

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

M.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 10-704
Issued: October 25, 2010**

Appearances:
Appellant, pro se
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 January 12, 2010 appellant filed a timely appeal from the October 28, 2009 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, the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was issued on November 5, 2008, denying appellant's claim for an increased schedule award. The Board lacks jurisdiction to review the merits of this claim.¹

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 For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

The Office accepted appellant's September 23, 2007 traumatic injury claim for fractures of the left wrist and ankle. On March 19, 2008 appellant requested a schedule award.

In a July 7, 2008 report of a second opinion examination, Dr. George Varghese, a Board-certified physiatrist, provided examination findings and an impairment rating pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Referring to Table 16-28, he concluded that appellant had a two percent impairment for both flexion and extension in the left upper extremity. Under Table 16-31, Dr. Varghese found a one percent impairment for both radial and ulnar deviation, for a total range of motion impairment of six percent. Noting that appellant had no strength or sensory deficit in the left upper extremity, he assigned a left upper extremity impairment of six percent. Referring to Table 17-11 Dr. Varghese determined that appellant had a seven percent impairment of the left lower extremity for dorsiflexion.

In a July 25, 2008 report, the district medical adviser concurred with Dr. Varghese's findings. He opined that appellant had a six percent left upper extremity impairment and a seven percent left lower extremity impairment. The date of maximum medical impairment was July 7, 2008.

In an August 8, 2008 decision, the Office granted appellant schedule awards for a six percent left upper extremity impairment and a seven percent left lower extremity impairment. The period of the awards was from July 7, 2008 to April 5, 2009.

On September 26, 2008 appellant requested reconsideration. In a September 19, 2008 report, Dr. William O. Hopkins, a Board-certified orthopedic surgeon, provided a history of injury, examination findings and an impairment rating pursuant to the fifth edition of A.M.A., *Guides*. Range of motion measurements for the wrists were as follows: flexion -- 74 degrees on the right as compared to 44 degrees on the left; extension -- 72 degrees on the right, 78 degrees on the left; radial deviation -- 33 degrees on the right, 17 degrees on the left; ulnar deviation -- 38 degrees on the right, 43 degrees on the left; supination -- 90 degrees bilaterally; pronation -- 82 degrees on the right, 78 degrees on the left. Sensory examination revealed numbness extending from the palmar side of the left thumb distally into the thumb, involving both the radial and ulnar segments. There was diminished two-point sensation, as well as numbness by sharp point perception in the left little finger. Two-point discrimination in the left thumb was reduced to seven millimeters involving the distal segment, both radial and ulnar. Two-point discrimination in the little finger was five millimeters over the entire digit. Pinch strength on the Jaymar dynamometer on the right side was 4.9 kilograms and left 4.3 kilograms, followed by 5.1 kilograms on the right and 4.3 kilograms on the left and then followed by 5.12 kilograms on the right and 4.4 kilograms on the left. Jaymar dynamometer grip strength on the right was 31 kilograms followed by 31 kilograms, followed by 32 kilograms. The left was 19 kilograms, followed by 20 kilograms, followed by 19 kilograms. He noted significant interosseous atrophy in the left hand as compared to the right, particularly involving the first dorsal interosseous muscle.

Examination of the left lower extremity revealed decreased range of motion. Dorsi-extension on the right was 90 degrees and 85 degrees on the left. Plantar flexion was 24 degrees on the right and 10 degrees on the left. Eversion at the ankle was 50 degrees on the right and 34 degrees on the left. There was tenderness over the tibialis anterior and peroneal tendon levels. Tip toe balance seemed impaired on the left as compared to the right.

Dr. Hopkins stated that appellant's "disability factors in the left wrist and hand" were loss of motion, loss of strength and loss of sensation with pain. Disability factors in the left lower extremity were loss of motion at the ankle and pain on use. Referring to Table 16-5 and 16-31 of the fifth edition of the A.M.A., *Guides*, Dr. Hopkins concluded that appellant had 3.5 percent extremity loss of function in the left wrist for flexion and 2.9 percent loss of function for radial deviation. He assigned a one percent rating for a small amount of loss of motion and pronation, for a total rating of 6.5 percent for loss of motion. For sensory loss in the thumb involving both ulnar and radial nerves, Dr. Hopkins concluded that appellant had a 25 percent loss of sensation in the thumb, which was a 10 percent loss to the hand or a 9 percent upper extremity loss. Under Tables 16-3 and 16-34, he found a 10 percent extremity loss secondary to grip and lateral pinch loss. Dr. Hopkins concluded that appellant had a total left upper extremity loss of 36.4 percent.

