

FACTUAL HISTORY

On September 23, 1992 appellant, then a 58-year-old nutritionist, filed a traumatic injury claim alleging that, on September 15, 1992, while performing an exercise activity during a team building event, she suffered pain and stiffness in her left knee and upper left leg. On May 11, 1993 the Office accepted her claim for traumatic arthritis left knee. On July 24, 2002 it issued a schedule award for a 42 percent impairment of the left lower extremity. On October 23, 2002 appellant underwent a left knee arthroscopy, chondroplasty, medial lateral femoral condyle, extensive synovectomy and partial medial meniscectomy, posterior horn. By decision dated March 31, 2004, the Office denied her claim for an increased schedule award for impairment to the left lower extremity. On August 31, 2004 it accepted appellant's claim for a consequential injury of right knee, effusion of the lower leg joint and localized osteoarthritis. By decision dated September 14, 2004, the Office issued a schedule award for 20 percent impairment to the right knee for 57.6 weeks for the period March 31, 2004 to May 8, 2005. On July 7, 2006 appellant underwent a total left knee arthroplasty and medial release. By decision dated October 25, 2007, the Office declined her request for an increased schedule award to her left leg.

By letter dated June 15, 2009, appellant requested that the Office review the impairment ratings for her left and right lower extremities. In support of her claim, she submitted form reports by Dr. Mark E. Easley, a Board-certified orthopedic surgeon, dated June 3, 2009. With regard to appellant's right knee, Dr. Easley noted that she had retained active flexion of 110 degrees and retained extension of negative 3 degrees. He recommended an impairment rating of 40 percent for the right lower extremity. Dr. Easley also indicated that appellant had a 40 percent impairment of her left lower extremity. In a report dated June 3, 2009, Dr. Justin Dennis Orr, an orthopedic surgeon, assessed her with right knee osteoarthritis with varus deformity, left foot posterior tibial tendon dysfunction, stage 2, left midfoot osteoarthritis and heel cord contracture left side. He advised appellant that if she wanted she could go ahead with a right knee total knee arthroplasty. Dr. Orr also stated that he confirmed the findings in the note dated June 3, 2009.

On July 30, 2009 appellant filed a claim for an additional schedule award.

On August 13, 2009 the Office asked the Office medical adviser to make a determination as to the impairment to appellant's left and right lower extremities. The medical adviser responded on the same date, indicating that she reached maximum medical improvement on June 3, 2009. He noted that appellant had arthroscopic debridement/chondroplasty/meniscectomy of the left knee on October 23, 2002 followed by a left total knee arthroplasty on July 7, 2006 with a fair to good result. The Office medical adviser also noted that she had right knee arthritis with range of motion 3/110 and 10 degrees varus deformity with a schedule award impairment of the right lower extremity of 20 percent as per the prior Office medical adviser's memorandum of August 31, 2004. He noted that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) there was no clinical data present in the medical file to support additional impairment of either lower extremity.

By letter dated September 4, 2009, the Office asked Dr. Easley to make an evaluation of appellant's impairment under the sixth edition of the A.M.A., *Guides*. Dr. Easley did not respond.

On October 28, 2009 the Office thanked Dr. Easley for his June 3, 2009 report, but asked for an impairment rating pursuant to the sixth edition of the A.M.A. *Guides*. Dr. Easley also did not respond to this request.

By decision dated December 7, 2009, the Office denied appellant's request for a greater schedule award.

In a January 13, 2010 report, received by the Office on February 11, 2010, Dr. Easley indicated that appellant suffered from right knee arthritis, right pes anserine bursitis and arthritis of the left midfoot. He specifically noted that she had pain in the range of motion of her knee and tenderness over the pes anserine bursa.

On February 22, 2010 appellant requested reconsideration of the denial of an increased schedule award with regard to the right lower extremity only. She submitted in support of her request a copy of Dr. Easley's June 3, 2009 report and indicated that this report was apparently lost by the Office. Appellant further stated that the forms sent to Dr. Easley asking for a further opinion were irrelevant because she did not have an amputation. She also noted that she had decided not to have a right knee replacement.

