

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY W. LUMPKIN and DEPARTMENT OF THE NAVY,
NAVAL AVIATION DEPOT, Cherry Point, NC

*Docket No. 03-1921; Submitted on the Record;
Issued October 7, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128.

On August 28, 2000 appellant, then a 53-year-old machinery repair mechanic, filed a notice of traumatic injury alleging that on August 25, 2000 his safety shoes rubbed a blister on the heel of his right foot. The Office accepted that appellant sustained a right heel blister and later expanded the claim to include right foot ulceration. Appellant was off work from August 28, 2000 until he returned to light duty effective December 5, 2000.¹ On June 13, 2001 he filed a claim for a schedule award.

Appellant was treated by Dr. John A. Hoover, a Board-certified podiatrist, who diagnosed a diabetic ulcer on the medial plantar aspect of his right heel. In a July 16, 2001 report, Dr. Hoover noted that diabetic foot ulcers were "a permanent risk factor in reulceration of the foot" and should be considered an eight percent impairment. An Office medical adviser reviewed the case file and prepared a report on June 27, 2000. The Office medical adviser noted that, as of January 3, 2003, appellant had returned to work with no residuals of his work injury and, since the skin was not a compensable organ, he had no permanent impairment for purposes of a schedule award rating.

In a decision dated July 24, 2002, the Office denied appellant's claim for a schedule award, finding that a foot ulcer was not ratable. On September 16, 2002 the Office received a request for reconsideration along with a report from Dr. Hoover dated August 12, 2002,² who related that appellant had sustained a burn on the medial aspect of his right heel "in September

¹ Appellant had a prior accepted claim for left carpal tunnel syndrome. He underwent surgery consisting of a left carpal tunnel release on September 11, 2000 and would have returned to work on October 6, 2000 but for his foot injury.

² Appellant also submitted a copy of Dr. Hoover's July 16, 2001 report, which was already of record.

2002 [sic],” which developed into full thickness skin ulceration. He opined that appellant’s diabetic condition and the work-related scarring of the heel made appellant at risk for recurrence of ulceration in that same area. Given these work-related risk factors, Dr. Hoover felt that appellant was entitled to some compensation. In a September 19, 2002 decision, the Office denied appellant’s reconsideration request on the grounds that the evidence presented on reconsideration was immaterial and repetitious.

On April 21, 2003 the Office received appellant’s request for reconsideration and treatment notes from Dr. Hoover dated from August 29 through November 1, 2001. Appellant also submitted an October 21, 2002 report from Dr. Hoover, who reiterated that appellant’s work injury resulted in a Grade III ulceration with full thickness skin loss to the posterior medial aspect of the right heel. He opined that appellant had an eight percent impairment based on decreased sensation in the area of the ulcer and decreased function to the right foot. In a decision dated April 23, 2003, the Office found the evidence to be repetitious and insufficient to warrant a merit review of the case.

Appellant subsequently filed a request for reconsideration on June 23, 2003 and submitted a June 23, 2003 report from Dr. Christopher Brigham, a Board-certified physician in occupational medicine. He reviewed the reports of Dr. Hoover and discussed the process of assessing skin impairment at Chapter 8 of the A.M.A., *Guides* (fourth edition). He opined that appellant had a Class 1 skin disorder as described at page 280 and calculated a nine percent impairment of the right foot according to Table 17-3. In a July 14, 2003 decision, the Office denied appellant’s reconsideration request, finding Dr. Brigham’s June 23, 2000 report to be immaterial to the issue of the case.

The Board finds that the Office properly refused to reopen appellant’s case for further merit review under 5 U.S.C. § 8128.

The only decisions before the Board in this appeal are the decisions of the Office dated September 19, 2002, April 23 and July 14, 2003, denying appellant’s request for reconsideration. Since more than one year had elapsed between the date of the Office’s most recent merit decision of July 24, 2002 and the filing of appellant’s appeal with the Board on July 29, 2003, the Board lacks jurisdiction to review the merits of his claim.³

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.⁴ The Office’s implementing federal regulations provide that an application for reconsideration must be submitted in writing and 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 When an

³ 20 C.F.R. § 501.3(d)(2). The Board notes that appellant filed his appeal by facsimile on July 29, 2003.

⁴ 5 U.S.C. § 8128.

⁵ 20 C.F.R. § 10.606(b)(2) (1999).

application for review of the merits of a claim is timely filed but 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.⁶

On reconsideration, appellant submitted no evidence showing that the Office erroneously applied or interpreted a specific point of law. He also did not advance any relevant legal argument not previously considered by the Office to show error in the denial of his claim for compensation. Although appellant submitted new medical reports from Dr. Hoover dated October 21, 2002⁷ and Dr. Brigham dated June 23, 2003, this evidence is not relevant to the issue in the case, which is whether appellant is entitled to a schedule award for a permanent impairment to the right foot based on his accepted skin ulcer. The medical evidence of record finding impairment based on a skin disorder has no bearing on appellant's entitlement to compensation in light of the fact that the Act does not permit schedule awards for permanent impairment caused by a noncompensable organ, such as the skin.⁸ Thus, appellant has failed to satisfy the requirements of section 10.606(b)(2), the Office properly refused to reopen his case for further merit review under section 8128.

The decisions of the Office of Workers' Compensation Programs dated September 19, 2002, April 23 and July 14, 2003 are hereby affirmed.

Dated, Washington, DC
October 7, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 20 C.F.R. § 10.608(b) (1999).

⁷ The Board also notes that Dr. Hoover's October 21, 2002 report is duplicative of his prior opinions. 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; *see John Polito*, 50 ECAB 347 (1999).

⁸ No schedule award is payable for permanent loss or loss of use of, anatomical members or functions or organs of the body not specified in the Act or in its implementing federal regulations; *see Jay K. Tomokiyo*, 51 ECAB 361 (2000); *see also* 5 U.S.C. § 8107. As the skin is not listed as a compensable organ in the Act or its implementing regulations, no schedule award is payable for permanent impairment to the skin.