination he found full motion of the wrists, negative Finkelstein's and Phalen's tests, discomfort on palpation of the right thumb, and a positive Tinel's sign over the right palm, but not the carpal canals. Dr. Fong diagnosed status post right carpal tunnel and motor nerve decompression with continued causalgia. He advised that the causalgia, or complex regional

[2] *Order Dismissing Appeal*, Docket No. 94-0786 (issued December 7, 1994); *Order Dismissing Appeal*, Docket No. 95-1877 (issued September 7, 1995); Docket No. 00-2708 (issued March 6, 2002); Docket No. 03-1304 (issued July 7, 2003); Docket No. 04-0087 (issued March 8, 2004); *Order Dismissing Appeal*, Docket Nos. 07-1058 & 07-1399 (issued September 12, 2007); Docket No. 07-1058 (issued March 11, 2009); Docket No. 08-1697 (issued March 11, 2009); Docket No. 13-1284 (issued September 16, 2013).

[3] By decisions dated April 21, 1998 and August 10, 2000, OWCP denied appellant's claim for an additional schedule award for the right upper extremity. Appellant appealed to the Board. By decision dated March 6, 2002, the Board affirmed the August 10, 2000 decision. Docket No. 00-2708 (issued March 6, 2002). By decision dated February 22, 2007, OWCP denied appellant's request for an additional schedule award for the right upper extremity. By decision dated April 30, 2008, it denied his request for reconsideration of its September 17, 1993 decision as it was untimely and failed to demonstrate clear evidence of error. Appellant appealed to the Board. By decisions dated March 11, 2009, the Board affirmed the February 22, 2007 and April 30, 2008 decisions. Docket No. 08-1697 (issued March 11, 2009); and Docket No. 07-1058 (issued March 11, 2009).

pain syndrome (CRPS), was a complication of appellant's injury. Referencing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] Dr. Fong identified the diagnosis as CRPS, which he found yielded 23 percent right upper extremity impairment according to Table 15-26 on page 454. He advised that a rating for carpal tunnel syndrome was not applicable as appellant's injury was to a median nerve branch distal to the carpal tunnel. Dr. Fong found 23 percent of the upper extremity or 14 percent whole person impairment.

On October 22, 2018 appellant filed a claim for an additional schedule award (Form CA-7).

On January 6, 2019 Dr. David J. Slutsky, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that appellant had no impairment due to carpal tunnel syndrome as he failed to meet the diagnostic criteria for the condition pursuant to page 445 of the A.M.A., *Guides*. He noted that appellant had a positive Tinel's sign over the right palm, but not the carpal canal and a negative Phalen's test. Dr. Slutsky advised that electrodiagnostic testing from April 18, 1980 had revealed normal distal medial and sensory latency. He noted that the A.M.A., *Guides* required the diagnosis of neuropathy to be documented by sensory and motor nerve condition studies to be ratable as an impairment.[5] Dr. Slutsky indicated that OWCP had not accepted CRPS as causally related to the accepted employment injury. He opined that appellant had not met the criteria for a CRPS diagnosis under the A.M.A., *Guides*, which required the condition be present over a year, verified by more than one physician, and classified by objective diagnostic criteria points.[6] Dr. Slutsky found that appellant had hyperesthesia of his thumb and hyperalgesia to pinprick, but no documented sweating, edema, loss of motion, vasomotor or trophic bone changes. He concluded that the CRPS diagnosis was not supported by objective findings.

Dr. Slutsky identified the class of diagnosis (CDX) as a moderate sensory, only peripheral, nerve impairment according to Table 15-18 on page 429 of the A.M.A., *Guides* based on appellant's abnormal sensation and two-point discrimination over six millimeters, which yielded three percent permanent impairment of the right upper extremity.

By decision dated January 17, 2019, OWCP denied appellant's claim for an additional schedule award.

In a supplemental report dated February 1, 2019, Dr. Fong opined that appellant had reached maximum medical improvement (MMI) on November 14, 2002. He advised on examination that she had no loss of range of motion (ROM) of the right upper extremity, but "nuance loss of use of the right hand and thumb," no atrophy, edema of the right wrist, a positive Tinel's sign at the base of the right thumb, and hyposthesias of the right thumb. Dr. Fong indicated that appellant had no trophic or temperature changes, but noted that individuals with

[4] A.M.A., *Guides* (6th ed. 2009).

[5] *Id*. at 445.

[6] *Id*. at 451.

chronic causalgia sometimes did not have acute symptoms as they had learned to manage their condition. He stated, "[Appellant's] lack of specific physical findings is typical of a long-standing causalgia patient." Dr. Fong further related that, "Dr. Slutsky's comments about the lack of findings are well-taken, but the claimant's causalgia is in the chronic phase where overt findings are not as evident…." He advised that appellant had objective findings of "chronic dysesthesia of the right thumb, relative edema of the hand and wrist and altered use of the hand with decreased grip and pinch…."

On February 14, 2019 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated May 23, 2019, OWCP's hearing representative affirmed the January 17, 2019 decision.

On September 30, 2019 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Fong had rated his impairment based on the accepted condition of carpal tunnel syndrome.

