United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 11-36**
	)	**Issued: August 17, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Capital Heights, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 4, 2010 appellant filed a timely appeal of a June 29, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review. Because over 180 days elapsed between the most recent merit decision, of January 4, 2010, to the filing of this appeal the Board lacks jurisdiction to review the merits of his case, pursuant to section 8128 of the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

[1] 5 U.S.C. §§ 8101-8193, 8128(a).

FACTUAL HISTORY

On January 25, 1999 appellant, then a 34-year-old letter sorter machine operator, filed an occupational disease alleging that he developed bilateral carpal tunnel syndrome due to factors of his federal employment.

On April 8, 1999 OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and right carpal tunnel release. On April 16, 1999 Dr. Rida Azer, a Board-certified orthopedic surgeon, performed a right carpal tunnel release. OWCP authorized left carpal tunnel release on April 4, 2000. Dr. Azer performed this surgery on May 12, 2000. On October 16, 2003 appellant underwent an electromyogram (EMG) and nerve conduction velocity (NCV) tests were normal. On March 9, 2005 Dr. Azer stated that he had satisfactory grip and normal sensation over the right and left median nerves. She repeated these findings on June 15, 2005.

In a report dated May 3, 2006, Dr. Azer stated that appellant had normal sensation of his right and left median nerve, but had residuals of 35 percent impairment bilaterally. Appellant filed a claim for compensation requesting a schedule award on October 12, 2006. He submitted a report dated February 9, 2007, Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon, who applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*) and found that appellant had 20 percent loss of strength on the right and 20 to 25 percent loss of strength on the left. Dr. Jackson found that appellant had 10 percent impairment bilaterally due to loss of grip strength. He further found that appellant had 10 percent impairment bilaterally due to loss of pinch strength. Dr. Jackson found that appellant had grade three sensory deficit and pain or 24 percent impairment of each upper extremity. He also found that appellant had grade four impairment due to motor and power deficit or 2.5 motor deficit. Dr. Jackson concluded that appellant had 41 percent impairment of each upper extremity due to carpal tunnel syndrome.

OWCP's medical adviser reviewed this report on March 20, 2007 and found that appellant required additional electrodiagnostic testing.

OWCP referred appellant for a second opinion evaluation with Dr. Robert Smith, a Board-certified orthopedic surgeon on June 19, 2007. In a report dated July 19, 2007, Dr. Smith noted appellant's history of injury and medical history. He found no evidence of atrophy or deformity in the upper extremities and normal range of motion. Dr. Smith stated that grip, pinch and opposition strength were normal with negative Tinel's and Phalen's signs. He noted that a postoperative EMG study in 2003 showed no evidence on ongoing carpal tunnel syndrome. Dr. Smith found that appellant had no ratable impairment of his upper extremities based on the fifth edition of the A.M.A., *Guides*.

By decision dated August 29, 2007, OWCP denied appellant's claim for a schedule award finding that Dr. Smith's report established that appellant did not have a ratable impairment due to his accepted condition of bilateral carpal tunnel syndrome.

[2] A.M.A., *Guides* (5th ed. 2001).

Dr. Peter S. Trent, a Board-certified orthopedic surgeon, submitted a report dated December 10, 2007 and stated that he did not agree with Dr. Smith's impairment rating. He stated, "The physical examination of [appellant] in the office today shows well-healed scars. There is a small degree of thenar atrophy on the right when compared to the left. [Appellant] does have some residual tenderness over the carpal canal, but grip strength is good."

Dr. Jackson submitted a report dated August 1, 2008 and stated that grip and pinch strength testing established diminished strength. He again opined that appellant had 41 percent impairment of his upper extremities bilaterally under the fifth edition of the A.M.A., *Guides*.

Appellant requested reconsideration on August 27, 2008. By decision dated December 4, 2008, OWCP reviewed the merits of his claim and denied modification of the August 29, 2007 decision.

Appellant again requested reconsideration on December 20, 2008. He submitted a report dated December 12, 2008 from Dr. Jackson noting that he supplied appellant's impairment rating based on the fifth edition of the A.M.A., *Guides* using grip and pinch strength and that appellant's impairment rating remained the same. Dr. Azer examined appellant on January 14, 2009 and stated that sensation in the median nerves was normal bilaterally and that grip was satisfactory.

OWCP's medical examiner reviewed the medical evidence on March 27, 2009 and agreed that appellant had no ratable impairment under the A.M.A., *Guides*.

