United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 08-1973**
	)	**Issued: May 1, 2009**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, Chelsea, MA, Employer	)	

Appearances:
Appellant, 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 July 8, 2008 appellant filed a timely appeal from the March 27, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's April 30 and June 12, 2008 nonmerit decisions denying reconsideration.

ISSUES

The issues are: (1) whether appellant has more than a two percent impairment of his right lower extremity or any impairment of his left lower extremity causally related to his March 4, 2004 employment injury; and (2) whether the Office properly denied appellant's requests for reconsideration. Appellant argues that three doctors reported a 23 percent impairment of his right lower extremity and that standing x-rays, which the Office required, would not show the actual result of his surgery.

FACTUAL HISTORY

On March 4, 2004 appellant, then a 27-year-old federal air marshal, injured his knees in the performance of duty when he was thrown to the ground while training in ground fighting techniques. The Office accepted his claim for right knee strain, right knee chondromalacia patella, right medial meniscus tear and left knee contusion.[1]

On August 12, 2004 appellant underwent right knee arthroscopy with debridement of a chondral injury to the lateral tibial plateau, as well as posterior horn lateral meniscus debridement. Dr. Mark J. Bulman, the operating orthopedic surgeon, reported that the patella chondral surface was in good condition. The postoperative diagnosis was chondral flap injury of the lateral tibial plateau and fraying of the posterior horn lateral meniscus.

Appellant claimed compensation for a schedule award. On November 3, 2006 Dr. Bulman reported a 15 percent impairment of the right lower extremity and a 10 percent impairment of the left. On December 18, 2006 he explained that he based his estimates on the third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Using the fifth edition of the A.M.A., *Guides*, Dr. Bulman estimated that appellant's chondral defect on the right lateral tibial plateau was a partial thickness injury:

> "The exact remaining chondral surface thickness is uncertain but a fair amount of it was involved in the chondral flap. By my estimate of remaining chondral surface based on arthroscopic evaluation using [Table 17-31, page 544], impairment of the lower extremity would be estimated at somewhere between 20 and 25 percent of the right knee."

On January 4, 2007 an Office medical adviser reported that a two percent impairment of the right lower extremity could be assigned under the fifth edition of the A.M.A., *Guides* for a partial lateral meniscectomy. He explained there was no impairment of the left lower extremity.

On March 16, 2007 Dr. Anthony J. Lombardo, an orthopedic surgeon, deferred to Dr. Bulman for a final impairment rating because he had already arthroscoped appellant's knee and understood the pathology and had fully evaluated appellant under the fifth edition of the A.M.A., *Guides*. He gave appellant a rating of 23 percent.

On June 25, 2007 the Office issued a schedule award for a two percent impairment of appellant's right lower extremity. It found that no impairment was attributable to the accepted left knee contusion.

In a letter postmarked June 30, 2007, appellant requested an oral hearing before an Office hearing representative. He indicated that he would prefer a telephone hearing. Appellant sent his letter, however, to the address for requesting reconsideration. On January 1, 2008 he instead requested reconsideration of the June 25, 2007 schedule award. Appellant based his request on Dr. Bulman's December 18, 2006 report and Dr. Lombardo's March 16, 2007 report.

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[1] In separate claims, appellant sustained a right knee sprain/strain on October 17, 2002 (OWCP File No. xxxxxx730) and a deviated septum on March 3, 2004 (OWCP File No. xxxxxx358).

The Office further developed the medical evidence. On February 12, 2008 Dr. William Dinenberg, an orthopedic surgeon and Office referral physician, agreed with Dr. Bulman's assessment of approximately a half chondral loss of the lateral aspect of the knee:

> "Dr. Bulman was the operating surgeon who performed the chondral debridement of a flap of cartilage at the lateral joint space. Using [his] previous guideline as the operative surgeon, 20 percent impairment of left [sic] lower extremity is attributed to this cartilage loss giving a final impairment rating of 20 percent for right lower extremity. Zero percent is given for the left lower extremity."

On February 26, 2008 an Office medical adviser explained that Table 17-31, page 544 of the A.M.A., *Guides*, require a standing x-ray to determine the thickness of the articular cartilage. Therefore, Dr. Dinenberg's estimate of 20 percent could not be accepted.

In a supplemental March 6, 2008 report, Dr. Dinenberg clarified that, if the results of the arthroscopy including chondral debridement were unable to be used in assessing impairment under Table 17-33, page 546 of the A.M.A., *Guides*, then appellant had a two percent impairment of the right lower extremity based on a partial lateral meniscectomy.

