



## ISSUE

The issue is whether OWCP properly denied appellant's application for reconsideration without reviewing the merits of the claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

The case has previously been before the Board. Appellant had filed an occupational disease claim (Form CA-2) on June 24, 1988 alleging that she developed carpal tunnel syndrome as a result of her secretarial job duties. She stopped working and OWCP accepted the claim for right carpal tunnel syndrome and an aggravation of carpal tunnel syndrome secondary to surgical scarring. In a decision dated January 9, 2002, the Board found that OWCP had properly terminated compensation for wage-loss and medical benefits effective April 4, 1993.<sup>3</sup> The Board also found that appellant had submitted sufficient medical evidence to create a conflict under 5 U.S.C. § 8123(a) as to whether she continued to be entitled to compensation after April 4, 1993. The case was remanded for referral to a referee physician to resolve the conflict.

By order dated August 4, 2006, the Board remanded the case to OWCP<sup>4</sup> finding that the referee physician, Dr. Britt Daniel, a Board-certified neurologist, had not properly resolved the issue as to whether appellant continued to have an employment-related disability after April 4, 1993. The case was remanded to properly resolve the disability issue.

By decision dated September 8, 2008, the Board again remanded the case.<sup>5</sup> The Board found that the new referee physician, Dr. Sandy Kimmel, an osteopath Board-certified in neurology, had not addressed the issue of whether appellant had a continuing employment-related disability from April 4, 1993. The case was again remanded to properly resolve the conflict.

OWCP then selected Dr. Edward Hemphill, a Board-certified orthopedic surgeon, to resolve the conflict. In a brief report dated December 1, 2009, Dr. Hemphill provided a history, but did not include results from his examination. He opined that, while appellant had residual carpal tunnel syndrome bilaterally, she was not disabled on or after April 4, 1993.

On February 10, 2013 OWCP advised appellant that Dr. John Sampson, a Board-certified neurosurgeon, had been selected as a referee physician to resolve the ongoing conflict in the medical opinion evidence regarding her disability status. In a report dated March 5, 2013, Dr. Sampson provided a history and results on physical and neurological examination. He indicated that appellant did not have documented carpal tunnel syndrome until August 1989, although he noted that it was possible to have carpal tunnel syndrome in the setting of a normal diagnostic study. Dr. Sampson noted that appellant had normal nerve conduction studies in January 1993. In response to a question as to any period of disability since April 1993, he

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<sup>3</sup> Docket No. 00-1942 (issued January 9, 2002).

<sup>4</sup> Docket No. 06-0529 (issued August 4, 2006).

<sup>5</sup> Docket No. 07-2123 (issued September 8, 2008).

concluded, “[Appellant] had normal studies in January 1993. According to [her], she had also ceased working since 1988. Therefore, I do not believe [that appellant] had any further disability related to work duties or related treatment.”

By decision dated December 3, 2013, OWCP denied the claim for wage-loss compensation commencing April 4, 1993. It found that the weight of the medical evidence rested with Dr. Sampson.

Appellant requested a hearing before an OWCP hearing representative on December 11, 2013, who affirmed the December 3, 2013 decision on November 14, 2014. The hearing representative noted that counsel had argued Dr. Sampson’s report was inconsistent, as the physician had referred to a permanent impairment while finding no disability after April 4, 1993.

On appeal, the Board affirmed the November 14, 2014 OWCP decision.<sup>6</sup> The Board found the Dr. Sampson represented the weight of the medical evidence. As noted by the Board, counsel had argued that Dr. Sampson’s report was internally inconsistent with respect to diagnostic studies, as it referred to the possibility of having carpal tunnel syndrome even with normal studies. He also argued that the report was not based on a complete background. The Board found Dr. Sampson provided a rationalized medical report based on a complete background, and his opinion was entitled to special weight as a referee physician. The facts and circumstances as discussed in the prior appeals are hereby incorporated by reference.

By letter dated December 14, 2015, counsel requested reconsideration. He again argued that Dr. Sampson’s report was inconsistent as he had referred to a permanent impairment, but found no employment-related injury. Counsel argued that OWCP did not address that Dr. Sampson had failed to consider whether there was a possible residual disability due to surgery, as a physician in 1993 had reported residuals of an aggravation of right carpal tunnel release.<sup>7</sup> In addition, he questioned why Dr. Sampson’s report was of more probative value than prior referee reports. Finally, counsel again argued that Dr. Sampson’s report was not based on a complete background.