By decision dated April 16, 2009, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

Dr. Azer examined appellant on May 22, 2009 and repeated his findings of satisfactory sensation and grip strength. Dr. Jackson recommended repeat EMG's on June 16, 2009. In a report dated October 9, 2009, Drs. Jackson and Azer reviewed appellant's findings and applied the sixth edition of the A.M.A., *Guides*.[3] The physicians stated, "It is my opinion that the ratings that we gave based on the fifth edition, remains 41 percent of the upper extremity. However, when I review the sixth edition for the same findings, [appellant's] rating drops to 38 percent. That is 38 percent in each upper extremity."

Appellant requested reconsideration on October 23, 2009. In a decision dated January 4, 2010, OWCP reviewed the merits of his claim but did not modify the April 16, 2009 decision denying his claim for a schedule award.

Appellant submitted a report dated January 29, 2010 from Dr. Azer which diagnosed carpal tunnel syndrome and opined that he had residuals. Dr. Daniel Ignacio, completed an EMG report on February 1, 2010 and diagnosed chronic bilateral carpal tunnel syndrome with chronic stable denervation of the right hand. He stated that the right median nerve conduction block across the right wrist was improved but continued to be slow with chronic denervation of the right hand. In a narrative report of the same date, Dr. Ignacio noted appellant's medical

[3] *Id*., at (6th ed. 2009).

history and found hypoesthesia along the right thumb and index finger with limited grip strength. He also found continuing hypoesthesia and weakness along the left hand. Dr. Ignacio diagnosed chronic bilateral carpal tunnel syndrome with chronic denervations along the right hand, chronic tenosynovitis of the wrist and chronic regional pain syndrome. On February 12 and 24, 2010 Dr. Ignacio repeated his diagnoses and recommended that appellant use a wrist splint. In a report dated March 11, 2010, he stated that appellant had multiple surgeries with scarrings and associated sensorimotor defect which he believed resulted in a permanent impairment.

Appellant requested reconsideration on March 18, 2010. He submitted a report dated February 10, 2010 from Dr. Henry M. Daniels, a Board-certified orthopedic surgeon, noting the history of injury and medical history. Dr. Daniels noted that appellant experienced numbness and tingling in the median sensory distribution of both hands as well as dysesthesia during sleeping hours and residual grip strength weaknesses. He reviewed appellant's electrodiagnostic studies and diagnosed residual median neuropathy and de Quervain's tenosynovitis bilaterally.

By decision dated June 29, 2010, OWCP declined to reopen appellant's claim for consideration of the merits finding that he failed to submit new legal evidence or argument in support of his request for reconsideration.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[4] Section 10.606(b) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.[5] Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, it will deny the application for review without reopening the case for a review on the merits.[6]

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. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.

ANALYSIS

Appellant requested a schedule award for his upper extremity impairments due to his accepted condition of bilateral carpal tunnel syndrome. OWCP denied this claim finding that he

[4] 5 U.S.C. §§ 8101-8193, 8128(a).

[5] 20 C.F.R. § 10.606.

[6] *Id.*, at § 10.608.

had not established a ratable impairment under the A.M.A., *Guides*. The issue currently before the Board is whether on reconsideration appellant has submitted new medical evidence pertinent and relevant to whether he has a permanent impairment of his upper extremities entitling him to a schedule award and requiring OWCP to reopen his claim for consideration of the merits.

Following the January 4, 2010 merit decision, appellant requested reconsideration and submitted a series of medical reports including a January 29, 2010 report from Dr. Azer, a February 10, 2010 report from Dr. Daniels and reports from Dr. Ignacio dated February 1, 12 and 24, 2010. OWCP declined to reopen his claim for consideration of the merits on June 29, 2010 finding that he had not submitted relevant new evidence.

It is well established that the requirement for reopening a claim for further merit review before OWCP does not require a claimant to submit all evidence necessary to discharge his burden of proof. Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent and not previously considered by OWCP. The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence warrants modification of an earlier decision.[7]

The evidence that appellant submitted with his request for reconsideration included Dr. Ignacio's 2010 EMG report, which demonstrated continued denervation of the right hand. This postsurgical electrodiagnostic study was new to the record and is relevant to appellant's permanent impairment for schedule award purposes under the sixth edition of the A.M.A., *Guides*.[8] Dr. Ignacio also submitted narrative reports finding hypoesthesia along the right thumb and index finger with limited grip strength as well as continuing hypoesthesia and weakness along the left hand. He stated that appellant had multiple surgeries with scarrings and associated sensorimotor defect which he believed resulted in a permanent impairment. The Board finds that these new reports are pertinent and relevant to the issue of whether he has permanent impairment of his upper extremities entitling him to a schedule award. Thus, a merit review is warranted.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration under section 8128 of FECA.

[7] *F.D. (S.D.)*, 58 ECAB 413 (2007).

[8] A.M.A., *Guides* 432-33, 445-50.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2010 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to OWCP for further actions consistent with this decision.

Issued: August 17, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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