United States Department of Labor
Employees' Compensation Appeals Board

RAUL RUIZ, JR., Appellant	)	
and	)	**Docket No. 04-1954**
	)	**Issued: January 19, 2005**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, BORDER PATROL, El Paso, TX, Employer	)	

Appearances:
Raul Ruiz, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 2, 2004 appellant filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated May 4, 2004 that refused to reopen his case for further review of a February 6, 2004 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both the May 4, 2004 nonmerit decision and the February 6, 2004 schedule award. However, appellant has requested review of only the May 4, 2004 nonmerit decision on the basis that his ankle impairment was not considered, and has not requested review of or disputed the February 6, 2004 schedule award for a 12 percent permanent impairment of each leg related to his knee conditions. Therefore, the Board will review only the May 4, 2004 Office decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim. On appeal, appellant contended that an April 7, 2004 report of his attending physician, submitted on reconsideration, rated his permanent impairment at 20

percent for the right ankle only, and showed that he was entitled to an additional 20 percent impairment of the right leg for his ankle.[1]

FACTUAL HISTORY

On August 5, 1987 appellant, then a 32-year-old border patrol agent, filed a traumatic injury claim for compensation for an injury to his left knee sustained on August 4, 1987 by stepping off a train. On August 1, 1995 the Office issued appellant a schedule award for a 22 percent permanent impairment of his left leg, based on loss of motion, pain and chondromalacia as reported by Dr. Richard S. Westbrook, appellant's attending physician.

On December 28, 1998 appellant filed a traumatic injury claim for compensation for an injury to his left knee sustained on October 23, 1998 when he twisted it getting into his government vehicle. The Office accepted that appellant sustained torn medial and lateral menisci and authorized surgery. On February 19, 1999 Dr. Westbrook performed medial and lateral meniscectomies and an anterior cruciate reconstruction. On May 25, 2000 the Office issued appellant a schedule award for a 33 percent permanent impairment of his left leg, based on reduced knee motion, partial meniscectomies and anterior cruciate reconstruction.

On February 1, 2002 appellant, then a supervisory immigration officer, filed a traumatic injury claim for compensation for an injury to both his knees and his right ankle sustained on that date on an exercise machine at work. On January 3, 2003 Dr. Westbrook performed arthroscopic surgery on both appellant's knees and on his right ankle, with the ankle surgery consisting of excision of a loose body and a synovectomy. In an April 1, 2003 report, Dr. Westbrook noted restricted motion of appellant's right ankle, but recommended continuation of physical therapy, and stated that appellant was not ready for an impairment rating. On July 10, 2003 Dr. Westbrook prescribed a lace-up ankle support.

On July 29, 2003 appellant filed a claim for a schedule award. He submitted a September 11, 2003 report from Dr. Westbrook describing the impairments of his knees, assigning a 12 percent permanent of each leg for weakness of the quadriceps and extensor mechanism of the knees, and noting that the present impairment had nothing to do with the anterior cruciate injury for which appellant received a prior schedule award. An Office medical adviser reviewed this report and agreed that it showed a 12 percent impairment of each leg due to loss of strength in knee extension.

On February 6, 2004 the Office issued appellant a schedule award for 12 percent permanent impairment of each leg.

By letter dated April 22, 2004, appellant requested reconsideration of the February 6, 2004 schedule award for his right leg, stating, "The attached new report by Dr. Westbrook dated April 7, 2004 shows an impairment rating of 20 percent of the lower right extremity and right ankle surgery."

[1] On appeal, appellant submitted April 7 and July 29, 2004 reports from Dr. Westbrook but these reports cannot be considered by the Board on appeal, as the Board's review is limited by 20 C.F.R. § 501.2(c) to the evidence that was before the Office at the time of its final decision.

By decision dated May 5, 2004, the Office found that appellant had not raised any new legal contentions or submitted any new relevant evidence that would support his claim for an additional impairment to his right leg, and that his request for reconsideration was not sufficient to warrant a merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS

In his April 22, 2004 request for reconsideration, appellant stated that the attached April 7, 2004 report of Dr. Westbrook showed that he had an additional 20 percent impairment of the right leg due to his ankle condition. However, appellant's April 22, 2004 letter was not accompanied by the April 7, 2004 report of Dr. Westbrook, or by any other evidence, nor did it raise any points of law. As appellant's request for reconsideration met none of the criteria of 20 C.F.R. § 10.606(b)(2), the Office properly refused to reopen his case for further review of the merits of his claim.

CONCLUSION

The Office properly refused to reopen appellant's case for further review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member