

FACTUAL HISTORY

The Office accepted that on or before August 10, 2006 appellant, then a 59-year-old clerk, sustained bilateral carpal tunnel syndrome in the performance of duty. She underwent right median nerve release on November 27, 2006, approved by the Office. Appellant returned to modified duty on December 29, 2006. Dr. Paul J. Donahue, an attending Board-certified orthopedic surgeon, released her to full duty on May 1, 2007.¹ He submitted progress notes through October 2007 noting residual pain and paresthesias in the right hand. On October 31, 2007 Dr. Donahue administered a cortisone injection to the left wrist and released appellant to restricted duty. He did not hold her off work.

In a December 12, 2007 report, Dr. Donahue held appellant off work due to a herniated cervical disc. Dr. Charles J. Hipp, an attending Board-certified internist, treated her through December 2008 for a herniated C8 disc with left-sided radiculitis and spondylosis. He opined on November 18, 2008 that appellant's left hand paresthesias were due to the herniated disc.²

On December 9, 2008 appellant claimed a schedule award. She submitted a December 30, 2008 impairment rating from Dr. Donahue, finding she had reached maximum medical improvement following the right median nerve release and a cervical laminotomy. Dr. Donahue rated a five percent impairment of the right upper extremity, three percent due to pain and two percent for weakness. An Office medical adviser reviewed Dr. Donahue's rating and found a four percent impairment of the right upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).

On May 22, 2009 the Office asked the medical adviser to rate both upper extremities under the sixth edition of the A.M.A., *Guides* that went into effect on May 1, 2009. In a June 3, 2009 report, an Office medical adviser found a two percent impairment of the right upper extremity due to Grade 1 carpal tunnel syndrome according to Table 15-23, page 449.³ He noted that although appellant had a three percent impairment of the left upper extremity, a nine percent schedule award for the left arm under a separate claim precluded any additional award.

In a July 23, 2009 compensation log sheet, the Office noted an effective date of October 31, 2007, the date of a recurrence of disability. It noted that appellant's weekly pay rate was \$970.55 a week as of October 31, 2007.

By decision dated July 29, 2009, the Office granted appellant a schedule award for a two percent impairment of the right upper extremity. It found that she was not eligible for an additional award for the left upper extremity due to a prior award in another claim. The award ran from February 9 to March 24, 2009 and was based on a weekly pay rate of \$970.55.

¹ On June 28, 2007 appellant claimed a schedule award. The Office did not develop the claim as the medical evidence indicated that she had not yet reached maximum medical improvement.

² There is no claim now before the Board on the present appeal for a herniated cervical disc.

³ Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

On August 11, 2009 appellant requested reconsideration. She contended that the effective date of the July 29, 2009 schedule award should have been December 30, 2008 according to Dr. Donahue. Appellant enclosed pay stubs from 2008 and 2009 showing a weekly salary of \$1,010.11 as of December 30, 2008. She also provided copies of Dr. Donahue's May 1, 2007 report and Dr. Hipp's November 18, 2008 report previously of record.

By decision dated November 4, 2009, the Office denied reconsideration on the grounds that the additional evidence submitted was insufficient to warrant a merit review of the claim. It found that appellant's arguments were irrelevant to the claim and the medical evidence was duplicative of reports previously of record. The pay stubs were found irrelevant to the claim. It also found that it correctly used October 31, 2007 as the effective date as appellant sustained a recurrence of disability on that day.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁷ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁸ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁹

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome on or before August 10, 2006, with right median nerve release on November 27, 2006. Appellant claimed a schedule award on December 9, 2008. On July 29, 2009 the Office granted her a

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b). *See also D.K.*, 59 ECAB 141 (2007).

⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *Annette Louise*, 54 ECAB 783 (2003).

schedule award for a two percent impairment of the right upper extremity, based on her pay rate as of February 9, 2009.

Appellant requested reconsideration on August 11, 2009, contending that the Office erred by using a recurrent pay rate in calculating the schedule award. She enclosed pay stubs from 2008 and 2009. An issue at the time of the last merit decisions in the case was whether the Office correctly calculated the July 29, 2009 schedule award. To be relevant, the evidence submitted supporting the request for reconsideration must address whether the schedule award was correct under the facts and circumstances of the case. The Board finds that appellant submitted new, relevant evidence and argument requiring a merit review.

In her August 11, 2007 letter, appellant asserted that the Office based her schedule award compensation on an incorrect pay rate. This argument is relevant and pertinent to the correctness of the schedule award as issued. There is conflicting evidence of record regarding which effective date the Office used.¹⁰ On July 23, 2009 the Office selected an effective date of October 31, 2007. However, in the July 29, 2009 schedule award decision, it used February 9, 2009 as the effective date of pay rate but, the Office found in its November 4, 2009 decision that the October 31, 2007 effective date was correct. On reconsideration, appellant also submitted pay stubs in an attempt to document the appropriate pay rate. Although the Office found these documents irrelevant, they are pertinent to the pay rate issue.

The Board finds that appellant's August 11, 2009 arguments regarding the correct pay rate, and the 2008 and 2009 pay stubs, were pertinent new evidence relevant to the issue of whether the Office correctly calculated the July 29, 2009 schedule award. This is sufficient to require further review of the case on its merits.¹¹ The case will be remanded for further consideration of appellant's arguments and evidence to be followed by issuance of an appropriate decision.

On appeal, appellant asserts that the Office improperly used a recurrent pay rate in calculating her schedule award compensation although she had no recurrence of disability. The Board notes that the record does not clearly indicate whether she sustained a recurrence of disability on October 31, 2007. Dr. Donahue, an attending Board-certified orthopedic surgeon, treated appellant on October 31, 2007 but did not hold her off work. On remand, the Office will conduct appropriate development to clarify this issue.

CONCLUSION

The Board finds that the Office improperly denied reconsideration. The case will be remanded to the Office for additional development, to be followed by issuance of an appropriate decision.

¹⁰ See also *R.M.*, 59 ECAB 690 (2008).

¹¹ 20 C.F.R. § 10.606(b)(2). *R.M.*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2009 is set aside. The case is remanded for further development consistent with this decision.

Issued: February 16, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board