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

| | | |
|---|---|---|
| **KEVIN R. OLSEN, Appellant** | ) | |
| **and** | ) | **Docket No. 04-816** |
| | ) | **Issued: August 10, 2004** |
| **DEPARTMENT OF AGRICULTURE, FOREST SERVICE, ASHLEY NATIONAL FOREST, Duchesne, UT, Employer** | ) | |

*Appearances:*
*David J. Holdsworth, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On February 5, 2004 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated October 9, 2003, denying modification of a December 27, 2002 decision, which denied his claim for a schedule award. Appellant also appeals the Office's December 23, 2003 nonmerit decision denying his request for a review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions in this case.

### ***ISSUES***

The issues are: (1) whether appellant sustained any impairment of his eye causally related to his August 22, 2001 employment injury, thereby entitling him to a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

On August 23, 2001 appellant, then a 25-year-old forestry aid technician, filed a traumatic injury claim alleging that on August 22, 2001 he sustained burns to both of his eyes while welding. Appellant indicated that he stopped working on August 23, 2001 and returned to work on August 27, 2001. By letter dated March 15, 2002, the Office accepted appellant's claim for bilateral eye erythematous.

By letter dated July 1, 2002, appellant, through his attorney, stated that, since his claim had been accepted, he was concerned about payment of his medical bills and mileage, compensation for wage loss, temporary and long-term total disability and permanent impairment and the need for vocational rehabilitation. In a July 16, 2002 response letter, the Office advised appellant's attorney that providers who previously had their bills rejected could resubmit them since appellant's claim had been accepted. Regarding appellant's inability to work during the period August 23 through 27, 2001, the Office stated that the employing establishment should have paid him provided he submitted the appropriate medical documentation showing that he was unable to work during this period. The Office noted that the record did not show that appellant was disabled for work after August 27, 2001 and enclosed a Form CA-7 to be completed by appellant for any additional wage loss he may have sustained and a travel voucher form for mileage to and from medical appointments.

By letter dated August 2, 2002, appellant's attorney requested guidance from the Office in processing a schedule award claim. Appellant's attorney submitted the July 16, 2002 medical treatment notes of Dr. Shane Powell, appellant's attending Board-certified ophthalmologist. Dr. Powell indicated that appellant's best corrected visual acuity was 20/20 in the right eye and 20/100- in the left eye resulting in a visual acuity impairment of 8 percent. He stated that, based on appellant's last visual field examination on April 2, 2002, which showed 8 degrees of central vision in the left eye and was normal in the right eye, his visual field impairment rating was 16 percent.

On July 24, 2002 appellant filed a Form CA-7 for wage loss during the period August 22 to 27, 2001 and a schedule award. His claims were accompanied by time and attendance records and correspondence with the Office. Appellant also submitted Dr. Powell's September 24, 2001 treatment notes, noting that he continued to have poor vision in the left eye and no normal depth perception. Dr. Powell stated that appellant would be a hazard to others if working outside while performing his regular job. Dr. Powell stated that he did not see any reason that appellant could not perform office work. In addition, appellant submitted Dr. Powell's July 16, 2002 report, finding that he had pain in or around the eye, myopia and dry eye syndrome. Dr. Powell stated that there was no clear etiology for vision loss of the left eye.

In an August 27, 2002 letter, the Office advised appellant that it had received his Form CA-7 and noted that his case record contained medical evidence revealing that, in September 2001, Dr. Judith Warner, a Board-certified neurologist, released him to return to work effective September 24, 2001 and that Dr. Powell stated in his September 24, 2001 note that there was no reason he could not perform office work. The Office stated that based on this evidence there was no entitlement to wage loss during the claimed period. The Office provided appellant with 30 days from the date of its letter to submit contemporary rationalized medical

evidence opinions and establishing that he was totally disabled and unable to perform even limited office duties during the claimed period. Regarding appellant's claim for a schedule award, the Office informed appellant that he would be scheduled for a second opinion medical examination to determine if his impairment was related to his August 22, 2001 employment injury.

