

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

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**DAVID A. WEILBACHER, Appellant**

**and**

**DEPARTMENT OF THE NAVY, MARINE  
CORPS BASE, Camp Pendleton, CA, Employer**

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**Docket No. 05-464  
Issued: May 10, 2005**

*Appearances:*  
*David A. Weilbacher, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member

**JURISDICTION**

On December 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 5, 2004 nonmerit decision denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the October 10, 2003 decision of the Office hearing representative. Because more than one year has elapsed between the last merit decision and the filing of this appeal on December 17, 2004 the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On February 26, 2001 appellant, then a 46-year-old electronics mechanic, filed a traumatic injury claim alleging that he sustained a right shoulder injury while digging in dirt with a shovel at work on February 23, 2001. The Office accepted that appellant sustained a right shoulder strain/sprain; it authorized a subacromial decompression and glenohumeral chondroplasty and debridement performed on September 11, 2001 and a right long head biceps tenodesis performed on May 14, 2002.

In a report dated December 9, 2002, Dr. Andrew M. Cooperman, an attending Board-certified orthopedic surgeon, evaluated the medical condition of appellant's right arm. Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon, who served as an Office medical adviser, reviewed the medical evidence of record on December 21, 2002 and determined that appellant had a 21 percent permanent impairment of his right arm. Dr. Simpson indicated that this total impairment rating was calculated by combining an 18 percent rating for loss of motion with a 3 percent rating for pain and a 1 percent rating for motor deficit using the Combined Values Chart of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated January 13, 2003, the Office granted appellant a schedule award for a 21 percent permanent impairment of his right arm.

Appellant requested a hearing before an Office hearing representative, which was held on August 26, 2003. At the hearing, appellant alleged that Dr. Simpson improperly calculated his impairment ratings for pain and motor deficit and claimed that he had employment-related right cubital tunnel syndrome and right carpal tunnel syndrome, which should have been included in the evaluation of the permanent impairment of his right arm. After the hearing, appellant submitted an August 26, 2003 statement, which contained an extensive discussion of these same arguments.

By decision dated and finalized October 10, 2003, the Office hearing representative affirmed the Office's January 13, 2003 decision. The hearing representative directly addressed and rejected the arguments presented by appellant at the hearing and in his August 26, 2003 statement.

By letter dated September 12, 2004 and received by the Office on September 16, 2004, appellant requested reconsideration of his claim. Appellant again argued that Dr. Simpson improperly calculated his impairment ratings for pain and motor deficit and claimed that he had employment-related right cubital tunnel syndrome and right carpal tunnel syndrome, which should have been included in the evaluation of the permanent impairment of his right arm.

By decision dated October 5, 2004, the Office denied appellant's request for further merit review of his claim.

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.<sup>4</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>5</sup>

## ANALYSIS

The Office granted appellant a schedule award for a 21 percent permanent impairment of his right arm and he later alleged that he was entitled to a larger schedule award for this permanent impairment.

In connection with his September 16, 2004 reconsideration request, appellant argued that Dr. Simpson, a Board-certified orthopedic surgeon, who served as an Office medical adviser, improperly calculated his impairment ratings for pain and motor deficit. He also claimed that he had employment-related right cubital tunnel syndrome and right carpal tunnel syndrome, which should have been included in the evaluation of the permanent impairment of his right arm. However, appellant previously made these same arguments at the August 26, 2003 hearing before an Office hearing representative and in an August 26, 2003 statement submitted after the hearing. In her October 10, 2003 decision, the hearing representative directly addressed and rejected the arguments. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>6</sup>

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of its October 10, 2003 decision under section 8128(a) of the Act, because the materials he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.607(a).

<sup>5</sup> 20 C.F.R. § 10.608(b).

<sup>6</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980). Appellant did not submit any additional medical evidence in support of his claim.

considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' October 5, 2004 decision is affirmed.

Issued: May 10, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>7</sup> On appeal appellant argued that the Office delayed issuing its October 5, 2004 decision such that it prejudiced his ability to have his case reviewed on its merits. The Office procedure provides that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996). In the present case, however, the Office issued its decision addressing appellant's September 16, 2004 reconsideration request less than three weeks after it was received.