In a decision dated March 27, 2008, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It noted that Dr. Dinenberg, in his initial report, simply followed Dr. Bulman's misapplication of the A.M.A., *Guides*. The Office found that Dr. Dinenberg, in his supplemental report, correctly applied the A.M.A., *Guides* and assessed a two percent impairment of the right lower extremity.

On April 19, 2008 appellant requested reconsideration and submitted an April 17, 2008 report from Dr. Anthony J. Lombardo, an orthopedic surgeon, who reported that he was deferring an impairment rating of the right and left knees to Dr. Bulman because he had fully evaluated appellant both arthroscopically and physically postoperatively. Dr. Lombardo noted that Dr. Bulman gave an impairment rating of 23 percent. He stated that he did not believe x-rays were the appropriate study to evaluate appellant's cartilage injury: "The x-rays, AP/Lat views of his bilateral knees were reviewed and reveal normal alignment, no masses, fractures or significant degenerative changes and deemed essentially normal and symmetrical." Sunrise and standing views of the right knee were also obtained on April 17, 2008 and were reported to be unremarkable.

In a decision dated April 30, 2008, the Office denied further merit review of appellant's case. It noted that Dr. Lombardo did not offer any opinion on the percentage impairment and simply stated that he was deferring to Dr. Bulman, whose opinion the Office had already reviewed.

On June 2, 2008 appellant again requested reconsideration. He submitted a pathology report signed on August 16, 2004. The report described receipt of arthroscopic shavings consisting of fragments of "partially blood stained pale yellow/white soft tissue that forms an aggregate 3 x 2.5 x 0.9 cm."

In a decision dated June 12, 2008, the Office denied a merit review of appellant's case. It noted that the evidence was previously submitted and received on February 16, 2005.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

ANALYSIS -- ISSUE 1

With respect to the left knee, the Office accepted appellant's claim for a contusion. Dr. Bulman, appellant's surgeon, reported a 10 percent impairment of the left lower extremity based on range of motion, but he did not explain how a contusion that occurred 20 months earlier, caused or contributed to any loss of motion or permanent impairment.[4] Moreover, he did not rate the left lower extremity under the applicable fifth edition to the A.M.A., *Guides*. For these reasons, the Board finds that Dr. Bulman's opinion on the impairment of appellant's left lower extremity is of diminished probative value. The Board will therefore affirm the Office's March 27, 2008 finding that appellant has no impairment of the left lower extremity causally related to his March 4, 2004 employment injury.

Appellant disagrees with the Office's decision on his right lower extremity. It accepted his claim for right knee strain, right knee chondromalacia patella and right medial meniscus tear. Dr. Bulman arthroscopically visualized the patellofemoral joint and reported that the chondral surface of the patella was in good condition. His postoperative diagnosis did not include chondromalacia patella. So there are no grounds for an impairment rating based on chondromalacia of the patella.

Dr. Bulman based his impairment rating, on the injury to the chondral surface of the lateral tibial plateau. This was not a tear of the lateral meniscus but a partial-thickness injury to the chondral surface of the bone. Having debrided the flap, Dr. Bulman applied Table 17-31, page 544 of the fifth edition of the A.M.A., *Guides*, to estimate a 20 to 25 percent impairment of the right lower extremity. This table, titled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals," is for estimating impairment due to arthritis. As the A.M.A., *Guides* explains, cartilage interval or joint space is the best roentgenographic indicator of disease stage and impairment of a person with arthritis.[5] But

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] The Board has held that medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

[5] The A.M.A., *Guides* 544 (5th ed. 2001).

Dr. Bulman did not diagnose arthritis. Moreover, he did not base his estimate on measurements taken from standing x-rays.[6]

The Board notes that Dr. Bulman did not adequately explain why he utilized Table 17-31 to rate impairment. As noted, he did not follow the procedures required to apply the table correctly. It might be, as appellant argues, that standing x-rays would not show the actual result of his surgery. But they would establish whether the surgery caused any loss of joint space, which is what Table 17-31 requires. For these reasons, the Board finds that Dr. Bulman's estimate of 20 to 25 percent impairment for the right lower extremity (representing cartilage intervals of two and one millimeter, respectively) is of diminished probative value.

