

FACTUAL HISTORY

On March 14, 2003 appellant, then a 56-year-old rehabilitation clerk, filed a claim for an injury occurring on that date to the right side of his neck and middle back. The Office accepted the claim, assigned file number xxxxxx973, for neck and low back sprains.¹

On March 31, 2008 appellant requested a schedule award. He submitted a February 27, 2008 impairment evaluation from Dr. Eddie Sassoon, a Board-certified physiatrist, who provided range of motion findings for appellant's cervical spine and opined that he had a 12 percent whole person impairment.

On April 18, 2008 the Office notified appellant that the Federal Employees' Compensation Act (the Act) did not provide schedule awards for impairments of the spine or the whole person but did provide schedule awards for nerve impairments of the extremities resulting from a spinal condition. It informed him to have his physician rate impairment of the extremities due to his spinal impairment utilizing Tables 15-15 through 15-18 on pages 423-34 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The Office allotted him an additional 30 days to submit medical evidence in support of his schedule award claim.

By decision dated June 10, 2008, the Office denied appellant's claim for a permanent impairment due to his March 14, 2003 work injury. It noted that he had previously received a schedule award under file number xxxxxx969 for a 13 percent permanent impairment of the right upper extremity. The Office found that the additional evidence from Dr. Sassoon did not address whether appellant had any greater impairment or provide a rationalized impairment rating.²

On June 25, 2008 appellant requested an oral hearing. By decision dated February 11, 2009, a hearing representative affirmed the June 10, 2007 decision. She found, however, that the Office should issue a formal decision regarding whether he sustained more than a lumbar and cervical strain due to his employment injury.³

Appellant submitted progress reports from Dr. Sassoon dated February to July 2009. In his progress reports, Dr. Sassoon described appellant's complaints and provided treatment recommendations.

¹ By decision dated May 2, 2003, the Office denied appellant's claim on the grounds that the evidence did not establish that he sustained an injury as alleged. On September 12, 2003 a hearing representative affirmed the May 2, 2003 decision. By decision dated March 4, 2004, the Office denied modification of its prior merit decisions. In a decision dated July 12, 2004, it modified its March 4, 2004 decision and accepted appellant's claim for sprains of the neck and low back.

² In a progress report dated March 26, 2008, Dr. Sassoon treated appellant for back spasm and diagnosed lumbar and cervical disc herniations. On April 23, 2008 he opined that appellant was disabled from work due to multiple disc herniations. In a report dated May 28, 2008, Dr. Sassoon diagnosed cervical and lumbar disc herniations and cervical and lumbar radiculitis with weakness and myospasm of the bilateral upper and lower extremities. He found that appellant had decreased strength in the upper extremities at C4-5 and lower extremities at L5-S1.

³ The Office is currently developing the issue of whether appellant sustained additional medical conditions causally related to his March 14, 2003 work injury.

On August 17, 2009 appellant requested reconsideration of the denial of his schedule award claim. He argued that he had provided all the necessary evidence regarding his March 14, 2003 work injury and thus should be entitled to a schedule award. By decision dated August 31, 2009, the Office denied appellant's request after finding that the evidence submitted was irrelevant and thus insufficient to warrant reopening his case for merit review.

On appeal appellant argues that he submitted all the necessary medical evidence. He also maintained that his schedule award under file number xxxxxx969 was for a separate injury to his right shoulder unrelated to his neck or back. Appellant asserted that his impairment rating should have been based on Dr. Sassoon's opinion.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ 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 legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁵ 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.⁶ 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.⁷

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.⁸ 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.⁹ 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.¹⁰

ANALYSIS

The Office found that appellant had not submitted sufficient evidence to establish that he had any permanent impairment causally related to his March 14, 2003 employment injury. It

⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

noted that he had received a schedule award for upper extremity impairment under another file number.

On reconsideration appellant argued that he submitted all the evidence necessary to receive a schedule award. The Office, however, previously considered the evidence submitted in support of his schedule award request and found that it was insufficient to meet his burden of proof. Consequently, appellant's argument lacks a reasonable color of validity such that it would warrant reopening his case for merit review.¹¹

Appellant submitted progress reports dated February to July 2009 from Dr. Sassoon. However, Dr. Sassoon did not address the extent of any permanent impairment in the progress reports and thus they are not pertinent to the issue at hand. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹²

On appeal appellant argues that the Office should not have considered his schedule award under file number xxxxxx969 as it was for a separate injury to his right shoulder and not due to his neck and back injury under the current file number. The Office, however, denied his schedule award because he did not submit any medical evidence conforming to the A.M.A., *Guides* showing that he had impairment resulting from his March 14, 2003 employment injury. Appellant has the burden to prove to submit medical evidence supporting that he has a permanent impairment of a scheduled member of the body due to his work injury.¹³

Appellant also maintains that the Office should have based his impairment rating on Dr. Sassoon's impairment evaluation. The Office, however, previously found that Dr. Sassoon's opinion was not in conformance with the A.M.A., *Guides* and insufficient to meet his burden of proof. A medical report that does not conform to the A.M.A., *Guides* is of diminished probative value.¹⁴

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 pertinent new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of his claim under section 8128.

¹¹ *Elaine M. Borghini*, 57 ECAB 549 (2006).

¹² *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹³ *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁴ *Mary L. Henninger*, 52 ECAB 408 (2001).

ORDER

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

Issued: June 7, 2010
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