

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

C.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Des Moines, IA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-66
Issued: July 13, 2010**

Appearances:
Julie Oscarson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2009 appellant filed a timely appeal of an August 17, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration without a merit review. Because more than 180 days elapsed from the last merit decision dated March 27, 2009 to the filing of this appeal on October 7, 2009, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

This case has previously been before the Board. In a June 17, 2009 decision, the Board affirmed the Office's May 9, 2008 decision denying acceptance of appellant's claim to include bilateral cubital tunnel syndrome. The medical evidence was insufficient to establish that

appellant sustained cubital tunnel syndrome in the performance of duty.¹ The Board also affirmed the Office's August 22, 2008 decision denying appellant's request for reconsideration. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.²

Appellant submitted medical evidence to the record, including several reports from Dr. Eugene Cherny, a Board-certified plastic surgeon. On June 5, 2008 Dr. Cherny noted that appellant's Tinel's test was positive for bilateral cubital tunnel syndrome. He diagnosed bilateral nerve compression syndromes involving the medial nerve at the level of the wrist and ulnar nerve at the wrist and elbow level. Dr. Cherny recommended carpal, ulnar and cubital tunnel releases bilaterally. In surgical reports dated July 2 and August 1, 2008, he performed neuroplasty of the median nerve on the left and right carpal tunnel respectively. Dr. Cherny's treatment notes dated from July 29 to October 9, 2008 indicated that appellant had follow-up visits following surgery. Appellant also submitted several physical therapy reports dated between August 11 and October 9, 2008.

On September 4, 2008 appellant filed a claim for an increased schedule award of her upper extremities. In a December 29, 2008 report, Dr. Cherny indicated that appellant had presented with positive Tinel's test for bilateral cubital tunnel. He provided an impairment rating for appellant's right and left upper extremities. On February 8, 2009 an Office medical adviser found Dr. Cherny's impairment rating insufficient and recommended that appellant be referred to a physician for an impairment evaluation. In a March 6, 2009 report, Dr. Charles Denhart, a Board-certified physiatrist and Office second opinion physician, diagnosed bilateral carpal tunnel syndrome and status post bilateral carpal tunnel releases. He provided an impairment rating for appellant's arms.

In a March 27, 2009 decision, the Office denied an increased schedule award finding the evidence insufficient to establish greater impairment than previously determined.

In a May 11, 2009 nerve conduction study report, Dr. William Koenig, a Board-certified physiatrist, found very mild right cubital tunnel syndrome. He noted that the values on the left were in the upper end of the normal range. Dr. Koenig also found mild bilateral ulnar tunnel syndrome and active bilateral carpal tunnel syndrome in an unoperated case.

In a May 12, 2009 bone scan report, Dr. Michael Quinn, a Board-certified diagnostic radiologist, found some mild degenerative-type uptake in both wrists. He noted that a total body scan revealed degenerative-type uptake in both feet and shoulders with some mild degenerative changes at the thoracolumbar junction and in the lower lumbar spine.

¹ Docket No. 08-2364 (issued June 17, 2009).

² The Board notes that appellant filed a traumatic injury claim for a January 4, 2008 incident. This claim was docketed as Claim No. xxxxxx678 and was combined with the present claim. The Office accepted the claim for right shoulder impingement syndrome and aggravated right shoulder osteoarthritis. It also issued appellant a schedule award for nine percent right upper extremity impairment. There are no issues regarding this claim currently before the Board.

In a May 27, 2009 report, Dr. Scott Neff, an osteopath, Board-certified in orthopedic surgery, diagnosed bilateral carpal tunnel syndrome and recommended bilateral carpal tunnel decompression. On June 24, 2009 he indicated that appellant had numbness and tingling in both hands with recurrent symptoms. Dr. Neff noted that, due to these recurrent symptoms, he referred appellant for an electromyogram (EMG), which showed mild ulnar tunnel at both wrists and active bilateral carpal tunnel syndrome.

