

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

W.H., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Campbell, KY, Employer**

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**Docket No. 09-584
Issued: September 10, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 29, 2008 appellant filed a timely appeal of a January 11, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated July 18, 2007 and the filing of the appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 1, 2003 appellant, then a 60-year-old material handler leader, filed a traumatic injury claim alleging that he experienced a sharp pain in his lower abdomen on that date as a result of lifting boxes weighing approximately 40 pounds. By letter dated May 1, 2003, the Office accepted his claim for right inguinal hernia.

On April 25, 2005 appellant filed a claim for a schedule award. He submitted medical reports which addressed his right groin pain and treatment.

On September 21, 2006 Dr. James A. Dyer, an Office medical adviser, reviewed appellant's case record. He determined that appellant reached maximum medical improvement on August 21, 2006. Dr. Dyer noted that he underwent right and left inguinal hernia repair with mesh and an excisional biopsy of the left ilioinguinal nerve and vas deferens on May 13, 2003. Appellant also underwent right groin exploration and neurolysis on March 2, 2004. Dr. Dyer stated that he sustained ilioinguinal nerve entrapment neuropathy on the right side at L1. He determined that appellant sustained a five percent impairment of the right lower extremity and a zero percent impairment of the left lower extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By decision dated July 18, 2007, the Office granted appellant a schedule award for a five percent impairment of the right lower extremity. It found no impairment of the left lower extremity.

On October 26, 2007 appellant requested reconsideration. In an October 23, 2007 letter, he stated that, after undergoing surgery twice in the same area, he continued to experience unbearable pain which caused depression. An August 19, 2007 report of Kenneth W. Jackson, a family nurse practitioner, stated that on April 2, 2003 appellant was diagnosed with a hernia requiring surgery. On April 15, 2005 appellant was placed on Cymbalta for depressive symptoms related to chronic pain issues that apparently resulted from the surgery. In a May 11, 2006 report, Dr. Scott J. Sanders, an attending Board-certified surgeon, found that appellant sustained ilioinguinal nerve neuropathy and right lower quadrant abdominal pain. He stated that appellant had reached maximum medical improvement. Dr. Sanders determined that he sustained a 20 percent physical and emotional impairment due to pain. In a May 13, 2003 report, he performed right and left inguinal hernia repair with mesh, and an excisional biopsy of left ilioinguinal nerve and vas deferens. In a March 2, 2004 report, Dr. Sanders performed right groin exploration and neurolysis.

By decision dated January 11, 2008, the Office denied appellant's request for reconsideration. It found that the evidence submitted was duplicative in nature and not relevant and, thus, insufficient to warrant further merit review of appellant's claim.¹

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant

¹ The Board notes that appellant submitted new evidence on appeal. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office with a formal written request for reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ 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.⁴ 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

In an October 23, 2007 letter, appellant disagreed with the Office's July 18, 2007 decision which granted him a schedule award for a five percent impairment of the right lower extremity and found no impairment to the left lower extremity. The relevant issue of whether appellant has sustained greater percentages of impairment than those previously awarded is medical in nature.

On reconsideration, appellant stated that following surgeries for his accepted condition he suffered from unbearable pain which caused his depression. Appellant did not submit medical evidence addressing whether he sustained greater impairment of his lower extremities. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening the claim.⁵ While pain may be a factor relevant to the determination of impairment, Mr. Jackson's August 19, 2007 report stated that appellant sustained a hernia requiring surgery and depressive symptoms that apparently resulted from the surgery. However, this evidence does not constitute a basis for reopening appellant's claim for merit review. The Board notes that a nurse is not defined as a physician under the Act.⁶ Therefore, Mr. Jackson's report does not constitute probative medical evidence. This evidence does not establish that appellant sustained more than five percent impairment of the right lower extremity.

Appellant resubmitted Dr. Sanders' May 13, 2003 and March 2, 2004 surgical reports and May 11, 2006 report finding that he sustained 20 percent physical and emotional impairment due to pain. However, the submission of this evidence did not require reopening of his claim for merit review because it was previously considered by the Office. The Board has held that evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.⁷

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

⁵ *D. Wayne Avila*, 57 ECAB 642 (2006).

⁶ *See Paul Foster*, 56 ECAB 208 (2004).

⁷ *See L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

argument not previously considered; or submit relevant and pertinent new evidence not previously considered by the Office. Appellant did not meet any of the regulatory requirements and the Office properly declined to reopen appellant's claim for further merit review.⁸

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.⁹

Issued: September 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

⁹ Appellant contends on appeal that he has sustained an emotional condition resulting from the pain caused by his accepted condition. However, the Office has not issued a final decision on this aspect of his claim. The Board has no jurisdiction to review this contention. *See* 20 C.F.R. § 501.2(c).