United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 10-414**
	)	**Issued: December 22, 2010**
DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES, Tunkhannock, PA, Employer	)	

Appearances:
James J. Conaboy, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 2, 2009 appellant, through counsel, filed a timely appeal of the June 17, 2009 merit and November 13, 2009 nonmerit decisions of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act and 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 has more than one percent impairment to both the right and left arm for which he received a schedule award; and (2) whether the Office properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 7, 2003 appellant, then a 47-year-old district conservationist, filed an occupational disease claim alleging that on May 15, 1989 he hurt his neck and head when a chair he was sitting in flipped backwards onto the floor. The Office accepted his claim for herniated

cervical disc and authorized anterior cervical discectomy and fusion at C4-5 which was performed on February 22, 1990.[1]

On October 17, 2005 appellant filed a claim for a schedule award. In a March 13, 2006 medical report, Dr. Robert T. O'Leary, an attending Board-certified physiatrist, obtained a history of appellant's employment injuries, medical treatment and family, psychosocial and employment background. He noted his chronic neck pain and occasional pain in his head, upper back and arms intermittently with numbness, generally right greater than left. Dr. O'Leary diagnosed cervical discogenic syndrome with upper extremity radiculopathy status postanterior cervical discectomy and fusion at C4-5. He also diagnosed multilevel cervical spondylosis, psoriatic arthritis, fibromyalgia and depression. On physical examination, Dr. O'Leary reported that the bilateral bicep muscles measured 33 centimeters and bilateral forearm muscles measured 28 centimeters in circumference. There was no atrophy. A varicose vein was present in the medial right forearm. Gait was normal. Range of motion of the cervical spine was 50 percent of normal on flexion and rotation and 25 percent of normal on extension and side bending with pain on each end range. Abduction and flexion beyond 90 degrees and lifting of the arms in flexion and abduction bilaterally caused appellant to complain about pain. On palpation he had spasm along the cervical and thoracic paravertebral musculature bilaterally. Appellant had multiple trigger points into the scapular elevators. Dermatographia was noted. On neurological examination, Dr. O'Leary reported Grade 4/5 for motor strength deficit of the shoulders, elbows, wrist and grip with pain in the neck bilaterally. Deep tendon reflexes were brisk at 2 to 3/4 at the biceps, triceps and brachioradialis. Sensation was intact to light touch and sharp sense in all dermatomes of the upper extremities although decreased in the right lateral greater than medial forearm to sharp sense in particular. Hoffmann and Spurling signs were present bilaterally. A Babinski's sign was absent. An impingement sign in the shoulders and Tinel's sign at the elbows and wrists were negative bilaterally.

Dr. O'Leary found that appellant continued to have residuals of his accepted employment injuries and authorized cervical surgery. He determined that pursuant to Table 15-5 on page 392 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant was a diagnosis-related estimates (DRE) Category IV for the cervical spine, resulting in a 28 percent whole person impairment rating. Dr. O'Leary opined that appellant's impairment was causally related to his accepted employment-related neck injury.

On February 21, 2008 Dr. Arnold T. Berman, an Office medical adviser, reviewed the medical evidence. He noted Dr. O'Leary's examination findings and disagreed with his 28 percent whole person impairment rating. Dr. Berman stated that his methodology for calculating the impairment rating was not acceptable as it did not meet the Office's guidelines. He found that appellant was entitled to a schedule award based on his nerve root type pain with subjective sensory loss without objective decreased sensation or muscle weakness. Dr. Berman determined that appellant had five percent maximum impairment to both the right and left upper extremities based on sensory loss or pain of the C5 nerve root. Under Table 15-17 on page 424 of the

[1] Subsequent to the instant claim, appellant filed a claim under File No. xxxxxx164 which the Office accepted for aggravation of cervical disc disease including the residuals of a failed fusion. The Office combined the subsequent claim with the instant claim in a master file claim File No. xxxxxx558.

A.M.A., *Guides* the maximum impairment for C5 nerve root impairment affecting an upper extremity is five percent. Dr. Berman found, under Table 15-15 on page 424 of the A.M.A., *Guides*, that the extent of sensory deficit was 25 percent or Grade 4. He multiplied the maximum value by the deficit grade to find 1.25 or 1 percent impairment to each upper extremity. Dr. Berman noted that the sensation and motor examinations were normal. He concluded that appellant had reached maximum medical improvement on March 13, 2006.

In a March 12, 2008 decision, the Office granted appellant a schedule award for one percent impairment of each arm.

By letter dated March 31, 2008, appellant, through his attorney, requested an oral hearing before an Office hearing representative. He submitted numerous medical records dated December 12, 2007 to June 3, 2009 which addressed his cervical, thoracic, shoulder and bilateral arm conditions and medical treatment.

In a June 17, 2009 decision, an Office hearing representative affirmed the March 12, 2008 decision, finding the evidence insufficient to establish that appellant had more than one percent impairment of each arm.

On October 27, 2009 appellant, through his attorney, requested reconsideration. He again submitted numerous medical records dated June 10 to October 28, 2009 which addressed his cervical, thoracic, shoulder and bilateral arm conditions and medical treatment.

In an October 19, 2009 report, Dr. John F. McIntyre, a general practitioner, reviewed a history of appellant's employment injuries and medical treatment. He noted his continuing cervical pain radiating into his arms, neck, shoulders and scalp which caused significant headaches and radicular symptoms in both arms. Appellant had symptoms related to his lower extremities which caused radicular symptoms including, pain, parathesis and occasional weakness. Dr. McIntyre determined that appellant had 28 percent impairment of the whole person based on DRE cervical Category IV, Table 15-5 on page 392 of the A.M.A., *Guides*. He opined that his continuing medical condition and complications were causally related to his accepted employment injuries. Appellant's other medical conditions included fibromyalgia, psoriatic arthritis and chronic pain syndrome with chronic headaches. Dr. McIntyre stated that he had reached maximum medical improvement.