By decision dated March 15, 2010, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act² and its implementing federal regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For decisions issued after May 1, 2009, the sixth edition will be used.⁵

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX) which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁶ The net adjustment formula is (GMFH - CDS) + (GMPE - CDX) + (GMCS - CDX).⁷

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ A.M.A., *Guides* 494-531; see *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

⁷ *Id.* at 521.

Before the A.M.A., *Guides* can be utilized, a description of impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁸

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser proving rationale for the percentage of impairment specified.⁹

ANALYSIS -- ISSUE 1

In the instant case, appellant received schedule awards based on a 42 percent impairment of her left lower extremity and a 20 percent impairment of her right lower extremity. She now alleges that she is entitled to a greater schedule award for impairment to her right lower extremity. However, the Board finds that appellant has not submitted sufficient evidence to establish that, as a result of her employment injury, she sustained any additional permanent impairment to a scheduled member or function such that she would be entitled to an additional schedule award.

The medical evidence submitted in support of a claim must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment and the resulting restrictions and limitations. In support of her claim, appellant submitted a June 3, 2009 report by Dr. Easley, wherein he opined that she retained active flexion in her right knee of 110 degrees and retained extension of negative 3 degrees. Based on these findings, Dr. Easley recommended an impairment rating of 40 percent of the right lower extremity. He did not indicate that he applied the sixth edition of the A.M.A., *Guides* so his opinion is not sufficient to establish a schedule award. Furthermore, Dr. Easley did not explain how he reached his conclusion with sufficiently detailed findings with regard to motion, atrophy, deformity or strength that would allow another party to properly review his report and apply the A.M.A., *Guides*. Although Dr. Orr noted that appellant had right knee osteoarthritis with varus deformity, he also did not provide any measurements or make any assessment with regard to the A.M.A., *Guides* as to degree of impairment.

Accordingly, the Office properly referred appellant's case to the Office medical adviser, who found that there was no clinical data present in the medical file to support an additional impairment of either lower extremity. The Board also notes that neither Dr. Easley nor Dr. Orr provided an explanation of her impairment that provided sufficient evidence for the medical

⁸ *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

adviser to determine the level of impairment to her right lower extremity. Appellant has the burden of proof to establish that she sustained a permanent impairment to a scheduled member entitling her to additional schedule award compensation. The Board finds that she did not meet her burden of proof as the medical reports of record lack detail and conformance with the A.M.A., *Guides* and therefore do not support her claim for an additional schedule award.¹⁰

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹¹ its 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 considered by the Office.¹² 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

Appellant did not demonstrate that the Office erroneously applied or interpreted a specific point of law; nor did she advance a relevant legal argument not previously considered by the Office. With regard to the latter, she contends that the forms sent to Dr. Easley with regard to evaluating her impairment under the sixth edition of the A.M.A., *Guides* were irrelevant because she did not have an amputation. However, although amputation is one of the criteria that can be utilized in completing the form, the form asked him to provide a complete assessment with regard to her impairment to her right lower extremity, which included determinations based on his primary impairing diagnosis and grade modifiers of GMFH, GMPE and GMCS. The Board notes that Dr. Easley never completed these forms. Thus, appellant's contention has no basis in fact.

The sole item of new evidence, the report by Dr. Easley dated January 13, 2010, does not address appellant's permanent impairment rating to her right lower extremity and thus does not constitute pertinent new and relevant evidence. Appellant resubmitted the June 3, 2009 note by Dr. Easley. However, as the Board has held, evidence which is repetitious or duplicative of evidence already in the case record is of no evidentiary value in establishing a claim and does not

¹⁰ See *A.L.*, *supra* note 8.

¹¹ 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).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

constitute a basis for reopening a case.¹⁵ Accordingly, appellant did not submit any pertinent new and relevant evidence with her request for reconsideration.

The Board finds that appellant did not meet any of the standards of 20 C.F.R. § 10.606(b)(2). Accordingly, the Office properly denied her application for reconsideration without review of the merits of the claim.

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award for the right lower extremity of greater than 20 percent of her right lower extremity, for which she received a prior schedule award. The Board further finds that the Office properly denied her request for reconsideration without further merit review of the claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 15, 2010 and December 7, 2009 are affirmed.

Issued: May 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984).