

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY A. YOUNG and DEPARTMENT OF THE ARMY,
FORT DETRICK, Frederick, MD

*Docket No. 97-2872; Submitted on the Record;
Issued June 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The Office accepted that appellant's March 17, 1990 employment injury resulted in epicondylitis of the right elbow, and authorized surgery for this condition and for a ganglion of the right wrist. This surgery was performed on September 13, 1991.

On October 8, 1993 appellant filed a claim for a schedule award. On July 19, 1995 the Office issued appellant a schedule award for a 10 percent permanent loss of use of his right arm. By letter dated October 2, 1995, appellant requested reconsideration, and submitted a report dated September 18, 1995 from his attending physician, Dr. Allan H. Macht, a Board-certified surgeon. In this report Dr. Macht described the permanent impairments of appellant's right arm, and concluded that these impairments amounted to a 35 percent permanent impairment of appellant's right arm. Dr. Macht also noted that the "ganglion in his right wrist has recurred and further surgery may be necessary," and stated, "The pain and discomfort has gotten worse not better. He is having more and more difficulty with his right arm." On October 25, 1995 an Office medical adviser reviewed Dr. Macht's September 18, 1995 report and stated that appellant's situation was not resolved and that "The case as presented by Dr. Macht as of September 18, 1995 is not in posture for impairment rating." On January 16, 1996 this Office medical adviser again reviewed the medical evidence, noted that appellant still had evidence of epicondylitis and may need further surgery for his recurrent ganglion of the right wrist. The Office medical adviser then stated: "All these conditions are not stable impairments; therefore, the case cannot be said to be in posture for valid IR [impairment rating]."

By decision dated January 16, 1996, the Office found that the evidence was not sufficient to warrant modification of its prior decision. The Office noted that its medical adviser indicated that appellant's conditions were not stable impairments, and that a schedule award was not payable until maximum improvement has been reached.

By letter dated February 21, 1997, appellant requested reconsideration, and submitted a report dated December 16, 1996 from Dr. Macht. In this report Dr. Macht stated:

“He has continued to have pain and discomfort about his right elbow with limitation of motion in his right elbow as well as weakness in his right elbow and arm. A ganglion on his right wrist has recurred. He has not had any formal treatments for his right elbow and arm since November 1992. He reached his maximum improvement in his right elbow and arm at that time.

“Although the ganglion in his right wrist has recurred and can be removed, this would not change the 35 percent permanent ... impairment of his right upper extremity according to the Fourth Edition of the A.M.A., *Guides*.”

By decision dated July 1, 1997, the Office found that the additional evidence was irrelevant and repetitious and not sufficient to warrant review of its prior decisions. The Office found that Dr. Macht’s December 6, 1996 report “adds no new medical or factual information, merely Dr. Macht’s dislike for the Office’s administrative policy of not finalizing an impairment award for an unstable medical condition which has not reached maximum improvement. This attitude of Dr. Macht’s is irrelevant to [appellant’s] case.”

The only Office decision before the Board on this appeal is the Office’s July 1, 1997 decision finding that appellant’s application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office’s most recent merit decision on January 16, 1996 and the filing of appellant’s appeal on September 21, 1997, the Board lacks jurisdiction to review the merits of appellant’s claim.¹

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will 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. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office’s final decision being appealed.

pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.² Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.³

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

On its most recent decision on the merits of appellant's claim, issued on January 16, 1996, the Office refused to modify its prior decision on the basis that the September 18, 1995 report from Dr. Macht, which was submitted in support of an October 2, 1995 request for reconsideration, showed that appellant had not reached maximum medical improvement. Whether appellant had reached maximum medical improvement was the question addressed in Dr. Macht's December 16, 1996 report, with the doctor concluding that appellant had done so in November 1992. Dr. Macht also concluded that appellant's impairment rating would not change if the ganglion in his right wrist was removed. As it addressed the basis of the Office's most recent denial of appellant's claim for an increased schedule award, Dr. Macht's December 16, 1996 report constitutes relevant new evidence requiring the Office to reopen the case for further review of the merits of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated July 1, 1997 is set aside and this case is remanded to the Office for an appropriate decision.

Dated, Washington, D.C.
June 14, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

² *Eugene F. Butler*, 36 ECAB 393 (1984).

³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).