In a November 13, 2009 decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was duplicative and repetitious in nature and not relevant and, thus, insufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation to be paid for

[2] 5 U.S.C. §§ 8101-8193; *see id*. at § 8107(c).

[3] 20 C.F.R. § 10.404.

permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[6] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[7] The Board notes that section 8101(19) specifically excludes the back from the definition of organ.[8] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[9]

ANALYSIS -- ISSUE 1

Appellant contends that he has more than one percent permanent impairment to both the right and left arm, for which he received a schedule award on March 12, 2008. The Office accepted his claim for cervical herniated disc. Appellant underwent an authorized cervical discectomy to treat the accepted cervical condition. The Board finds that he has not met his burden of proof to establish that he has greater impairment than that for which he received a schedule award.

On March 13, 2006 Dr. O'Leary, an attending physician, opined that appellant sustained 28 percent impairment of the whole person according to DRE cervical Category IV, Table 15-5 on page 392 of the A.M.A., *Guides*. However, Table 15-5 concerns diagnosis-related estimates for impairments related to cervical spine injuries and provides impairment values for the whole person (A.M.A., *Guides* 392, Table 15-5). Dr. O'Leary's evaluation in this regards is of limited probative value because the Act does not provide for a schedule award for impairment to the body as a whole.[10] His conclusion regarding appellant's total impairment is of reduced probative value in that he failed to provide a full explanation of how his assessment of permanent

[4] 5 U.S.C. § 8107(c)(19).

[5] *Id*.

[6] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[7] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000); *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[8] 5 U.S.C. § 8101(19).

[9] *Thomas J. Engelhart*, *supra* note 7.

[10] *See supra* note 8.

impairment was derived in accordance with the standards adopted by the Office and approved by the Board for evaluating schedule losses.[11]

On February 21, 2008 Dr. Berman, an Office medical adviser, reviewed Dr. O'Leary's findings with reference to the fifth edition of the A.M.A., *Guides*. He found that appellant had one percent impairment to each upper extremity. Dr. Berman properly stated that Dr. O'Leary's 28 percent whole person impairment rating was not made in accordance with the relevant guidelines. Based on Dr. O'Leary's clinical findings[12] he determined that appellant sustained five percent impairment of the C5 nerve root, the maximum allowable impairment, for sensory loss or pain to both the right and left upper extremities (A.M.A., *Guides* 424, Table 15-17). Dr. Berman further determined that appellant had sensory deficit of 25 percent or Grade 4 (A.M.A., *Guides* 424, Table 15-15). He multiplied the maximum value of 5 percent by the 25 percent sensory deficit grade to find that appellant had 1.25 or 1 percent impairment of each upper extremity.

Dr. Berman's opinion that appellant had one percent impairment to both upper extremities is based on a proper review of the record and appropriate application of the A.M.A., *Guides*. There is no probative medical evidence to establish that appellant sustained greater permanent impairment. The Board will affirm the June 17, 2009 decision.[13]

The medical records dated December 12, 2007 to June 3, 2009 which addressed appellant's cervical, thoracic, shoulder and bilateral arm conditions and medical treatment are insufficient to establish his entitlement to an additional schedule award. This evidence does not provide an impairment rating for a scheduled member of the body based on the A.M.A., *Guides.* The Board finds, therefore, that appellant has failed to submit sufficient medical evidence to establish that he was entitled to an additional schedule award for his upper extremities.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[14] 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

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[11] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[12] Pursuant to Office procedures, when the case appears to be in posture for schedule award determination, the Office will ask the Office medical adviser to evaluate cases. The Office medical adviser is responsible for reviewing the file, particularly the medical report on which the award is to be based and then calculating the award. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a) (June 2003). *C.J.*, 60 ECAB ___ (Docket No. 08-2429, issued August 3, 2009).

[13] *See C.J. supra*, note 12. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[14] 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).

previously considered by the Office.[15] 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.[16] 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.

ANALYSIS -- ISSUE 2

On October 27, 2009 appellant disagreed with the hearing representative's June 17, 2009 decision, which affirmed the Office's determination that he had one percent impairment to both the right and left arm. The relevant issue in the case, whether he has more than one percent impairment of both the right and left arm, is medical in nature.

Appellant submitted among other nonrelevant documents, a report from, Dr. McIntyre dated October 19, 2009. The Office denied a merit review of this evidence finding the report of Dr. McIntyre to be essentially duplicative of a report submitted by Dr. O'Leary. As appellant submitted a new medical report on the issue of permanent impairment, the Office should have conducted a merit review. The requirements for reopening a claim for merit review do not require that the claimant submit all the evidence which may be necessary to discharge his or her burden of proof. Those requirements mandate only that the evidence submitted be relevant, pertinent and not previously considered by the Office.[17] Dr. McIntyre may have a report similar in result to Dr. O'Leary but it remains a relevant new medical report. For the stated reasons, the Board finds that Dr. McIntyre's new report constitutes a basis for reopening appellant's claim for merit review.

CONCLUSION

The Board finds that appellant failed to establish an impairment greater than one percent to the right arm and the left arm, for which he received a schedule award. The Board further finds that the Office improperly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b)(1)-(2).

[16] *Id.* at § 10.607(a).

[17] *Donald T. Pippin*, 54 ECAB 631 (2003).

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2009 decision is set aside and the case is remanded for further proceedings and that the June 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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