By letter dated September 5, 2002, the Office advised appellant that a second opinion medical examination was necessary to address the issues of his claim. In an October 8, 2002 letter, the Office referred appellant along with the case record, a list of specific questions and a statement of accepted facts to Dr. Oren C. Alldredge, a Board-certified ophthalmologist, for a second opinion medical examination. The appointment was scheduled for Thursday, October 31, 2002 at 3:30 p.m.

Appellant did not receive the referral letter as it was mailed to an old address.[1] The Office again referred appellant to Dr. Alldredge for a second opinion medical examination by letter dated October 23, 2002. The appointment was scheduled for Tuesday, November 19, 2002 at 3:30 p.m.[2]

The Office received an August 19, 2002 attending physician's report from Dr. Powell, indicating a date of injury as August 22, 2001 and a diagnosis of blurred vision. As to the causal relationship between appellant's diagnosed condition and his employment activities, Dr. Powell stated that he could not find a direct link other than the timing of events.

In a December 6, 2002 letter, appellant's attorney stated that the notes of Drs. Warner and Powell support appellant's claim for wage loss for the period August 22 through September 24, 2001 and that appellant was laid off by the employing establishment on approximately October 5, 2001. He questioned the need for a second opinion examination regarding appellant's schedule award claim as there was no dispute as to the relationship between appellant's August 22, 2001 employment injury and impairment. Appellant's attorney advised the Office of appellant's new mailing address, Post Office Box 1774, Roosevelt, Utah 84066. He noted that appellant suffered from serious depression and requested assistance in having appellant's claim accepted for this condition.

The Office received a December 10, 2002 medical report of Dr. Gregory Staker, a neurologist, revealing that appellant was being treated for headaches. He provided his findings on physical and neurological examination. Dr. Staker stated that a positive Romberg test raised the suspicion of a potential neurologic deficit and that appellant may benefit if his symptoms persisted from a magnetic resonance imaging scan of the spine and a lumbar puncture to determine whether he had multiple sclerosis. The Office also received laboratory reports dated December 21, 2001 and July 30, 2002.

[1] The record reveals that the September 5 and October 8, 2002 letters referring appellant to a second opinion medical examination were mailed to him at 820 East 200 North, Roosevelt, Utah 84066.

[2] The Office's October 23, 2002 letter referring appellant to Dr. Alldredge was mailed to appellant's address of record at that time, Post Office Box 1022, Roosevelt, Utah 84066.

By decision dated December 27, 2002, the Office denied appellant's claim for a schedule award. The Office found no evidence establishing a ratable impairment related to appellant's August 22, 2001 employment injury as appellant failed to attend two second opinion medical examinations scheduled for October 31 and November 19, 2002.

In a February 7, 2003 letter, appellant, through his attorney, requested reconsideration. Counsel noted, among other things, that appellant's new address was 425 West 1100 North Price, Utah 84501. In support of his request, appellant submitted a January 12, 2003 letter indicating that he did not receive the October 23, 2002 letter referring him to a second opinion medical examination until after the scheduled appointment. He stated that he received the letter on December 2, 2002. Appellant further stated that upon receipt of the letter he and his attorney scheduled a telephone conference call on Friday, December 6, 2002. He indicated that he received a letter on Friday, January 10, 2003 advising him that he had missed two second opinion appointments. Appellant stated that he had only received one letter informing him about the November 19, 2002 appointment.

The Office received the reports and treatment notes of Jeannee Olsen, a physician's assistant, covering the period January 17 through May 20, 2003, which addressed appellant's left eye pain with vision loss.

In a September 23, 2003 letter, the Office referred appellant, together with medical records, an amended statement of accepted facts and a list of specific questions, to Dr. Alldredge for a second opinion medical examination. The examination was scheduled for Thursday, October 9, 2003. The letter was mailed to appellant at Post Office Box 1022, Roosevelt, Utah 84066. An October 7, 2003 Office email message revealed that appellant's appointment had been cancelled because the Office could not determine his whereabouts. The Office telephoned appellant's residence, but was told that he no longer lived there.

The Office received additional reports and treatment notes from Ms. Olsen dated July 29 and August 20, 2003, regarding appellant's left eye pain with vision loss.