In a statement dated June 7, 2009, appellant addressed the carpal tunnel surgery on both hands in 2008. He indicated that Dr. Cherny treated him for postsurgery recovery but believed that “something with hands were not right.” Appellant decided to consult another surgeon, and chose Dr. Neff to continue his treatment. He also submitted physical therapy notes to the record.

In a July 30, 2009 statement, appellant requested reconsideration before the Office. He asserted that, based on new information that had been forwarded by Dr. Neff, Dr. Cherny did not do complete testing before or after his carpal tunnel surgeries. Appellant indicated that his condition became increasingly painful making it more difficult to carry on with his daily routine. He noted that he needed to have cubital tunnel surgery in order for the carpal tunnel surgeries to be a long-term success.

A July 31, 2009 operative report from Dr. Neff diagnosed severe right carpal tunnel syndrome with chronic scarification. Dr. Neff performed extensive revision of carpal tunnel decompression on that date.

In an August 17, 2009 decision, the Office denied appellant’s reconsideration request without a merit review finding that the evidence submitted was either duplicative or irrelevant. It also found that appellant did not otherwise advance a new legal argument or point of law not previously considered.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office regulations provide that 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.⁴

ANALYSIS

Appellant’s reconsideration request consists of a statement asserting that Dr. Cherny did not conduct proper testing of his carpal tunnel condition. He also argued that his increasingly

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

⁴ 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

painful condition has interfered with his daily routine. Appellant noted that he needed additional cubital tunnel surgery. His contentions do not show that the Office erroneously applied a point of law or advance any new relevant legal arguments not previously considered by the Office. Appellant's June 7, 2009 statement explaining why he sought treatment with Dr. Neff does not address the relevant underlying issue, which is medical in nature, regarding whether appellant sustained bilateral cubital tunnel syndrome in the performance of duty.⁵

The additional medical documents submitted by appellant, although new, do not constitute relevant and pertinent evidence not previously considered by the Office. The medical evidence is not relevant as it does not support that his cubital tunnel syndrome is employment related. Dr. Cherny's reports dated June 5 and December 29, 2008 noted that appellant had a positive Tinel's test for bilateral cubital tunnel syndrome, but did not discuss whether his employment activities caused this condition.⁶ His other reports dated between July 29 and October 9, 2008, addressed treatment following appellant's carpal tunnel releases. These reports are not relevant as carpal tunnel syndrome is not the condition at issue in the present case and they do not address whether appellant's employment caused his cubital tunnel condition.

The reports from Drs. Neff, Quinn and Denhart are irrelevant as they only report carpal tunnel and degenerative findings to appellant's wrists without discussing his cubital tunnel syndrome or its cause. As noted, new evidence that does not address the pertinent issue does not constitute relevant evidence. Dr. Koenig's May 11, 2009 nerve conduction study report merely reported findings of mild right cubital tunnel syndrome, but is not relevant because it did not address the cause of this condition.

The record also contains physical therapy reports. However, reports of appellant's physical therapists are of no probative medical value as physical therapists are not considered physicians as defined under the Federal Employees' Compensation Act and, are not competent to render a medical opinion.⁷ As the underlying issue is medical in nature, the physical therapy reports do not constitute relevant evidence.

For these reasons, the Office properly denied appellant's request for reconsideration without a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

⁵ See *Y.S.*, 60 ECAB ___ (Docket No. 08-440, issued March 16, 2009) (where the issue is medical in nature, it can only be resolved through the submission of relevant medical evidence from a physician).

⁶ See *E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence); *Freddie Mosley*, 54 ECAB 255 (2002).

⁷ See *Barbara Williams*, 40 ECAB 649 (1989); *A.C.*, 60 ECAB __ (Docket No. 08-1453, issued November 18, 2008); see also 5 U.S.C. s 8101(2) (defining the term "physician").

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated August 17, 2009 is affirmed.

Issued: July 13, 2010
Washington, DC

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

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

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