United States Department of Labor
Employees' Compensation Appeals Board

L.F., Appellant	)	
and	)	**Docket No. 08-2256**
	)	**Issued: July 22, 2009**
DEPARTMENT OF THE NAVY, MARINE CORPS BASE, Camp LeJeune, NC, Employer	)	

Appearances:
Robert V. Lucas, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 8, 2008 appellant, through counsel, filed a timely appeal of an October 4, 2007 merit decision of the Office of Workers' Compensation Programs, denying her claim for a schedule award and July 28, 2008 nonmerit decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained permanent impairment of the right leg due to her accepted employment injury; and (2) whether the Office properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 26, 2004 appellant, then a 47-year-old contract surveillance specialist, fractured her right ankle when she slipped on a mat and fell. The Office accepted the claim for a right ankle fracture, trimalleolar and authorized open reduction and fixation surgery of the ankle

fracture, which was performed on September 3, 2004. Appellant stopped work on August 26, 2004, returned to part-time light-duty work on April 11, 2005 and to full-time work with restrictions on January 9, 2006. She returned to her date-of-injury job on March 1, 2006.

In January 12, 2005 progress notes, Dr. Joel C. McClurg, a treating Board-certified orthopedic surgeon, diagnosed hyperreflexia, status post open reduction and internal fixation surgery with slow return of function and low back pain due to abnormal gait. A physical examination revealed full bilateral lower extremity range of motion. Dr. McClurg reported good range of motion in February 9, 2000 progress notes. He also noted that appellant continued to have pain symptoms unsupported by objective evidence. On January 3, 2006 Dr. McClurg reported that appellant lacked "dorsi-flexion of the ankle, though it has improved in the interim."

On July 7, 2006 appellant filed a claim for a schedule award. In July 6, 2006 report, Dr. McClurg concluded that she had a 29 percent whole person permanent impairment. A physical examination revealed an antalgic gait. Using Table 17-5, page 529 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. McClurg stated that appellant had a 15 percent whole person impairment based upon her gait abnormality. He stated that she had Grade 4 decreased ankle strength and flexor-extensor eversion and inversion (Table 17-8, page 532) which resulted in a 16 percent impairment using Table 604. Dr. McClurg combined the gait abnormality and strength impairment ratings to find 29 percent whole person impairment.

On October 20, 2006 the Office medical adviser reviewed Dr. McClurg's July 6, 2006 report and concluded that the impairment rating was incorrect. He noted that Table 17-2 provides that impairments for muscle strength and for gait cannot be combined with loss of motion impairment. The Office medical adviser recommended an objective measurement of range of motion to calculate any permanent impairment.

In a letter dated October 24, 2006, the Office informed Dr. McClurg that the Federal Employees' Compensation Act does not provide for whole person impairments. It also noted that range of motion impairment could not be combined with gait impairments and requested that he provide objective range of motion measurements for the right ankle.

On February 20, 2007 Dr. McClurg stated that appellant had "preserved [range] [of] [motion]."

In a February 28, 2007 report, the Office medical adviser determined that appellant had no permanent impairment based upon her normal ankle range of motion.

On June 18, 2007 the Office received Dr. McClurg's response to its October 24, 2007 letter requesting objective range of motion measurement for her right ankle. Dr. McClurg noted that not all patients fit neatly within the A.M.A., *Guides* and opined that she had 16 percent impairment.

By decision dated July 18, 2007, the Office denied appellant's claim for a schedule award.

On August 2, 2007 the Office received appellant's request for reconsideration. In a July 26, 2007 report, Dr. McClurg reiterated that she had a 16 percent permanent impairment of the right leg, which he based on his knowledge of fractures and dislocations. He noted that the A.M.A., *Guides* were only guidelines and that his impairment rating was an honest and true opinion of her disability.

By decision dated October 4, 2007, the Office denied modification of the July 18, 2007 decision.

In a letter dated March 7, 2008, appellant's counsel requested reconsideration. In a March 6, 2008 report, Dr. Mark E. Easley, a treating Board-certified orthopedic surgeon, diagnosed post-traumatic ankle arthritis. A physical examination revealed 10 degrees dorsiflexion, 30 degrees plantar flexion, mild ankle swelling and tenderness along the anterior ankle joint.

On March 17, 2008 the Office received a March 5, 2008 report by Dr. Easley, in which he noted that appellant had ankle range of motion of 30 degrees flexion and 20 degrees extension.