By decision dated April 5, 2016, OWCP denied the reconsideration request without merit review of the claim. It found that counsel had not raised new and relevant legal arguments and the reconsideration request was insufficient to require merit review.

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<sup>6</sup> Docket No. 15-0402 (issued June 9, 2015).

<sup>7</sup> The record contains a January 5, 1993 report from Dr. William Curtin, a Board-certified neurologist serving as a second opinion physician. Dr. Curtin indicated that there were no objective findings of aggravation of right carpal tunnel syndrome. He reported that appellant had subjective symptoms of alleged aggravation of right carpal tunnel release and epineurotomy. Dr. Curtin opined that appellant did not currently have right carpal tunnel syndrome.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>8</sup> OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."<sup>9</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>10</sup>

## ANALYSIS

In the present case, OWCP had found that appellant had not established an employment-related disability on or after April 4, 1993, causally related to the accepted right carpal tunnel syndrome and permanent aggravation of carpal tunnel syndrome secondary to surgical scarring. The Board affirmed the November 14, 2014 hearing representative decision, finding that the referee physician, Dr. Sampson, provided a rationalized medical opinion in his March 5, 2013 report. The Board finds that, with respect to the findings made in its prior decision dated June 9, 2015, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>11</sup>

By letter dated December 14, 2015, counsel requested reconsideration. He did not show that OWCP had erroneously applied or interpreted a specific point of law. With respect to legal arguments, counsel listed four arguments regarding the probative value of Dr. Sampson's report. The first argument was that Dr. Sampson was inconsistent as he had referred to a permanent impairment but found no employment-related disability. This argument was raised and addressed by the hearing representative in the November 14, 2014 decision. It does not represent a new legal argument.<sup>12</sup> The second argument is that Dr. Sampson did not consider possible residual disability from surgery. Dr. Sampson had a complete background and noted the carpal tunnel surgeries and the medical evidence of record. As the Board held in the prior appeal, Dr. Sampson provided a rationalized medical opinion that appellant did not have disability on or after April 4, 1993 causally related to the work duties or any treatment. Where the argument

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<sup>8</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>9</sup> 20 C.F.R. § 10.606(b)(3).

<sup>10</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>11</sup> *R.T.*, Docket No. 16-543 (issued May 20, 2013).

<sup>12</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case. *See V.R.*, Docket No. 16-0969 (issued August 8, 2016); *Eugene F. Butler*, 36 ECAB 393, 398 (1984)

presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.<sup>13</sup>

Counsel next questioned why Dr. Sampson's report was of more probative value than prior referee reports. The Board found that a conflict under 5 U.S.C. § 8123(a) existed in its January 9, 2002 decision. As the history of the case reflects, the prior referee physicians did not provide a rationalized medical opinion, based on a complete background, that was sufficient to resolve the conflict. The Board explained in its prior decision why Dr. Sampson represented the weight of the medical evidence in this case. Appellant has not provided a pertinent new and relevant legal argument in this regard.

The final argument raised was that Dr. Sampson did not base his opinion on a proper background, as he questioned the permanency of the carpal tunnel syndrome aggravation. The Board specifically addressed this argument in the June 9, 2015 decision.<sup>14</sup>

Appellant did not submit any pertinent new and relevant evidence on reconsideration. The Board finds that 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 constituted relevant and pertinent new evidence not previously considered by OWCP. Since appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review.

On appeal counsel reiterates the arguments that Dr. Sampson's report was not sufficient to resolve the conflict in the medical evidence. The issue on appeal was whether appellant had met any of the requirements of 20 C.F.R. § 10.606(b)(3) that would require OWCP to review the merits of the claim. For the reasons discussed, OWCP properly denied merit review in this case.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's application for reconsideration without reviewing the merits of the claim pursuant to 5 U.S.C. § 8128(a).

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<sup>13</sup> See *Charles A. Jackson*, 53 ECAB 671 (2002); *Norman W. Hanson*, 40 ECAB 1160 (1989).

<sup>14</sup> See *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 5, 2016 is affirmed.

Issued: September 13, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board