By decision dated October 9, 2003, the Office denied appellant's request for modification based on a merit review of his claim. The Office noted that appellant had failed to appear at three separate second opinion medical examinations and found that, in the absence of a second opinion medical report with an impairment rating, the December 27, 2003 decision[3] was not in posture for modification.

Subsequent to its decision, the Office received the September 27, 2003 emergency treatment notes of a physician whose signature is illegible indicating that appellant experienced chest tightness and difficulty with breathing. The notes also indicated that appellant had bronchitis and light-headedness probably secondary to his medications and that he could follow up as needed.

[3] It appears that the Office inadvertently referred to the date of its decision as December 27, 2003 rather than December 27, 2002.

In a November 11, 2003 letter, appellant, through his attorney, requested reconsideration on the following grounds: (1) he timely filed a claim for compensation for his August 22, 2001 employment-related bilateral eye injury; (2) the Office accepted his claim and had been paying related medical expenses; (3) the Office only addressed his schedule award claim and not his claim for wage loss; (4) the relevant facts regarding his appointments scheduled for October 31 and November 19, 2002 were set forth in his attorney's February 7, 2003 letter; (5) the Office denied his claim for a schedule award on December 27, 2002; (6) his attorney requested reconsideration by letter dated February 7, 2003; (7) the Office did not act on his request for reconsideration before making arrangements for him to attend another second opinion examination; (8) the Office sent its referral letter dated September 23, 2003 to appellant's former address after his attorney advised the Office about his new address in his February 7, 2003 letter; (9) his attorney received the Office's notice on September 27, 2003 and forwarded it to him on September 30, 2003 and he received it on October 3 or 4, 2003; (10) the appointment required him to travel by car approximately two to two and one-half hours to Salt Lake City; (11) the Office made no effort to contact him by telephone; (12) the Office made no effort to contact his attorney to confirm his address or telephone number or to request his assistance in assuring that he was notified of the second opinion examination; (13) he had no knowledge that the Office performed an internet search for him in Roosevelt and Price, Utah; (14) on either October 6 or 7, 2003 he contacted the Office about rescheduling the October 9, 2003 appointment due to problems with making travel arrangements; (15) Gary at RICWEL told him that he would reschedule his appointment after he explained that he could not make it and that he needed more notice to make travel arrangements; (16) RICWEL's September 23, 2003 correspondence was not mailed to his address in Price, Utah; (17) neither he nor his attorney had any knowledge of RICWEL calling him at his last known telephone number or what RICWEL may have been told; (18) he continued to reside at 425 West 1100 North, Price, Utah 84501; and (19) neither he nor his attorney had an explanation as to why RICWEL may not have communicated his conversation with Gary.

Appellant's attorney contended that the September 23, 2003 letter was not properly addressed to appellant's last known address in Price, Utah and that he informed the Office of his current address and telephone number in his February 7, 2003 letter. He further contended that appellant communicated with RICWEL regarding the scheduling of the third second opinion examination, but RICWEL apparently failed to pass this information on to the Office. Appellant's attorney noted correspondence from him, the Office and RICWEL.

In a November 24, 2003 letter, appellant stated that on October 7, 2003 he spoke to Gary at RICWEL and told him that he had received short notice to make driving arrangements for his second opinion examination scheduled for October 9, 2003 in Salt Lake City, Utah. He also stated that on the same date he had an appointment with his regular doctor. Appellant indicated that RICWEL knew he had a different address, but still sent the correspondence to his old address. He further indicated that Gary told him that his appointment could be rescheduled without any problem. Appellant noted that his new address was 425 West 1100 North, Price, Utah 84501.

In a December 23, 2003 decision, the Office denied appellant's request for a merit review on the grounds that the evidence submitted was not new or relevant, and, thus, it was insufficient to warrant review of its prior decision. The Office found that appellant only discussed the

missed second opinion medical evaluations and he failed to submit a medical opinion supportive of impairment.[4]

## ***LEGAL PRECEDENT -- ISSUE 1***

An employee seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[6] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[7]

The schedule award provision of the Act[8] and its implementing regulation[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[10]

## ***ANALYSIS -- ISSUE 1***

Appellant has not submitted sufficient evidence establishing that he sustained a permanent impairment of his eyes causally related to his August 22, 2001 employment injury. The Board notes that appellant failed to attend second opinion medical examinations, which were scheduled by the Office for October 21 and November 19, 2002 and October 9, 2003 to determine whether he had any impairment causally related to his accepted employment injury.

