



## ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On appeal, appellant's representative contends that the medical evidence from his attending physician is sufficient to establish his entitlement to an additional schedule award.

## FACTUAL HISTORY

This case has previously been before the Board. In a June 4, 2009 decision, the Board set aside the Office's April 17 and November 21, 2008 decisions and remanded the case for further development regarding whether appellant had more than three percent impairment of the right upper extremity.<sup>3</sup> The Board instructed the Office to determine whether appellant's occupational disease claim, under File No. xxxxxx848 for right wrist carpal tunnel syndrome, was employment related. The Board instructed it to combine his claim File No. xxxxxx848 for carpal tunnel syndrome of the right wrist with the current claim File No. xxxxxx148 for the accepted employment-related ganglion cyst of the right wrist for proper consideration. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are set forth.

On June 24, 2009 the Office combined all of appellant's claims including, File No. xxxxxx148 and xxxxxx848 into a master claim assigned File No. xxxxxx148.<sup>4</sup>

On June 26, 2009 the Office referred appellant, together with an updated statement of accepted facts and the medical record, to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion medical examination. In a July 16, 2009 report, Dr. Draper reviewed the medical record and listed findings on physical examination. He diagnosed ganglion cyst dorsum of the right wrist and benign cyst dorsum of the right index finger for which appellant was status postsurgery. Dr. Draper also diagnosed markedly improved right carpal tunnel syndrome. He advised that appellant had one percent impairment of the right upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6<sup>th</sup> ed. 2009).

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<sup>3</sup> Docket No. 09-574 (issued June 4, 2009). The Office accepted appellant's claim for ganglion cyst of the right wrist and authorized a March 3, 2005 surgery to remove the cyst. In decisions dated May 23 and June 5, 2007, it granted him a schedule award for two percent impairment of the right upper extremity. Following an Office hearing representative's November 1, 2007 decision which remanded the case to the Office for further development, the Office, on April 17, 2008, granted appellant an additional schedule award for one percent impairment or three percent impairment of the right arm. In a November 21, 2008 decision, an Office hearing representative affirmed the April 17, 2008 decision.

<sup>4</sup> A June 24, 2009 statement of accepted facts indicated that appellant's claim under File No. xxxxxx148 for a January 9, 2007 work incident was accepted for right wrist carpal tunnel syndrome. His claim under File No. xxxxxx700 for a December 14, 2002 work incident was accepted for right trigger thumb. Appellant's claims under File No. xxxxxx424 and xxxxxx238 for April 9, 2002 and June 25, 2004 work incidents, respectively, were accepted under the Office's short-form closure policy and paid for limited medical treatment related to his right wrist injuries.

On August 13, 2009 Dr. Willie E. Thompson, an Office medical adviser, reviewed Dr. Draper's impairment rating. He agreed that appellant had one percent impairment of the right arm based on the sixth edition of the A.M.A., *Guides*.

In an August 26, 2009 decision, the Office found that appellant was not entitled to an additional schedule award for the right upper extremity based on the medical opinions of Dr. Draper and Dr. Thompson.

On September 23, 2009 appellant requested a review of the written record by an Office hearing representative. In a September 2, 2009 report, Dr. Eric G. Dawson, an attending orthopedic surgeon, noted appellant's continuing symptoms related to carpal tunnel syndrome and ganglion cyst of the right wrist. He also found ongoing symptoms related to his extensor tendon with a cyst of the right finger. Dr. Dawson advised that appellant had 16 percent impairment of the right upper extremity based on the sixth edition of the A.M.A., *Guides*.

In a November 2, 2009 decision, an Office hearing representative set aside the August 26, 2009 decision and remanded the case to the Office for an impartial medical examination based on the conflict in medical opinion between Dr. Draper, Dr. Thompson and Dr. Dawson regarding the extent of appellant's right upper extremity impairment.

On November 5, 2009 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. David Dorin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a November 17, 2009 report, Dr. Dorin reviewed the medical record and listed his findings on physical examination. He advised that there was no aggravation of appellant's symptoms which caused more than three percent impairment of his right upper extremity.

In response to an Office request for a supplemental report containing an explanation of how he reached his conclusion, Dr. Dorin provided his calculations for his right upper extremity impairment rating based on the sixth edition of the A.M.A., *Guides* in a December 11, 2009 report.

On March 26, 2010 Dr. Morley Slutsky, an Office medical adviser, reviewed Dr. Dorin's findings. Utilizing the sixth edition of the A.M.A., *Guides*, he determined that appellant had two percent impairment of the right upper extremity.

In a March 30, 2010 decision, the Office found that appellant was not entitled to an additional schedule award for his right upper extremity.

On May 6, 2010 appellant appealed to the Board. In an order dated May 18, 2010, the Board granted his request to dismiss his appeal.<sup>5</sup>

On June 16, 2010 appellant requested that the Office reconsider its March 30, 2010 decision. He submitted Dr. Dawson's reports dated April 16 through August 20, 2010 which advised that appellant had weakness and nerve impingement of the right wrist. Appellant could

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<sup>5</sup> Docket No. 10-1437 (issued May 18, 2010).

perform limited-duty work with restrictions. He submitted a duplicate copy of Dr. Dawson's September 2, 2009 report.

In a September 16, 2010 decision, the Office denied appellant's request for reconsideration. It found that he failed to raise substantive legal questions or submit new and relevant evidence.<sup>6</sup>

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>7</sup> the Office's regulation 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.<sup>8</sup> 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.<sup>9</sup> 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 of the merits.

### **ANALYSIS**

Appellant's June 16, 2010 request for reconsideration did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by the Office. The Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

The Board finds that appellant also failed to submit relevant and pertinent new evidence not previously considered by the Office. Dr. Dawson's reports of April 16 through August 20, 2010 found that appellant had weakness and nerve impingement of the right wrist. He advised that appellant could perform limited-duty work with restrictions. These reports do not pertain to the issue of whether appellant has more than three percent impairment of the right upper extremity due to his accepted employment-related conditions. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>10</sup>

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<sup>6</sup> Following the issuance of the Office's September 16, 2010 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this evidence and legal contentions with a formal, written request for reconsideration to the Office. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

<sup>7</sup> *Supra* note 1.

<sup>8</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *D'Wayne Avila*, 57 ECAB 642 (2006).

Appellant resubmitted Dr. Dawson's September 2, 2009 report. This report was previously of record and reviewed by the Office. The Board has held that duplicative evidence does not warrant reopening a case for further merit review. This report is insufficient to warrant a merit review.<sup>11</sup>

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his June 16, 2010 request for reconsideration.<sup>12</sup>

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2011  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> See *L.H.*, 59 ECAB 253 (2007); *James E. Norris*, 52 ECAB 93 (2000).

<sup>12</sup> *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).