United States Department of Labor
Employees' Compensation Appeals Board

BARBARA J. AGRESTI, Appellant	)	
and	)	**Docket No. 05-769**
	)	**Issued: September 1, 2005**
U.S. POSTAL SERVICE, POST OFFICE, JFK, NY, Employer	)	

Appearances:
Barbara J. Agresti, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 25, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated November 29, 2004, which denied her request for reconsideration. Appellant also timely appealed a schedule award decision dated July 13, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues on appeal are: (1) whether appellant has more than a 10 percent permanent impairment of her right upper extremity for which she received a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 25, 2000 appellant, then a 57-year-old clerk, filed a traumatic injury claim alleging that she tripped on a string of a defective bag and injured her left knee and both

shoulders. Appellant did not initially stop work.[1] The Office accepted her claim for left knee sprain and right shoulder sprain/strain and authorized a magnetic resonance imaging (MRI) scan of the right shoulder, a right shoulder arthroscopy/arthrotomy[2] and authorized physical therapy.[3] She received appropriate compensation benefits.

In an October 15, 2002 report, Dr. Norman Sveilich, a Board-certified orthopedic surgeon, determined that appellant had an impairment of 40 percent to the right shoulder.

On January 19, 2003 appellant requested a schedule award.

In support of her claim, appellant submitted a January 15, 2003 report from Dr. Sveilich, who advised that she had rotator cuff rupture, capsulitis rupture and synovitis of the right shoulder. He believed appellant's condition was caused or aggravated by her employment and advised that she had a 40 percent loss of use of the right shoulder.

By letter dated February 20, 2003, the Office requested that Dr. Sveilich provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001).

In an April 8, 2003 report, Dr. Sveilich advised that appellant had almost full range of motion, except at the extremes, with discomfort. He restricted her to no more than 10 pounds of lifting and noted that appellant had slight weakness in the muscles on the right compared to the left and again rated impairment of 40 percent. Dr. Sveilich stated that appellant had essentially reached maximum improvement. In reports dated October 21 and November 18, 2003, Dr. Sveilich advised that appellant had reached maximum medical improvement. In a February 10, 2004 report, Dr. Sveilich advised that appellant was lacking 10 percent range of motion when compared to the opposite shoulder and her neurovascular examination was normal. On March 9, 2004 Dr. Sveilich noted that physical examination of the right shoulder revealed mild tenderness to palpation and decreased range of motion, with a normal neurovascular examination. In an April 15, 2004 report, Dr. Sveilich indicated that appellant experienced pain that warranted a 3 out of 10 rating and advised that she was currently working light duty. Right shoulder examination revealed tenderness to palpation in the biceps and decreased range of motion secondary to soreness. Neurovascular examination was normal.

Dr. Sveilich's reports and the case record were referred to an Office medical adviser. In a report dated June 2, 2004, he utilized the A.M.A., *Guides* and noted that appellant had almost full range of motion of the right shoulder and thus was not entitled to an impairment. He advised that appellant's slight weakness was not sufficient for an impairment rating. The Office medical adviser also explained that there were no neurological changes, but that she underwent an

[1] The record reflects that appellant started working light duty on March 5, 2001 and stopped working on September 6, 2001.

[2] Appellant underwent an arthroscopy of the right shoulder with open repair of the rotator cuff on September 7, 2001.

[3] The Office also accepted appellant's claim for a recurrence on July 24, 2001.

acromioplasty on September 17, 2001. The Office medical adviser explained that appellant had a 10 percent impairment to the right upper extremity. He noted that, "although the surgery she had does not exactly match" the procedures listed in Table 16-27, the closest applicable procedure in the chart was a resection of the outer clavicle, which would entitle appellant to a 10 percent right upper extremity impairment. He determined that maximum medical improvement was reached on April 8, 2003.

On July 13, 2004 the Office granted appellant a schedule award for 10 percent impairment of the right upper extremity. The award covered a period of 31.20 weeks from November 19, 2003 to June 24, 2004.

In a July 22, 2004 report, Dr. Sveilich opined that appellant had reached maximum recovery regarding her right shoulder rotator cuff tear with impingement and tendinitis/synovitis and recommended active strengthening. He noted a 40 percent loss regarding activities that required raising the arm.

On August 26, 2004 appellant requested reconsideration and included additional evidence from Dr. Sveilich which essentially repeated the contents of his previous reports.

By decision dated November 29, 2004, the Office denied reconsideration of the July 13, 2004 schedule award. The Office determined that appellant did not raise any substantive legal questions, nor did she include relevant and pertinent new evidence and thus, her request was insufficient to warrant a review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[4] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[5] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[6] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

ANALYSIS -- ISSUE 1

The record reflects that appellant underwent an arthroscopy of the right shoulder with open repair of the rotator cuff on September 7, 2001. Dr. Sveilich advised that appellant had reached maximum medical improvement by November 18, 2003. He stated that appellant had an impairment of 40 percent. Although the Office requested that Dr. Sveilich utilize the A.M.A.,

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8107.

[6] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[7] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

Guides to calculate the percentage of permanent impairment, the physician did not explain how he determined the impairment rating in accordance with the relevant standards of the A.M.A., *Guides*.[8] He merely advised that appellant had a 40 percent impairment as a result of the accepted injury. Dr. Sveilich did not refer to any specific tables or charts in the A.M.A., *Guides* or to provide his calculations in support of his determination. Therefore, the Board finds that his reports are of diminished probative value in determining the extent of appellant's permanent impairment.[9]

The Office medical adviser reviewed the medical evidence and noted that appellant had a full range of motion and slight weakness in her muscles but no percentage loss and no neurological changes. He utilized a diagnosis-based rating and found that appellant had a 10 percent permanent impairment of the right arm. The Office medical adviser explained that appellant's surgical procedure was sufficiently close to a distal clavicle resection that would warrant a 10 percent impairment of the right upper extremity under Table 16-27. Appellant had an arthroscopy of the right shoulder with open repair of the rotator cuff on September 7, 2001. Pursuant to Table 16-27, the Office medical adviser opined that this warranted a 10 percent impairment. The Office medical adviser found no other basis upon which to attribute any greater impairment. Appellant did not submit any other medical evidence to support greater impairment under the A.M.A., *Guides.*

The Board finds that the evidence supports that appellant has a 10 percent impairment of the right upper extremity. She has not established entitlement to a schedule award greater than the 10 percent awarded by the Office.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Office regulations, at 20 C.F.R. § 10.606, state that an employee seeking reconsideration should send the application for reconsideration to the address as instructed in the final decision, and that the application must be submitted in writing and must set forth arguments and contain

[8] *See Tonya R. Bell*, 43 ECAB 845, 849 (1992).

[9] *See Shalanya Ellison*, 56 ECAB ___ (Docket No. 04-824, issued November 10, 2004) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is not probative where it is not based on the A.M.A., *Guides*).

evidence that either shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on August 26, 2004 and submitted additional reports from Dr. Sveilich which essentially repeated his previous findings that appellant had reached maximum medical recovery regarding her right shoulder rotator cuff tear and that she sustained a 40 percent impairment. He also submitted periodic reports which repeated light-duty restrictions. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[10]

Appellant therefore did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to a merit review.[11]

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant does not have more than a 10 percent impairment of her right upper extremity. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

[10] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[11] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 29 and July 13, 2004 are hereby affirmed.

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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