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S.B., Appellant	)	
	)	
and	)	Docket No. 10-974
	)	Issued: December 6, 2010
DEPARTMENT OF VETERANS AFFAIRS,	)	
VETERANS ADMINISTRATION MEDICAL	)	
CENTER, Muskogee, OK, Employer	)	
	)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On February 23, 2010 appellant filed a timely appeal from the January 6, 2010 decision of the Office of Workers' Compensation Programs denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.¹

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

This case has previously been for the Board. In a June 10, 2008 decision, the Board affirmed the Office's determination that appellant did not meet her burden of proof to establish

¹ The most recent merit decision is that of the Board dated June 10, 2008.

permanent impairment of her right leg or that she had more than a 37 percent impairment of her left leg, for which she received a schedule award.² The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

In a November 17, 2008 letter, appellant requested reconsideration of her claim indicating that an enclosed July 3, 2008 report of Dr. Fred M. Ruefer, an attending Board-certified orthopedic surgeon, showed that she had permanent impairment of her right leg.³ In this report, Dr. Ruefer stated that he had previously given appellant impairment ratings in connection with her bilateral total knee replacements. He indicated that a "court" had decided that his opinion was "not adequate for documentation" and stated:

"My reply to that would be that I will be more than happy to give her an absolute complete and full accounting of this if they want to authorize payment for same with and [impartial medical examination] evaluation for which there is a charge, or through the Workman's Compensation for dictation of a lengthy report concerning this. Also, the patient would need to be referred, initially, to a physical therapist so range of motion measurement, etc. could be obtained and those would need to accompany the patient. Obviously, if they would prefer to have a nonbiased third-party evaluation they can refer the patient to another physician for evaluation as indicated. If they would like to authorize same, in writing, I would be more than happy to give a rating as requested."

In a January 6, 2010 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁴

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office's regulations provide that the evidence or argument submitted by 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

² Docket No. 08-475 (issued June 10, 2008). The Office accepted that on September 8, 1987 appellant, then a 49-year-old nursing assistant, sustained bilateral knee strains due to twisting her knees while stepping off a curb. She underwent a left partial lateral meniscectomy on November 30, 1993, a repeat left partial lateral meniscectomy with chondroplasty on April 22, 1996 and a total left knee replacement on June 25, 1998. These procedures were authorized by the Office. On August 13, 1999 the Office granted appellant a schedule award for a 37 percent permanent impairment of her left leg. The record contains documents which suggest that she underwent a right total knee replacement in December 2006, but the record does not contain a report of such surgery.

³ Appellant later submitted a similar letter dated February 25, 2009.

⁴ The record contains an April 2, 2009 decision denying appellant's reconsideration request which also mentions the July 3, 2008 report of Dr. Ruefer. It does not appear that this decision was added to the record until January 6, 2010.

⁵ 5 U.S.C. §§ 8101-8193. 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).

considered by the Office.⁶ 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.⁷ 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 on the merits.⁸ The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

The Office accepted that on September 8, 1987 appellant sustained bilateral knee strains due to twisting her knees while stepping off a curb. It granted her a schedule for a 37 percent permanent impairment of her left leg and later determined that she did not meet her burden of proof to establish that she sustained permanent impairment of her right leg. On June 10, 2008 the Board affirmed the Office's determination.

In support of her reconsideration request, appellant submitted a July 3, 2008 report from Dr. Ruefer, an attending Board-certified orthopedic surgeon, who stated that he had previously given appellant impairment ratings in connection with her bilateral total knee replacements. Dr. Ruefer discussed the possibility of providing another evaluation of appellant's leg impairment and noted that, if such an evaluation were carried out, she would have to be sent to a physical therapist for range of motion testing.¹⁰

The submission of this evidence did not require reopening of appellant's case for further review of the merits because it does not address the particular issue involved in this case.¹¹ Dr. Ruefer did not provide medical opinion addressing any permanent impairment of her legs. Appellant received a schedule award for a 37 percent impairment of her left leg and was found not to be entitled to a schedule award for her right leg. The issue of permanent impairment and the extent of such impairment are to be resolved by the submission of probative medical evidence. In connection with her reconsideration request, appellant did not submit medical opinion addressing the relevant issued of impairment rating. Dr. Ruefer merely noted the process by which an additional rating could be obtained.

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁰ On appeal, appellant argued that because she had the same surgery on both knees and she should have received the same degree of schedule award compensation for each leg. However, her own opinion on the extent of her impairment would not advance the argument that the Office improperly failed to further review her case on the merits. On appeal, appellant submitted additional medical evidence, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c)(1).

¹¹ See *supra* note 9.

Appellant has not established that the Office improperly denied her request for further review of the merits of its prior merit decisions under section 8128(a) of the Act, because the evidence she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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