

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

C.D., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, JACKSON
INTERNATIONAL AIRPORT, Flowood, MS,
Employer**)

**Docket No. 11-59
Issued: July 19, 2011**

Appearances:

*Alan J. Shapiro, 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 12, 2010 appellant filed a timely appeal from a September 3, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) that denied her request for reconsideration. As more than 180 days elapsed from the last merit decision of February 3, 2010 to the filing of this appeal, pursuant to the Federal Employee's Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration without further merit review of the claim under 5 U.S.C. § 8128(a).

On appeal, appellant's attorney argues that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 14, 2007 appellant, then a 37-year-old transportation security screener, filed a traumatic injury claim alleging that on May 11, 2007 she sustained neck and shoulder conditions from lifting an overweight bag. By letter dated July 20, 2007, OWCP accepted her claim for sprain of shoulder and upper arm, other specified sites. It paid compensation and medical benefits. On April 1, 2008 OWCP also accepted appellant's claim for sprain of the neck. On May 14, 2009 it expanded her claim to include acceptance of permanent aggravation, degenerative disc disease.

On December 4, 2009 appellant filed a claim for a schedule award. In support of her claim, she submitted a medical report dated December 1, 2009 by Dr. Rahul Vohra, appellant's treating Board-certified physiatrist with a subspecialty certification in pain medicine. Dr. Vohra indicated that he examined appellant and concluded that from his perspective appellant was at maximum medical improvement, and that, according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant would receive an impairment of six percent to the whole person. Appellant also submitted a medical report by Jack Moriarity, M.D., wherein he indicated that he reviewed appellant's cervical myelogram of April 18, 2008, and that appellant did not have clear structural or electrophysiologic source for her symptoms. OWCP referred appellant to its medical adviser and in a note dated January 13, 2010, he concluded that appellant had no impairment under the OWCP *Guidelines* and had a zero percent impairment to her right and left upper extremities.²

By decision dated February 3, 2010, the Office denied appellant's claim for a schedule award.

In an undated report dated May 13, 2010, Dr. Vohra advised that he treated appellant for neck pain and bilateral arm pain starting May 29, 2008. Appellant's myelogram/postmyelogram computerized tomography revealed some foraminal stenosis at C5-6 on the right as well as some mild foraminal stenosis at C6-7 on the right. She underwent physical therapy and injections as well as chiropractic treatment for her neck. Dr. Vohra noted that appellant was released from his care on December 1, 2009.

On August 13, 2010 appellant requested reconsideration of the February 3, 2010 decision.

In a July 30, 2010 report, Dr. William N. Grant, a Board-certified internist, noted that he did not examine appellant but only spoke with her on the telephone. He noted that, while appellant had magnetic resonance imaging scan studies on her cervical spine, the results of these studies were not available for his review. Dr. Grant reviewed appellant's history and her current complaints. He noted that appellant had reached maximum medical improvement. For results of physical examination, Dr. Grant listed a normal range of motion right shoulder as per patient. He listed appellant's diagnosis as "cervical spine and right shoulder." Dr. Grant listed appellant's right shoulder peripheral neuropathy CDX 2 as per Table 15-20 on page 434 of the

² The Board notes that neither Dr. Vohra nor OWCP's medical adviser referenced which edition of the A.M.A., *Guides* he used. In fact, OWCP's medical adviser made no reference to the A.M.A., *Guides*.

A.M.A., *Guides* (6th ed. 2009). He listed a GMFX grade modifier of 3 because of a *QuickDash* score of 77 and pain/symptoms with less than normal activity and a GMPE grade 2 modifier as per Table 158 on page 408, for a net adjustment of 1. Dr. Grant then concluded that appellant had a 23 percent upper extremity impairment under the sixth edition of the A.M.A., *Guides* based on her history, physical examination.

Other documents submitted after the February 3, 2010 decision include a request for an injection for myelogram in the right side received on June 2, 2010 and a copy of Dr. Moriarity's progress note dated April 21, 2008.

By decision dated September 3, 2010, denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP 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.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

OWCP accepted appellant's claim for sprain of shoulder and upper arms, sprain of neck and permanent aggravation of degenerative disc disease. In a February 3, 2010 decision, it denied her claim for a schedule award. OWCP gave weight to the opinion of its medical adviser over that of Dr. Vohra, explaining that Dr. Vohra had incorrectly applied the A.M.A., *Guides* while the medical adviser had correctly applied the A.M.A., *Guides*. The only issue is whether OWCP properly denied appellant's reconsideration request.

On reconsideration, appellant resubmitted a report by Dr. Moriarity that was previously of record. The Board has held that submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁷ With

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ 20 C.F.R. § 10.608(b).

⁷ *S.J.*, Docket No. 10-1318 (issued February 3, 2011); *Edward W. Malaniak*, 51 ECAB 279 (2000).

regard to the new report by Dr. Vohra, the Board notes that this report does not address appellant's impairment for schedule award purposes. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ For the same reason, the Board notes that the request for an injection is not relevant to the schedule award issue and, accordingly, does not merit a reopening of appellant's case for merit review.

The Board further finds that the opinion of Dr. Grant is not sufficient to reopen appellant's case. Dr. Grant gave an opinion with regard to appellant's impairment rating. However, he never examined appellant or reviewed appellant's medical records. Dr. Grant based his opinion solely on a telephone conversation he had with appellant. It is not apparent that he had knowledge with regard to appellant's accepted conditions, as he listed the diagnosis as "cervical spine and right shoulder" but did address findings relevant to her cervical spine or shoulder. Accordingly, Dr. Grant's report does not constitute relevant and pertinent new evidence not previously considered by the Office.⁹

Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, it did not abuse its discretion in denying her request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review of the claim under 5 U.S.C. § 8128(a).

⁸ *D.B.*, Docket No. 10-2036 (issued May 13, 2011); *Edward Mathew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ *See J.D.*, Docket No. 10-959 (issued December 7, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 3, 2010 is affirmed.

Issued: July 19, 2011
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