

condition in December 2002 and realized it was caused or aggravated by his employment on March 7, 2003. The Office, by decision dated September 8, 2003, accepted appellant's claim for a left wrist ganglion cyst. The record reflects that appellant underwent surgical treatment of the cyst.

The Office also accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral lesion of the ulnar nerve. Appellant underwent medical treatment including left carpal tunnel release and left ulnar nerve release at the elbow on June 9, 2005.

On January 22, 2008 appellant filed a schedule award claim (Form CA-7).

Appellant submitted a September 25, 2006 note from Dr. Carl J. Beaudry, a Board-certified orthopedic surgeon, who reported that the left wrist and elbow conditions had reached maximum improvement. Dr. Beaudry recommended that appellant see Dr. Martin R. Haig, a Board-certified orthopedic surgeon, for a permanent disability rating.

Appellant submitted a December 28, 2006 report in which Dr. Haig reported findings upon examination and a review of appellant's medical history. He noted that the only complaint was a "strange sensation" in his left forearm. Appellant did not complain of pain or numbness. He reported that there was "no functional deficit whatsoever" and that based on the A.M.A., *Guides*, appellant had a zero percent impairment.

Appellant submitted a December 18, 2007 report signed by Dr. Beaudry who reported that appellant continued to complain of left forearm and elbow pain, particularly after engaging in physical activities. Dr. Beaudry recommended that appellant undergo an electromyogram (EMG) of his upper extremities and submit to a functional capacity analysis.

By decision dated January 30, 2008, the Office denied appellant's schedule award claim because the evidence of record was insufficient to establish that he sustained permanent impairment to a scheduled member due to his accepted conditions.

On August 29, 2008 appellant requested reconsideration.

Appellant submitted March 14, 2008 treatment and work status reports. He submitted an April 21, 2008 report in which Dr. Paul Q. Proffitt, a Board-certified neurologist, reported that an EMG revealed a cervical radiculopathy, predominantly at the C6-7 nerve root level of the left arm. The EMG revealed ulnar nerve entrapment in appellant's elbows which he opined was "compatible" with mild cubital tunnel syndrome. The EMG also revealed bilateral ulnar nerve entrapment neuropathy in appellant's wrists, which he opined was "compatible" with moderate carpal tunnel syndrome, "R=L."

Appellant submitted an October 7, 2008 report in which Dr. Beaudry reported that an EMG conducted April 21, 2008 yielded results consistent with "ulnar nerve entrapment at the elbows (mild) and [bilateral] carpal tunnel syndrome of moderate severity, along with a problem of cervical radiculopathy [at the] C6-7 [level]." Dr. Beaudry noted that appellant continued to complain of pain extending from his shoulder into his forearm, mostly in the median nerve distribution. He questioned whether appellant's current complaints were the result of the

previous surgery or a recurrent problem. Dr. Beaudry recommended a magnetic resonance imaging (MRI) scan of appellant's cervical spine.

In an October 21, 2008 report, Dr. Michael Doiron, a Board-certified diagnostic radiologist, reported that an MRI scan of appellant's cervical spine revealed a large right paracentral disc protrusion at the C3-4 level as well as a central disc protrusion at the C4-5 level. The MRI scan also revealed diffuse mild cervical disc degeneration, diffuse cervical osteophytosis and multilevel spondylosis, "most marked at [the] C3-4 and C4-5 [levels]."

Appellant submitted a note, dated January 14, 2005 in which Dr. Beaudry stated that appellant could return to full-duty work.

In an October 24, 2008 report, Dr. Beaudry reviewed results from the scan conducted October 21, 2008. He opined that appellant should be referred to a neurosurgeon.

By decision dated December 12, 2008, the Office denied appellant's request for merit review pursuant to 5 U.S.C. § 8128(a). It found that appellant had not raised substantive legal questions and had not submitted new relevant and pertinent evidence.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act¹ provides compensation for both disability and physical impairment. Disability means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.² In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.³

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.⁴ The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the employment injury.⁵ The medical opinion must be based on a complete factual and medical

¹ 5 U.S.C. §§ 8101-8193.

² *C.S.*, 59 ECAB ___ (Docket No. 08-736, issued September 3, 2008); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

³ *B.K.*, 59 ECAB ___ (Docket No. 07-1545, issued December 3, 2007); *see also Renee M. Straubinger*, 51 ECAB 667 (2000).