In a July 28, 2008 nonmerit decision, the Office denied appellant's request for reconsideration, finding that as she did not raise any substantive legal questions or include new and relevant evidence her request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The Act[1] provides compensation for both disability and physical impairment. Disability means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[2] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[3]

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.[4] The evidence generally required to establish causal

[1] 5 U.S.C. §§ 8101-8193.

[2] *C.S.*, 59 ECAB ___ (Docket No. 08-736, issued September 3, 2008); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[3] *B.K.*, 59 ECAB ___ (Docket No. 07-1545, issued December 3, 2007); *see also Renee M. Straubinger*, 51 ECAB 667 (2000).

[4] *See D.H.*, 58 ECAB ___ (Docket No. 06-2160, issued February 12, 2007); *Veronica Williams*, 56 ECAB 367 (2005).

relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the employment injury.[5] The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right ankle fracture in the performance of duty on August 26, 2004. Appellant underwent an open reduction and internal fixation of right ankle on September 3, 2004. She filed a claim for a schedule award on July 7, 2006 and has the burden to establish by the weight of the medical evidence that her injury caused permanent impairment to her right leg.

On July 6, 2006 Dr. McClurg found that appellant had a 15 percent whole person permanent impairment due to gait abnormality using Table 17-5 and a 16 percent whole person impairment due to decreased muscle strength using Table 604 resulting in a total 29 percent whole person impairment. The Board notes that a schedule award is not payable for an impairment of the whole person.[7] Dr. McClurg provided no explanation as to how he arrived at his impairment rating for appellant's decreased right ankle muscle strength. In response to the Office's request for clarification, he stated that the A.M.A., *Guides* are just guidelines and that he believed that appellant had a 16 percent impairment of the right leg. Dr. McClurg did not provide any explanation as to the factors on which he based his rating for appellant's decreased muscle strength. He did not utilize the A.M.A., *Guides* or identify the table or tables utilized or explain why they were otherwise inapplicable. The Board precedent is well settled that, when an attending physician's report gives an estimate of impairment but does not address how the estimate was reached based upon the A.M.A., *Guides*, the Office may rely on a medical adviser or consultant where he or she has properly applied the A.M.A., *Guides*.[8]

The Office medical adviser properly reviewed the medical record and found no basis for a rating impairment of the right leg. He noted that Dr. McClurg reported normal ankle range of motion. The medical adviser properly concluded that, as there was no medical evidence of impairment to the right lower extremity resulting from the accepted conditions, there was no ratable impairment in this case.

Appellant did not submit sufficient medical evidence to establish that she sustained a permanent impairment to a specified member, organ or function of the body listed in the Act or its implementing regulations. The medical evidence of record supports that she has no right

[5] *Manuel Gill*, 52 ECAB 282 (2001).

[6] *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[7] *D.H., supra* note 4; *Marilyn S. Freeland*, 57 ECAB 607 (2006) (the Act does not authorize schedule awards for permanent impairment of "the whole person").

[8] *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008); *Laura Heyen*, 57 ECAB 435 (2006).

lower extremity impairment. The Board finds that appellant is not entitled to a schedule award as a result of her employment-related accepted ankle fracture.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[9] the Office's regulations 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.[10] 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.[11] 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.[12]

ANALYSIS -- ISSUE 2

On March 6, 2008 appellant's counsel disagreed with the Office's October 4, 2007 decision, which denied her claim for a schedule award. The relevant issue in this case is whether appellant has established that she sustained a permanent impairment to her right ankle, causally related to the August 26, 2004 employment injury.

Appellant did not contend that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. However, she submitted reports dated March 5 and 6, 2008 from Dr. Easley. Although the reports of Dr. Easley are new, they are not relevant to the issue in this case as he provided no impairment rating or findings. He provided findings on examination in both reports; however, he did not address the history of injury or explain whether his findings were related to the August 26, 2004 employment injury. These reports are not relevant to the issue of whether appellant sustained permanent impairment of her right ankle as they do not provide any rating of impairment. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case for further merit review.[13]

The evidence submitted by appellant does not satisfy the third criterion noted above, for reopening a claim for merit review. Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously

[9] 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).

[10] 20 C.F.R. § 10.606(b)(1)-(2). *See C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008).

[11] *Id*. at § 10.607(a). *See A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

[12] *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008).

[13] *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

considered by the Office. As she did not meet any of the regulatory requirements, the Board finds that the Office properly denied merit review.[14]

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award. The Board also finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 28, 2008 and October 4, 2007 are affirmed.

Issued: July 22, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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