Referring to Table 17-11, Dr. Hopkins extrapolated that appellant had a 15 percent impairment of the left lower extremity secondary to motion loss. He stated that she did have some loss of eversion and inversion of the ankle joint, which is not listed as a disability factor and which I do not think is significant. Dr. Hopkins equated mild weakness to an estimated 20 percent loss of function in the left lower extremity secondary to her articular fraction of the ankle involving both tibia and fibula with resultant loss of motion and pain on use.

In an October 25, 2008 report, the district medical adviser stated that Dr. Hopkins failed to properly explain the left upper extremity rating for weakness pursuant to page 508 of the A.M.A., *Guides*, misused Table 16-34 and incorrectly correlated grip strength rating with Table 16-3. The medical adviser determined that Dr. Hopkins' impairment rating of the left lower extremity was improper under the A.M.A., *Guides* as it was an estimate. He opined that Dr. Hopkins' report was not an acceptable basis for modification of the prior schedule award.

By decision dated November 5, 2008, the Office denied modification of the August 5, 2008 decision, finding that the weight of the medical evidence was represented by Dr. Varghese's July 7, 2008 report.

On October 2, 2009 appellant again requested reconsideration, contending that she had greater impairment in accordance with Dr. Hopkin's September 19, 2008 report. She alleged that Dr. Varghese failed to perform a thorough examination and did not address pain or sensory changes. Appellant described pain which prevented her from performing massages, teaching Yoga classes or performing other daily tasks. She asserted that she had not been treated fairly. Appellant submitted a *curriculum vitae* for Dr. Varghese; an article from the employing establishment's website concerning schedule awards; copies of photographs of her left wrist and a copy of a previously submitted operative report dated October 2, 2007. She also provided a December 15, 2008 letter from Dr. Hopkins in which he asked the Office to identify how he had erred in his impairment rating.

By decision dated October 28, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant merit further review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.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 on the merits.⁵ 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.⁶

ANALYSIS

In her October 2, 2009 request for reconsideration, appellant described pain which prevented her from performing massages, teaching Yoga classes or performing other daily tasks; alleged that Dr. Varghese failed to perform a thorough examination and did not address pain or sensory changes and asserted that she had not been treated fairly. She did not allege or demonstrate, that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to further review of the merits based on the first and second requirements under section 10.606(b)(2).

Appellant provided a copy of an October 2, 2007 surgical report, which was previously received and considered by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review.⁷

Appellant submitted a December 15, 2008 letter from Dr. Hopkins requesting information from the Office; a *curriculum vitae* for Dr. Varghese; an article from the employing establishment's website concerning schedule awards and copies of photographs of her left wrist.

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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁷ *Denis M. Dupor*, 51 ECAB 482 (2000).

None of these documents contains an opinion from a physician on the underlying medical issue in this case, namely, the degree permanent impairment to appellant's left upper and lower extremities. Therefore, they do not constitute relevant and pertinent new evidence not previously considered by the Office.⁸

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office or constituted relevant and pertinent new evidence not previously considered by the Office. The Board finds that the Office properly determined that she was not entitled to further review of the merits pursuant to any of the requirements under section 10.606(b)(2). It properly denied her request for reconsideration.

On appeal, appellant contends that her impairments related to the accepted conditions warrant an increased schedule award. As noted, the Board does not have jurisdiction over the merits of this case. The issue is whether the Office properly denied appellant's request for merit review. For reasons stated, the Board finds that she is not entitled to further review of the merits.

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).

⁸ See *Susan A. Filkins*, 57 ECAB 630 (2006). Evidence which does not address the issue involved is not a basis for reopening a case. See *Joseph A. Brown, Jr.*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 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