⁴ *See D.H.*, 58 ECAB ___ (Docket No. 06-2160, issued February 12, 2007); *Veronica Williams*, 56 ECAB 367 (2005).

⁵ *Manuel Gill*, 52 ECAB 282 (2001).

background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish that his accepted conditions produced a permanent impairment entitling him to a schedule award.

A schedule award can be paid only for permanent impairment related to an employment injury. The accepted conditions in this case are left wrist ganglion cyst as well as bilateral carpal tunnel syndrome and bilateral lesion of the ulnar nerve. In order to establish entitlement to a schedule award for his accepted conditions, appellant had to submit rationalized medical evidence demonstrating that the accepted conditions caused a permanent impairment.⁷ The record before the Office at the time of the January 30, 2008 merit decision contained no medical evidence demonstrating permanent impairment due to these accepted conditions.⁸ Rather, in a December 28, 2006 report, Dr. Haig reported that appellant sustained "no functional deficit whatsoever" and that based on the A.M.A., *Guides*, appellant had a zero percent impairment.

On appeal, appellant argues that the Office improperly relied on Dr. Haig's report because he "was not thoroughly examined by Dr. Haig" and Dr. Haig "knew nothing about the treatment [and] medications [provided by] Dr. Beaudry." Page 1 of Dr. Haig's report reviewed appellant's history of injury and the course of treatment prescribed by Dr. Beaudry. Page 2 of Dr. Haig's report presented findings upon physical examination and an opinion on appellant's disability status that was based on appellant's medical history and Dr. Haig's findings upon physical examination.

As there was no other probative medical evidence on the issue of impairment, the Office properly found that appellant has not met his burden of proof to establish his accepted conditions produced a permanent impairment entitling him to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ 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

⁶ *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

⁷ A.M.A., *Guides* 423 (5th ed. 2001); *see generally James R. Hentz*, 56 ECAB 573 (2005).

⁸ Appellant submitted a report from a physical therapist. Because healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence. (5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ____ (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983). Thus, this report has no probative value.

⁹ 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).

relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰

The third regulatory requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

Appellant did not argue that the Office erroneously applied a point of law, nor did he advance a new legal argument not previously considered by the Office. Therefore, he was not entitled to a merit review based upon the first two enumerated grounds noted above.

Appellant did however submit relevant and pertinent evidence which was not previously considered by the Office. In support of his request for reconsideration he submitted a new April 21, 2008 EMG report, which documented abnormal findings compatible with mild cubital tunnel syndrome and moderate carpal tunnel syndrome. While the Office found that this report was duplicative evidence, the Board notes that the report was not prepared or submitted prior to the January 2008 merit decision and was the first EMG study appellant had undergone since his carpal tunnel surgery. Appellant also submitted additional reports from Dr. Beaudry, which described in additional detail appellant's increasing pain complaints.

In evaluating carpal tunnel syndrome, the A.M.A., *Guides* provide that, if after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paresthesias or difficulties in performing certain activities three possible scenarios can be present. The first situation is: Positive clinical finding of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTS is rated according to the sensory and/or motor deficits as described earlier. In this situation, the impairment due to residual carpal tunnel syndrome is evaluated by multiplying the grade of severity of the sensory or motor deficit by the respective maximum upper extremity impairment value resulting from sensory or motor deficits of each nerve structure involved. When both sensory and motor functions are involved the impairment values derived for each are combined. In the second scenario: Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present, and an impairment rating not to exceed five percent of the upper extremity may be justified. In the final situation: Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ *Billy B. Scoles*, 57 ECAB 258 (2005).

¹² 20 C.F.R. § 10.608(b).

testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating.¹³

The Board concludes that the new EMG report and the additional reports from Dr. Beaudry submitted after the January 30, 2008 merit decision were pertinent to evaluation of permanent impairment due to carpal tunnel under the A.M.A., *Guides*. This case will therefore be remanded to the Office for such further development as necessary, to be followed by a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's claim on January 30, 2008. The Board also finds that the Office improperly denied appellant's request for merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2008 decision is affirmed and the December 12, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this opinion.

Issued: October 2, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹³ A.M.A., *Guides* 495.