

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

S.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
EDWARD HINES JR. HOSPITAL, Hines, IL,)
Employer)

Docket No. 10-1587
Issued: February 11, 2011

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2010 appellant filed a timely appeal from the December 30, 2009 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial. The last merit decision, dated July 29, 2009, was issued more than 180 days prior to the filing of this appeal and therefore the Board does not have jurisdiction over the merits of this case.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration pursuant to section 8128(a) of the Federal Employees' Compensation Act.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On January 5, 2006 appellant, then a 35-year-old pharmacy technician, sustained a right hand injury in the performance of duty when she pulled extremely hard to open a malfunctioning door. The Office accepted her claim for acquired trigger finger, right middle and de Quervain's tenosynovitis of the right wrist.² On February 27, 2008 it issued a schedule award for 10 percent impairment of appellant's right upper extremity based on right middle finger range of motion and pain. On February 3, 2009 the Office issued an additional schedule award of 3 percent for pain, for a total right upper extremity impairment of 13 percent.

Appellant filed a request for reconsideration. In a decision dated July 29, 2009, the Office reviewed the merits of her claim and denied modification of its prior decision. It had asked appellant to submit a report from her physician providing exact goniometric measurements of flexion and extension of each joint in the right middle finger. Discussing the metacarpophalangeal joint in the right long finger, her physician reported a "10-degree flexion contracture measured with a goniometer." A second opinion physician found no significant flexion contracture of the right middle finger or otherwise. The Office found that the weight of the evidence rested with the second opinion physician, who provided a well-rationalized report based on objective physical findings and a review of the evidence. It noted that appellant's physician did not follow the recommendation to provide measurements of each joint of the right middle finger using a goniometer to confirm his findings.

On October 2, 2009 appellant again requested reconsideration. She stated that her new physician was refusing to examine or do anything with her hand, as he did not perform any of the surgeries. Appellant stated that the second opinion physician did not examine her hand and did not ask any questions about her pain or limitations. She also stated that the requirement to obtain a private physician to collect and submit the necessary information was causing her undue financial hardship. Appellant requested reconsideration of the percentage disability the Office awarded.

On October 1, 2009 Dr. Michael Bednar, an orthopedic hand surgeon, reported a lack of approximately 15 degrees extension in the metacarpophalangeal joint of appellant's right middle finger with tenderness on palpation over the region of the A-1 pulley. He prescribed a new tennis elbow band, therapy to relieve symptoms of lateral epicondylitis and stretching the metacarpophalangeal joint.

The October 29, 2009 therapy showed very minimal change in appellant's pain. Dr. Bednar prescribed an injection in the A-1 pulley region. On December 1, 2009 he noted that this helped with appellant's hand pain, but she continued to experience pain in her forearm. Appellant wished to proceed with surgery at the radial tunnel.

In a decision dated December 30, 2009, the Office denied appellant's request for reconsideration. It found that Dr. Bednar's medical reports did not address the measurements for a schedule award or the permanent impairment of appellant's right upper extremity. The Office

² The Office may also have accepted appellant's case for right lateral epicondylitis.

concluded that appellant's request for reconsideration was insufficient to warrant a merit review of her case.

On appeal, appellant argues that her condition continues to deteriorate and that she now requires additional surgery. She describes the trouble she is having with her right hand, elbow and shoulder.

LEGAL PRECEDENT

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.³ The employee shall exercise this right through a request to the district Office.⁴

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The only decision the Board may review is the Office's December 30, 2009 decision denying appellant's request for reconsideration. The issue, therefore, is whether the Office properly denied her request. The question is whether appellant's request for reconsideration meets at least one of the three standards for obtaining a merit review of her case.

Appellant did not attempt to show that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605.

⁵ *Id.* at § 10.606.

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608.

by the Office.⁸ Appellant did not submit with her request any evidence that constituted relevant and pertinent new evidence not previously considered by the Office. The Office later received several reports from Dr. Bednar, her hand surgeon, but these reports were not relevant and pertinent to whether she should receive an increased schedule award. Dr. Bednar did not rate the impairment of appellant's right upper extremity. He did not attempt to follow the protocols of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Bednar's single recorded measurement of 15 degrees lack of extension in the metacarpophalangeal joint of the right middle finger does not support a finding of more than 13 percent impairment of her right upper extremity.

Because appellant's request for reconsideration does not meet at least one of the standards for obtaining a merit review of her case, the Board finds that the Office properly denied her request. The Board will affirm the Office's December 30, 2009 decision.

Appellant argues on appeal that she continues to have trouble with her right upper extremity, but complaints alone are not enough to justify a reopening of her case. Her physician would have to provide the Office with the goniometric measurements previously requested of each joint in the right middle finger, in accordance with the sixth edition of the A.M.A., *Guides*, together with an impairment rating following the procedures of the A.M.A., *Guides* and showing that appellant has more than 13 percent impairment of her right upper extremity causally related to her January 5, 2006 employment injury.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

⁸ There appears to be no basis for appellant's assertion that the second opinion physician did not examine her hand. The physician's findings on physical examination, conducted in the presence of a registered nurse, and his analysis show otherwise.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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