In support of his claim, appellant submitted Dr. Powell's September 24, 2001 treatment notes revealing that he continued to have poor vision in the left eye and no normal depth perception. Dr. Powell stated that appellant would be a hazard to others if working outside while performing his regular job. He also stated that he did not see any reason that appellant could not

[4] The Board notes that, subsequent to the Office's December 23, 2003 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c). The Board notes that appellant can submit the new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2) (1999).

[5] U.S.C. §§ 8101-8193.

[6] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[7] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

perform office work. Dr. Powell failed to address whether appellant had any permanent impairment causally related to his August 22, 2001 employment injury.

Dr. Powell's July 16, 2002 treatment notes finding that appellant's corrected visual acuity of 20/20 in his right eye and 20/100- in his left eye resulted in a visual acuity impairment rating of 8 percent and that 8 degrees of central vision in his left eye and normal vision in his right eye resulted in a field impairment of 16 percent did not address whether appellant's impairment was caused by his August 22, 2001 employment injury. Similarly, in his report of the same date, revealing that appellant had pain in or around the eye, myopia and dry eye syndrome and there was no clear etiology for vision loss of the left eye, Dr. Powell did not state that appellant had any impairment of the eye causally related to his accepted employment injury.

Dr. Powell's August 19, 2002 attending physician's report indicated that appellant had blurred vision. Regarding the cause of appellant's eye condition, Dr. Powell stated that he could find no direct link other than the timing of events. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.[11] As Dr. Powell did not provide any medical rationale to support his opinion, it is insufficient to establish appellant's burden.

The July 30, 2002 treatment notes of Dr. Kent Worthen, a psychiatrist, diagnosing appellant with depression, a laboratory report of the same date revealing the results of appellant's blood test, the December 10, 2002 report of Dr. Staker regarding appellant's headaches and possible multiple sclerosis and the September 27, 2003 emergency treatment notes concerning appellant's tightness in the chest and difficulty with breathing failed to address whether appellant had any permanent impairment causally related to his August 22, 2001 employment injury.

The reports and treatment notes of Ms. Olsen, a physician's assistant, covering the period January 17 through August 20, 2003, which addressed appellant's left eye pain with vision loss do not constitute probative medical evidence inasmuch as a physician's assistant is not considered a "physician" under the Act.[12]

For the foregoing reasons, the Board finds that appellant has failed to satisfy his burden of proof that he sustained a permanent impairment of his eyes that was causally related to his August 22, 2001 employment injury.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128 of the Act,[13] the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not

[11] *John F. Glynn*, 53 ECAB ___ (Docket No. 01-1184, issued June 4, 2002).

[12] 5 U.S.C. § 8101(2); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[13] 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).

previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[14] 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.[15] 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 of the merits.

## ***ANALYSIS -- ISSUE 2***

Appellant's contentions regarding the filing of a timely claim, the acceptance of his claim by the Office and the Office's issuance of a decision concerning his schedule award claim and not his wage loss claim, are not relevant to the issue in this case, whether appellant has established that he is entitled to a schedule award for permanent impairment of his eyes.

Further, appellant's arguments regarding the reasons for his failure to attend the scheduled second opinion medical examinations were previously considered and rejected by the Office. 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.[16] Thus, appellant's contentions are repetitious and insufficient to require a reopening of the case for a merit review.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit any relevant and pertinent new evidence not previously considered by the Office.

## ***CONCLUSION***

The Board finds that appellant has failed to establish that he sustained an impairment causally related to his August 22, 2001 employment injury, thereby entitling him to a schedule award. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(1)-(2).

[15] *Id*. at § 10.607(a).

[16] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 23 and October 9, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 10, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member