

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

A.A., Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Philadelphia, PA, Employer)

Docket No. 10-125
Issued: July 12, 2010

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2009 appellant filed an appeal of a July 31, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the nonmerit decision. The most recent merit decision of record was a December 8, 2008 decision denying a schedule award. Because more than 180 days elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).¹

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(e).

FACTUAL HISTORY

This case was previously before the Board. By decision dated March 4, 1998, the Board affirmed a September 6, 1995 hearing representative's decision terminating appellant's compensation benefits on the grounds that her injury-related disability had ceased.² In a decision dated September 22, 2008, the Board found the case was not in posture for a decision as to whether appellant had permanent impairment to her right upper extremity and remanded the case for further development of the medical evidence.³ The facts contained in those prior decisions are incorporated herein by reference.⁴

On remand the Office referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion examination and a determination as to the degree of permanent impairment to her right upper extremity. In a November 5, 2008 report, Dr. Draper provided a history of injury and treatment, as well as examination findings. He found no atrophy, no radiculopathy and no evidence of peripheral polyneuropathy or myopathy. Based upon the results of his examination and test results, Dr. Draper opined that appellant had no (zero percent) impairment to her right upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He stated that she had reached maximum medical improvement as of January 1, 2000.

In a report dated December 1, 2008, the Office medical adviser reviewed Dr. Draper's report, which contained findings reflecting no sensory deficit, no reflex deficit, and normal cervical spine and right elbow range of motion. He agreed with Dr. Draper's conclusion that appellant had no impairment related to her accepted condition and had a zero percent impairment to her right upper extremity pursuant to the A.M.A., *Guides*.

By decision dated December 8, 2008, the Office denied appellant's claim for a schedule award, finding that the weight of the medical evidence was represented by Dr. Draper's well-reasoned opinion.

On July 14, 2009 appellant, through her representative, requested reconsideration. Counsel argued that ineligibility for wage-loss compensation did not preclude receipt of a schedule award and that a 1998 medical report was sufficient to create a conflict in medical opinion with Dr. Draper's 2008 second opinion report.

² Docket No. 96-573 (issued March 4, 1998).

³ Docket No. 08-951 (issued September 22, 2008).

⁴ Appellant's April 8, 1993 traumatic injury claim was accepted for right ulnar neuropathy and cervical radiculitis. On September 14, 2007 an Office hearing representative affirmed the Office's denial of her request for a schedule award. As noted, by decision dated September 22, 2008, the Board remanded the case to the Office for further development.

By decision dated July 31, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant merit review. It found that she had not raised a substantive legal question and had not submitted new and relevant evidence.⁵

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office 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.⁷ 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.⁸ 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.⁹ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

Appellant's July 14, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Her representative noted that ineligibility for wage-loss compensation did not preclude her receipt of a schedule award. The Office did not deny appellant's request for a schedule award based on her failure to establish disability for work, but rather on the grounds that she had no permanent impairment to her right upper extremity under the A.M.A., *Guides*. Counsel's argument was previously addressed in the Board's September 22, 2008 decision. He also contended that Dr. Diamond's 1998 report was sufficient to create a conflict in medical opinion with Dr. Draper's report. As noted, the Board's prior decision addressed the probative value for Dr. Diamond report. This argument merely addresses the sufficiency of the evidence and does not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

⁵ A September 16, 1998 report from Dr. Nicholas Diamond, an osteopath, found that appellant had 30 percent impairment to her right arm. The Board's September 22, 2008 decision addressed the probative value of his medical report.

⁶ 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).

⁷ *Id.* at § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Moreover, appellant did not submit relevant and pertinent new evidence not previously considered by the Office.¹¹ She submitted no additional evidence to support her request for reconsideration. Therefore, appellant failed to satisfy the third requirement under section 10.606(b)(2).

On appeal, counsel contends that Dr. Draper's report is insufficient to represent the weight of the medical evidence. Counsel's argument, however, goes to the merits of the case. The issue on appeal is whether appellant submitted sufficient evidence or argument to warrant further merit review.

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her July 14, 2009 request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ 20 C.F.R. § 10.606(b)(2).