Table 17-33, page 546 of the A.M.A., *Guides*, specifies two percent impairment for a partial lateral meniscectomy. The Office therefore properly determined that appellant had a two percent impairment of the right lower extremity from Dr. Bulman's debridement of the posterior horn of the lateral meniscus.

Dr. Lombardo, another orthopedic surgeon, simply deferred to Dr. Bulman for a final rating. He declined to perform his own evaluation. Dr. Dinenberg, the Office referral orthopedic surgeon, also deferred to Dr. Bulman's assessment of chondral loss. But like Dr. Bulman before him, he did not justify applying the Table 17-31 for arthritis take measurements from standing x-rays, as the A.M.A., *Guides* requires. Dr. Dinenberg later clarified that, if the chondral debridement could not be used, appellant had a two percent impairment of the right lower extremity due to his partial lateral meniscectomy.

The medical opinion evidence establishes no more than a two percent impairment of the right lower extremity due to appellant's partial lateral meniscectomy and no impairment of the left knee. The Board will affirm the Office's March 27, 2008 decision denying modification of appellant's schedule award.

LEGAL PRECEDENT -- ISSUE 2

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.[7] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[8]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or

[6] The A.M.A., *Guides* requires that estimates for arthritis impairment of the knee joint be based on standard x-rays taken with the individual standing, if possible. The ideal film-to-camera distance is 90 centimeters and the beam should be at the level of and parallel to the joint surface. *Id*.

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.605.

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[9]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[10] A timely request for reconsideration may be granted if it determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

ANALYSIS -- ISSUE 2

Appellant twice requested reconsideration of the Office's March 27, 2008 merit decision denying modification of his schedule award. The question is whether either request for reconsideration met at least one of the standards for obtaining a merit review of his case.

Appellant based his April 19, 2008 request for reconsideration on Dr. Lombardo's April 17, 2008 report. Although this report was new to the record, it was repetitive of evidence previously submitted. Dr. Lombardo once again reported that he was deferring any impairment rating to Dr. Bulman. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[12]

Dr. Lombardo added that he did not believe x-rays were the appropriate study to evaluate appellant's cartilage injury. But the Office had already considered this issue when it issued its March 27, 2008 decision. In a February 26, 2008 report, the Office medical adviser reiterated that x-rays were, in fact, required under Table 17-31 to demonstrate the extent of cartilage interval.

Dr. Lombardo's contention that x-rays are inappropriate does not have a reasonable color of validity. He deferred to Dr. Bulman, who applied Table 17-31, which requires measurements taken from standing x-rays. As Dr. Lombardo's contention departs from a proper application of the A.M.A., *Guides*, his report did not require the Office to reopen appellant's case for further consideration of the merits.[13]

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[9] *Id*. at § 10.606.

[10] *Id*. at § 10.607(a).

[11] *Id*. at § 10.608.

[12] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[13] Reopening of a case for merit review is not required where the contention made does not have a reasonable color of validity. *See generally Daniel O'Toole*, 1 ECAB 107 (1948) (that which is offered as an application should contain at least the assertion of an adequate legal premise, or the proffer of proof or the attachment of a report or other form of written evidence, material to the kind of decision which the applicant expects to receive as the result of his application).

Dr. Lombardo reported that appellant's x-rays were essentially normal and that standing x-rays were unremarkable. This in no way supports that Table 17-31 requires no x-rays and there remains a substantial question whether, in the absence of arthritis, Table 17-31 is an appropriate table for estimating any impairment due to the debridement of a chondral flap. Because appellant's April 19, 2008 request for reconsideration does not meet at least one of the three standards for obtaining a merit review of his case, the Board will affirm the Office's April 30, 2008 decision denying that request.

Appellant based his June 2, 2008 request for reconsideration solely on the submission of a pathology report signed on August 16, 2004. The Office previously received this report on February 16, 2005. It is well established that evidence which repeats or duplicates that already of record is of no evidentiary value or constitute a basis for reopening a case for merit review.[14]

Because appellant's June 2, 2008 request for reconsideration does not meet at least one of the three standards for obtaining a merit review of his case, the Board will affirm the Office's June 12, 2008 decision denying that request.

CONCLUSION

The Board finds that the medical opinion evidence fails to establish more than a two percent impairment of appellant's right lower extremity or any impairment of his left lower extremity causally related to his March 4, 2004 employment injury. The Board also finds that the Office properly denied appellant's requests for reconsideration.

[14] *See Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the June 12, April 30 and March 27, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 1, 2009
Washington, DC

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