

On April 18, 2006 appellant, then a 43-year-old rural mail carrier, sustained a sprain/strain of the right shoulder and arm when his vehicle hit an obstruction in the road and went into a ditch. On May 2, 2006 he underwent surgical repair of a right distal biceps tendon tear performed by Dr. Ronald R. Romanelli, an attending Board-certified orthopedic surgeon.

On February 24, 2007 appellant filed a claim for a schedule award. His physician, Dr. Romanelli, did not provide an impairment rating based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Office referred appellant to Dr. Richard F. Howard, an osteopathic physician Board-certified in orthopedic surgery, for a physical examination and impairment rating of appellant's right upper extremity. In an August 2, 2007 report, Dr. Howard reviewed appellant's medical history and provided findings on physical examination. He determined that appellant had no impairment of his right upper extremity causally related to his accepted right distal biceps tendon tear. In an August 15, 2007 report, Dr. Robert W. Wysocki, an orthopedic surgeon and an Office medical adviser, stated that the medical evidence established that appellant had no impairment of his right upper extremity causally related to his accepted right distal biceps tendon tear.¹

By decision dated August 30, 2007, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence did not establish that he had any impairment causally related to his accepted right upper extremity condition.

On August 29, 2008 appellant requested reconsideration and submitted medical reports from Dr. Romanelli previously submitted. He argued that the Office should accept additional medical conditions as causally related to the April 18, 2006 employment injury. Appellant expressed his reasons for disagreeing with Dr. Howard's impairment rating.

By decision dated September 15, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review of his claim.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵

¹ See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (October 2005) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

² Subsequent to the September 15, 2008 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8128(a).

⁵ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ 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.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ 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.⁹

ANALYSIS

On August 29, 2008 appellant requested reconsideration of the August 30, 2007 merit decision denying his claim for a schedule award. He submitted medical reports from Dr. Romanelli previously of record. Because these reports were previously of record they do not constitute new and relevant pertinent evidence not previously considered by the Office. Appellant argued that the Office should accept additional medical conditions as causally related to the April 18, 2006 employment injury. He expressed his reasons for disagreeing with Dr. Howard's impairment rating. However, the Board notes that lay individuals are not competent to render a medical opinion.¹⁰ Therefore, Dr. Howard's opinions regarding the medical evidence does not constitute new and relevant pertinent evidence not previously considered by the Office. Because appellant did not submit evidence or argument that showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered or constituted relevant and pertinent new evidence not previously considered by the Office. The Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

⁶ Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ See *Robert J. Krstyen*, 44 ECAB 227 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 15, 2008 is affirmed.

Issued: June 4, 2009
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