United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 08-844**
	)	**Issued: October 16, 2008**
U.S. FOREST SERVICE, LEWIS & CLARK NATIONAL FOREST, Great Falls, MT, Employer	)	

Appearances:
Ralph Hunt, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 10, 2008 nonmerit decision, which denied his request for reconsideration. Because more than one year has elapsed between the January 11, 2007 merit decision and the filing of this appeal on January 19, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On October 3, 2004 appellant, then a 34-year-old border patrol agent, filed a traumatic injury (Form CA-1) alleging that on October 2, 2004 he climbed over a fence and hurt his right hand at work. He did not stop work. The Office accepted appellant's claim for right hand joint

disorder. On February 8, 2005 appellant underwent a procedure to remove a traumatic mass on the palm of his right hand and a tenosynovectomy of the right ring finger. He returned to full duty on February 15, 2005 and received appropriate compensation.

On November 21, 2005 appellant filed a claim for a schedule award. In an October 10, 2005 report, Dr. Derrik F. Woodbury, a Board-certified orthopedic surgeon, conducted a physical examination and determined that appellant had reached maximum medical improvement. He advised that appellant had a 20 percent permanent impairment of his right middle finger secondary to his work injury. By letter dated January 24, 2006, the Office requested that Dr. Woodbury provide an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) (5th ed. 2001). In a February 6, 2006 report, Dr. Woodbury advised that he had utilized the A.M.A., *Guides* and that appellant had a 20 percent permanent impairment of the right middle finger. This represented a four percent permanent impairment of the right hand or four percent impairment of the upper extremity.

In a report dated March 15, 2006, the Office medical adviser indicated that the case record did not contain a medical report upon which an impairment determination could be based. On April 22, 2006 the Office medical adviser recommended a second opinion examination in order to obtain range of motion, grip strength loss or sensory findings.

On May 4, 2006 the Office referred appellant to Dr. Borislav Stojic, a Board-certified orthopedic surgeon, for a second opinion regarding permanent impairment. In a June 16, 2006 report, Dr. Stojic noted appellant's history of injury and treatment, referred to the A.M.A., *Guides* and conducted a physical examination. He advised that the right hand revealed no evidence of swelling and a well-healed surgical scar over the palmar aspect of the right hand. Dr. Stojic indicated that it was 2.5 centimeters in the area of the flexor tendon of the right long finger. Appellant was able to make a fist with all fingers to the mid palmar crease. Dr. Stojic advised that appellant had normal range of motion and the flexor digitorum profundi and flexor digitorum sublimi of the fingers of the right hand were functioning well. He advised that appellant's grip strength in the left and right hand was 140-140-120 pounds. Dr. Stojic provided the measurements related to his physical examination.

In a report dated July 4, 2006, the Office medical adviser found that appellant did not sustain any impairment as there was no loss of range of motion or strength. She indicated that appellant had no impairment due to sensory deficit or pain and opined that he had no impairment of the right upper extremity.

By decision dated July 10, 2006, the Office denied appellant's claim for a schedule award.

On August 9, 2006 appellant requested a review of the written record. He informed the Office that he had an appointment with his treating physician to obtain the requested information.

In a report dated August 15, 2006, Dr. Woodbury opined that appellant had a 20 percent permanent impairment of his right ring finger based on his decreased endurance and sensitivity

in his palm and decreased grip strength. He reiterated that this was equivalent to a four percent permanent impairment of his upper extremity or two percent permanent impairment of his whole person.

By decision dated October 30, 2006, the Office hearing representative set aside the July 10, 2006 decision. The Office hearing representative requested that the Office medical adviser clarify the basis for her opinion that no impairment should be assigned due to sensory deficit or pain.

By letter dated December 11, 2006, appellant's representative contended that a conflict arose in the impairment ratings between the treating physician and the second opinion physician. He resubmitted a copy of Dr. Woodbury's February 6 and August 15, 2006 impairment findings.

In a January 6, 2007 report, the Office medical adviser explained her opinion regarding impairment due to sensory deficit or pain. Although Dr. Woodbury indicated that appellant had decreased grip strength on the right, he did not provide any actual measurement or provide a discussion of how the A.M.A., *Guides* provided for the four percent upper extremity rating. The Office medical adviser also noted that there appeared to be subjective sensitivity over the scar noted by both doctors; however, Dr. Stojic measured equal grip strength readings and found no sensory loss. The Office medical adviser reiterated that there was no basis for rating sensory deficit or pain impairment. She opined that appellant reached maximum medical improvement on June 26, 2006.

By decision dated January 11, 2007, the Office denied appellant's claim for a schedule award. It found that there was no measurable impairment.

On December 29, 2006 appellant's representative contended that there was a conflict in the medical evidence which remained unresolved. By letters dated October 25 and November 13, 2007, appellant's representative reiterated his arguments. On December 4, 2007 appellant's representative requested reconsideration.

In August 16, 2006 and December 14, 2007 reports, Dr. Woodbury noted that, based on decreased endurance and sensitivity in appellant's palm and decreased grip strength, he sustained 20 percent impairment of the right ring finger or 4 percent impairment of the arm.

By decision dated January 10, 2008, the Office denied appellant's request for reconsideration without a merit review of the claim. It found that the reports from Dr. Woodbury were duplicative and not in accordance with the A.M.A., *Guides*. The Office determined that because his letter neither raised substantive legal questions nor included new and relevant evidence, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section

[1] 5 U.S.C. § 8128(a).

10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[2]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[3]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[4] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[5] While the 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.[6]

ANALYSIS

Appellant and his representative disagreed with the January 11, 2007 denial of his claim for a schedule award and requested reconsideration on December 4, 2007.

In support of his claim, appellant submitted letters dated December 29, 2006, October 25 and November 13, 2007, from his representative. He reiterated his previous arguments that a conflict had arisen in the medical evidence, which was unresolved and which warranted referral to an impartial medical examiner. However, as this argument is repetitive of the argument previously made before the Office and is insufficient to warrant a merit review. This argument was considered by the Office which noted that the reports from Dr. Woodbury did not address how the impairment rating was derived in accordance with the A.M.A., *Guides*.[7]

---

[2] 20 C.F.R. § 10.606(b).

[3] *Id*. at § 10.608(b).

[4] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[5] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[6] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[7] *See Shalanya Ellison*, 56 ECAB 150, 154 (2004) (schedule awards are to be based on the A.M.A., *Guides;* an estimate of permanent impairment is irrelevant where it is not based on the A.M.A., *Guides*).

The Office also received a copy of an August 16, 2006 report from Dr. Woodbury and a December 14, 2007 report in which he referred to his August 16, 2006 report. While these reports are new, the Board notes that they are repetitive of the physicians previous reports and impairment rating. The August 16, 2005 report provides the same impairment ratings as his other reports and do not provide any explanation as to how his impairment rating was derived. As noted, evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

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 new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements for reopening a claim on reconsideration, he is not entitled to further merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2008 is affirmed.

Issued: October 16, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] *See supra* note 4.