On October 4, 2019 OWCP received a copy of Dr. Fong's October 4, 2018 report, with the date updated to July 25, 2019.

By decision dated January 10, 2020, OWCP denied modification of its May 23, 2019 decision.

On February 4, 2020 appellant requested reconsideration. He argued that he had filed a lawsuit against Dr. Damon for altering his medical records. Appellant asserted that an EMG/NCV study showed distal median neuropathy, rather than carpal tunnel syndrome. He summarized the operative report and a July 12, 2012 radiology report, finding likely scar tissue around the median nerve. Appellant asserted that Dr. Damon had scarred the median nerve of his thumb during surgery, causing nerve damage and causalgia.

Appellant resubmitted medical evidence dating from 1980 to 2012, including reports from his April 18, 1980 electrodiagnostic testing and May 27, 1980 carpal tunnel release. He additionally resubmitted a September 29, 1980 chart note from Dr. Damon, and a July 12, 2012 magnetic resonance imaging (MRI) scan. Appellant also submitted correspondence dated April 2, 2004 from his medical provider's office regarding compensatory damages and a May 4, 1995 statement from his medical provider's office forwarding a copy of the May 27, 1980 operative report and noting that the diagnosis was a pinched motor branch of the right median nerve.

By decision dated April 20, 2020, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[7] and its implementing federal regulations,[8] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.[9] The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[10]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning Disability and Health (ICF).[11] Under the sixth edition, the evaluator identifies the impairment class of diagnosis (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[12] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[13] Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of the right upper extremity, for which he previously received a schedule award.

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[7] *Supra* note 1.

[8] 20 C.F.R. § 10.404.

[9] For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700, Exhibit 1 (January 2010).

[10] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[11] A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[12] *Id*. at 494-531.

[13] *Id*. 411.

[14] *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

OWCP granted appellant a schedule award for 10 percent permanent impairment of the right upper extremity by decision dated November 26, 1982. On October 22, 2018 appellant requested an additional schedule award.

In support of his request, appellant submitted an October 4, 2018 impairment evaluation from Dr. Fong. Dr. Fong diagnosed causalgia, or CRPS, as a consequence of appellant's right carpal tunnel release. On examination he found full ROM of the wrist, a positive Tinel's sign over the right palm, but not the carpal canals, and a negative Finkelstin, and Phalen's test. Dr. Fong identified the CDX as CRPS, which yielded a permanent impairment of 23 percent under Table 15-26 on page 454 of the A.M.A., *Guides*. Table 15-26, however, provides that a diagnosis of CRPS must be established by the diagnostic criteria of Table 15-24, which requires three of the four symptoms of either hyperesthesia and/or allodynia, temperature or skin changes, edema and/or sweating, and decreased ROM, motor dysfunction, or trophic changes. Appellant has not met the objective diagnostic criteria for CRPS entitling him to a schedule award for that condition. Additionally, OWCP has not accepted that he sustained CRPS causally related to his accepted condition. For conditions not accepted by OWCP as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relationship.[15] Appellant has not submitted such evidence and thus not met his burden of proof.[16]

On January 6, 2019 Dr. Slutsky reviewed Dr. Fong's report and advised that appellant failed to meet the diagnostic criteria for an impairment rating due to carpal tunnel syndrome as he had no evidence of motor latency sufficient to show focal neuropathy under Appendix 15-B.[17] The A.M.A., *Guides* provides that test results must show focal nerve compromise in order to be rated for entrapment/compression neuropathy under Table 15-23.[18] Dr. Slutsky further found that appellant failed to meet the diagnostic criteria for CRPS as he had hyperesthesia of the thumb, but no documented sweating, reduced motion, or vasomotor or trophic changes. He identified the CDX as a moderate impairment due to a sensory only peripheral nerve injury, which yielded three percent permanent impairment of the right upper extremity according to Table 15-18 on page 429.[19] Dr. Slutsky properly reviewed the medical evidence and evaluated appellant's impairment of the right upper extremity in accordance with the A.M.A., *Guides*. There is no medical evidence in conformance with the A.M.A., *Guides* showing a greater impairment. Appellant previously received a schedule award for 10 percent permanent impairment of the right upper extremity due to sensitivity of the median nerve of the

[15] *See L.T.*, Docket No. 18-1405 (issued April 8, 2019); *F.E.*, Docket No. 17-0584 (issued December 18, 2017).

[16] *See F.E., id.*

[17] A.M.A., *Guides* 487.

[18] *Id.* at 445-49.

