



## **FACTUAL HISTORY**

On March 26, 2002 appellant, a 48-year-old mail processor, filed an occupational disease claim alleging injuries to her upper extremities due to employment activities. OWCP accepted her claim for bilateral carpal tunnel syndrome.<sup>2</sup>

Appellant submitted a request for a schedule award. In a September 21, 2004 report, Dr. David Weiss, a treating physician, opined that appellant had a 45 percent impairment of her right upper extremity. In an October 11, 2005 report, Dr. Andrew Hutter, a second opinion Board-certified orthopedic surgeon, opined that the claimant had no impairment of either upper extremity. By decision dated November 23, 2005, OWCP denied appellant's request for a schedule award. In a February 7, 2006 decision, OWCP's hearing representative vacated the November 23, 2005 decision and remanded the case to OWCP for resolution of the conflict in medical opinion between Dr. Hutter and Dr. Weiss.

On remand, appellant was referred to Dr. Ronald Gennace, a Board-certified orthopedic surgeon, for an impartial medical examination. An initial evaluation, which occurred on November 14, 2006, was concluded prematurely when appellant became ill. A reevaluation was scheduled for February 27, 2007; however, appellant failed to attend the examination. By decision dated March 22, 2007, OWCP denied the claim for a schedule award, determining that the medical evidence was insufficient to support permanent partial impairment. In a June 4, 2007 decision, OWCP's hearing representative set aside the March 22, 2007 decision and remanded the case for an impartial medical examination with Dr. Gennace. In an October 25, 2007 report, Dr. Gennace found that appellant had no permanent impairment of the upper extremities causally related to her accepted conditions.

On February 7, 2008 OWCP issued a schedule award decision denying the claim for permanent partial impairment of the upper extremities. By decision dated August 4, 2008, OWCP's hearing representative set aside the February 7, 2008 decision on the grounds that the statement of accepted facts provided to Dr. Gennace was incomplete because it failed to reflect that OWCP had accepted appellant's traumatic injury claim for cervical radiculitis and did not address whether repetitive duties caused or aggravated her preexisting degenerative disc disease. The case was remanded with instructions to OWCP to consolidate the instant case with File No. xxxxxx014 and to obtain a supplemental report from Dr. Gennace after providing him with an updated statement of accepted facts reflecting OWCP's acceptance of appellant's cervical radiculitis condition.

In an October 21, 2008 report, Dr. Gennace provided examination findings, which revealed no atrophy of the upper extremities; no strength loss secondary to median nerve deficiency; and full cervical range of motion. He opined that appellant's carpal tunnel syndrome had resolved, as evidenced by a recent electromyogram (EMG), and that her cervical radiculopathy was not work related. He concluded that she had no permanent impairment related to her accepted conditions. On November 13, 2008 the district medical adviser reviewed

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<sup>2</sup> OWCP also accepted appellant's October 4, 2002 traumatic injury claim for left arm strain and cervical radiculopathy. (File No. xxxxxx014) The files were subsequently consolidated, with File No. xxxxxx014 serving as the master file.

Dr. Gennace's findings and determined that appellant had no ratable upper extremity impairment pursuant to the provisions of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The district medical adviser referred to the results of a February 5, 2008 EMG of appellant's upper extremities, which revealed no significant abnormalities.

By decision dated December 2, 2008, OWCP denied appellant's request for a schedule award based upon Dr. Gennace's October 21, 2008 report.

In a July 6, 2009 decision, OWCP's hearing representative affirmed the December 2, 2008 decision. He found that Dr. Gennace's opinion, which was well rationalized and based on an accurate medical and factual background, established that appellant had no permanent impairment of her upper extremities causally related to her accepted work injuries.

On July 3, 2010 appellant, through her attorney, requested reconsideration.<sup>3</sup> Counsel contended that Dr. Gennace's referee report was not well reasoned. He argued that the report was based on an inaccurate medical history because it ignored evidence of a shoulder injury. Counsel also contended that the evidence did not support Dr. Gennace's conclusion that appellant's carpal tunnel syndrome condition had resolved, noting that the April 30, 2004 EMG was positive and that the impartial medical examiner did not provide a date for the EMG on which he relied in rendering his opinion. He did not submit any new medical evidence in support of his reconsideration request.

By decision dated August 17, 2010, OWCP denied appellant's request for reconsideration, finding that the evidence and argument presented were insufficient to warrant merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> OWCP's 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The Board has held that the submission of

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<sup>3</sup> The record indicates that appellant was represented by Aaron B. Aumiller, Esquire before OWCP. This appeal was filed by appellant, *pro se*.

<sup>4</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, 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).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup>

### ANALYSIS

In its July 6, 2009 decision, OWCP's hearing representative affirmed the denial of appellant's schedule award request based on the well-rationalized opinion of the impartial medical examiner. As noted above, the Board does not have jurisdiction over the July 6, 2009 decision. The issue presented on appeal is whether appellant's July 3, 2010 reconsideration request met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

Appellant did not submit any new or relevant evidence in support of her July 3, 2009 reconsideration request, nor did she show that OWCP erroneously applied or interpreted a specific point of law. Additionally, contrary to his contention, counsel did not advance a new and relevant legal argument.

Appellant argued that Dr. Gennace's report was based on an inaccurate medical history because it ignored evidence of a shoulder injury. Appellant's shoulder condition is irrelevant to the underlying schedule award claim, as it was not accepted by OWCP under either of his claims.<sup>9</sup> Her argument that the referee report was not well reasoned is factual rather than legal in nature. It is also repetitious of an argument made and considered by OWCP and is therefore cumulative in nature.<sup>10</sup> Noting that an April 30, 2004 EMG was positive, counsel noted that the impartial medical examiner did not provide a date for the EMG on which he relied in rendering his opinion. The Board notes that appellant's condition in 2004 is not relevant to her entitlement to a schedule award in 2010. The record reflects the results of a February 5, 2008 EMG of appellant's upper extremities, which revealed no significant abnormalities.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### CONCLUSION

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

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<sup>8</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>9</sup> *See id.* and accompanying text.

<sup>10</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 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