

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

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**JENNIFER A. GUILLARY, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 06-208  
Issued: March 13, 2005**

*Appearances:*  
*Jennifer A. Guillary, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 3, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 7, 2005 merit decision, denying her request for a second opinion evaluation and an October 6, 2005 nonmerit decision denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

**ISSUES**

The issues are: (1) whether the Office properly denied appellant's request for a second opinion evaluation; and (2) whether the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On June 1, 1999 appellant, then a 43-year-old mail carrier, filed an occupational disease claim (file number 13-1190026) alleging that she sustained a right upper extremity condition due to her work duties, which included lifting heavy mail bundles and engaging in repetitive arm

motion while casing and delivering mail over extended periods. The Office accepted that she sustained right carpal tunnel syndrome and right upper extremity strain and provided authorization for right carpal tunnel release surgery, which was performed on December 17, 1999. By decision dated May 31, 2001, the Office granted appellant a schedule award for a five percent permanent impairment of her right arm.

On October 1, 2004 appellant filed an occupational disease claim (file number 13-2116071) alleging that she sustained a left upper extremity condition due to her work duties, which included lifting up to 70 pounds, casing mail for 3 to 4 hours per day and delivering mail for 3 to 5 hours per day. The Office accepted that she sustained left carpal tunnel syndrome and provided authorization for left carpal tunnel release surgery, which was performed on January 6, 2005. The case files for appellant's left and right upper extremity claims were combined under the master file number 13-1190026.

On April 19, 2005 appellant claimed that she was entitled to a schedule award due to her accepted left carpal tunnel syndrome. By letter dated May 4, 2005, the Office requested that Dr. Mark Goldstein, an attending osteopath, provide an opinion on the permanent impairment of appellant's left upper extremity in accordance with the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5<sup>th</sup> ed. 2001).<sup>1</sup>

In a report dated May 11, 2005, Dr. Goldstein detailed the findings of his examination, including range of motion testing and indicated that appellant exhibited no significant findings other than some mild discomfort on examination. He concluded that, under the relevant standards of the A.M.A., *Guides*, appellant did not have any permanent impairment of her left upper extremity.

In a letter dated May 24, 2005, appellant stated that she was seeking a second opinion on the permanent impairment related to her left carpal tunnel syndrome. She requested that Dr. Fernando Ravessoud, a Board-certified orthopedic surgeon, be considered for this purpose.

By decision dated July 7, 2005, the Office denied appellant's request for a second opinion evaluation noting that she did not state any reason for the request.<sup>2</sup>

In a letter dated August 18, 2005, appellant requested reconsideration of her claim and again requested a second opinion on the permanent impairment due to her left carpal tunnel syndrome. She asserted that Dr. Goldstein would not allow her to pursue a second opinion evaluation.<sup>3</sup>

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<sup>1</sup> Dr. Goldstein was a member of the Kaiser Permanente practice group.

<sup>2</sup> The Office referred to appellant's request as a request to "transfer medical supervision." Although this language is suggestive of a request for a change of treating physicians (*see* 5 U.S.C. § 8103(3); 20 C.F.R. § 10.316(b)), appellant actually made a request for a second opinion evaluation in connection with an impairment rating evaluation.

<sup>3</sup> She indicated that the reports of physicians from the Kaiser Permanente practice group "may show bias."

By decision dated October 6, 2005, the Office denied appellant's request for merit review of her claim.<sup>4</sup>

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

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> and its implementing regulation<sup>6</sup> sets 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>7</sup>

Under Office procedure, the attending physician should make the evaluation of permanent impairment whenever possible.<sup>8</sup> Office procedure also generally provides that the Office may choose to request an opinion from a second opinion specialist when the existing medical evidence is inadequate, including that obtained from an attending physician and a detailed, comprehensive report and opinion is needed from a specialist in the appropriate field.<sup>9</sup>

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

In April 2005, appellant claimed that she was entitled to a schedule award due to her accepted left carpal tunnel syndrome. The Office requested that Dr. Goldstein, an attending osteopath, provide an opinion on the permanent impairment of appellant's left extremity and, in a report dated May 11, 2005, Dr. Goldstein concluded that she did not have any permanent impairment of her left upper extremity. In a letter dated May 24, 2005, appellant stated that she was seeking a second opinion on the permanent impairment related to her left carpal tunnel syndrome.

As noted above, Office procedure provides that an attending physician should make the evaluation of permanent impairment whenever possible and the Office may choose, in some circumstances, to make a referral for a second opinion evaluation.<sup>10</sup> The Office properly found

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<sup>4</sup> The Board notes that it does not appear from the record that the Office issued a decision regarding appellant's entitlement to schedule award compensation for her left upper extremity.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.c (August 2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.5 (April, September 1993). The Office may request clarification from an attending physician on permanent impairment or other matters before requesting a second opinion evaluation. *Id.* at 2.810.8 (April 1993). A second opinion evaluation would generally be requested by an Office claims examiner or a registered nurse that the Office has assigned to a given case. *Id.* at 2.810.9 (June 2002).

<sup>10</sup> *See supra* note 8 and 9 and accompanying text.

that appellant did not state any reason or justification for the request.<sup>11</sup> Appellant did not present any argument that would have shown that it was necessary for the Office to refer her for a second opinion evaluation in connection with its assessment of the permanent impairment of her left upper extremity. She did not identify any particular evidence of record or relevant precedent which would have supported her request for a second opinion evaluation. For these reasons, the Office properly denied her request.<sup>12</sup>

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>13</sup> 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.<sup>14</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.<sup>15</sup> 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.<sup>16</sup>

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

In an August 18, 2005 letter effectuating her reconsideration request, appellant again argued that she was entitled to a second opinion evaluation regarding the permanent impairment related to her left carpal tunnel syndrome. However, the Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>17</sup> She asserted that Dr. Goldstein would not allow her to pursue a second opinion evaluation, but this apparent argument would not have a reasonable color of validity as an attending physician could not direct a claimant to undergo a second

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<sup>11</sup> In addition, such a referral would typically be made on the Office's own initiative rather than in connection with a request by a claimant. *See supra* note 9 and accompanying text. Appellant requested that Dr. Ravessoud, a Board-certified orthopedic surgeon, be considered for a second opinion evaluation, but she did not further explain this request.

<sup>12</sup> The Board notes that it does not appear that the Office issued a decision regarding appellant's entitlement to schedule award compensation for her left upper extremity. The Board finds that, therefore, this matter is interlocutory in nature and is not currently before the Board. *See* 20 C.F.R. § 501.2(c) (providing that the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

<sup>13</sup> 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).

<sup>14</sup> 20 C.F.R. § 10.606(b)(2).

<sup>15</sup> 20 C.F.R. § 10.607(a).

<sup>16</sup> 20 C.F.R. § 10.608(b).

<sup>17</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

opinion evaluation.<sup>18</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>19</sup>

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of its July 7, 2005 decision under section 8128(a) of the Act, because the argument she submitted did not to 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 constitute relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a second opinion examination. The Board further finds that the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> See *supra* note 9 and accompanying text.

<sup>19</sup> *John F. Critz*, 44 ECAB 788, 794 (1993). Appellant indicated that the reports of physicians from Kaiser Permanente, Dr. Goldstein's practice group, might show bias. However, she provided no support for this assertion and, therefore, it would not have a reasonable color of validity and would not require reopening of her claim.