[19] Table 15-18 does not provide rating the impairment based on ROM as an alternative means of assessment for the diagnosis in question, and thus the provisions of FECA Bulletin No. 17-06 do not apply. FECA Bulletin No. 17-06 (May 8, 2017).

right thumb and loss of grip strength.[20] The current rating thus duplicates in whole or in part the prior impairment rating, therefore, he is not entitled to an additional schedule award.[21]

Dr. Fong reviewed Dr. Slutsky's report and advised that appellant had decreased specific physical findings because his causalgia was long-standing. He indicated that appellant had dysthesia of the thumb and relative edema of the hand and wrist with altered hand use. The issue, however, is whether appellant has demonstrated that he sustained causalgia, or CRPS, causally related to his accepted employment injury and, if so, whether it meets the criteria for ratable permanent impairment under the A.M.A., *Guides*. Dr. Fong has not provided a reasoned opinion explaining the mechanism by which the accepted employment injury resulted in the diagnosis of causalgia/CRPS and thus his report is of little probative value.[22] He further has not provided an impairment rating for CRPS consistent with the A.M.A., *Guides*. Appellant, consequently, has not established more than 10 percent permanent impairment of the right upper extremity.

On appeal appellant contends that physicians diagnosed him with causalgia in the right hand. As discussed, however, the issue is whether he has established more than 10 percent permanent impairment of the right upper extremity. Appellant has not submitted evidence in accordance with the A.M.A., *Guides* showing more than 10 percent right upper extremity impairment and thus has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

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.[23]

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

[20] It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule award for an earlier injury if compensation in both cases is for impairment of the same member or function or different parts of the same member or function and the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment. 20 C.F.R. § 10.404(d). *See S.M.*, Docket No. 17-1826 (issued February 26, 2018).

[21] *See D.P.*, Docket No. 19-1514 (issued October 21, 2020); *E.B.*, Docket No. 19-0530 (issued August 9, 2019).

[22] *See J.M.*, Docket No. 19-0359 (issued June 3, 2019); *E.D.*, Docket No. 16-1854 (issued March 3, 2017).

[23] 5 U.S.C. § 8128(a).

considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[24]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[25] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[26] 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.[27]

ANALYSIS -- ISSUE 2

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).

Initially, the Board finds that OWCP properly considered appellant's correspondence as a request for reconsideration and not as a claim for an additional schedule award.[28] The underlying issue on reconsideration is whether the medical evidence demonstrates a greater permanent impairment than that previously awarded. Thus, the Board must determine whether appellant presented sufficient evidence or argument regarding the extent of permanent impairment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).[29]

Appellant has not submitted evidence or raised an argument in support of his request for reconsideration sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(3). He did not show that OWCP erroneously applied or interpreted a specific point of law or raise a relevant legal argument not previously considered. On reconsideration, appellant contended that Dr. Damon had scarred the median nerve of his thumb causing causalgia and indicated that electrodiagnostic studies showed distal median neuropathy instead of carpal tunnel syndrome. The Board, however, previously considered this argument in its September 16, 2013 decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.[30] Appellant further maintained that

[24] 20 C.F.R. § 10.606(b)(3); *see also S.S.*, Docket No. 18-0647 (issued October 15, 2018).

[25] *Id.* at § 10.607(a). 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. *Supra* note 9 at Chapter 2.1602.4 (February 2016). 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.

[26] *Id.* at § 10.608(a); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018).

[27] *Id.* at § 10.608(b); *K.S.*, Docket No. 18-1022 (issued October 24, 2018).

[28] *See K.W.*, Docket No. 19-0553 (issued November 8, 2019); *B.W.*, Docket No. 18-1415 (issued March 8, 2019).

[29] *S.W.*, Docket No. 18-1261 (issued February 22, 2019).

[30] *J.S.*, Docket No. 19-0022 (issued November 4, 2020); *C.D.*, Docket No. 19-1973 (issued May 21, 2020).

Dr. Damon had altered his medical records, however, this argument is not relevant to the pertinent issue of whether the medical evidence is sufficient to establish greater than 10 percent permanent impairment of the right upper extremity. Evidence or argument that does not address the particular issue involved does not warrant reopening a case for further merit review.[31] Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).[32]

The Board further finds that appellant did not submit any relevant or pertinent new evidence not previously considered. With his reconsideration request, appellant resubmitted April 18, 1980 electrodiagnostic testing, the May 27, 1980 operative report, a May 4, 1995 letter from his medical provider's office, a September 29, 1980 chart note from Dr. Damon, and a July 12, 2012 MRI scan. However, providing additional evidence that either repeats or duplicate information already in the record does not constitute a basis for reopening a claim.[33] Therefore, these reports are insufficient to require OWCP to reopen the claim for consideration of the merits.[34] Appellant further submitted one page from an April 2, 2004 letter to his healthcare provider regarding his request for damages; this evidence, however, fails to address the relevant issue in this case, which is medical in nature and must be addressed by relevant medical evidence establishing a higher percentage of permanent impairment.[35] As he did not provide relevant and pertinent new evidence, appellant is not entitled to a merit review based on the third requirement under section 10.606(b)(3).[36]

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[37]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 10 percent permanent impairment of the right upper extremity, for which he previously received a schedule award. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

[31] *See T.Q.*, Docket No. 18-0641 (issued October 5, 2018).

[32] 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

[33] *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *S.F.*, Docket No. 18-0516 (issued February 21, 2020).

[34] *G.J.*, Docket No. 19-1652 (issued January 29, 2021).

[35] *See M.P.*, Docket No. 20-0814 (issued January 26, 2021).

[36] 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

[37] *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 20 and January 10, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board