United States Department of Labor
Employees' Compensation Appeals Board

MARY H. JOHNSON, Appellant	)	
and	)	**Docket No. 05-1311**
	)	**Issued: October 19, 2005**
DEPARTMENT OF THE ARMY, INFANTRY CENTER, Fort Benning, GA, Employer	)	

Appearances:
Mary H. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 31, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 25, 2005 nonmerit decision denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was an April 16, 2004 decision concerning her entitlement to schedule award compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on May 31, 2005, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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).

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On September 25, 2000 appellant, then a 52-year-old administrative assistant, filed a traumatic injury claim alleging that she sustained back, left shoulder and neck injuries due to a vehicular accident at work on September 14, 2000. The Office accepted that appellant sustained left shoulder subluxation/dislocation, cervical disc disruption at C5-6, cervical subluxation, aggravation of cervical degenerative disc disease, lumbar subluxation and left carpal tunnel syndrome. The Office authorized surgery for a left carpal tunnel release on July 9, 2002.

On September 30, 2002 appellant filed a claim for a schedule award for permanent impairment.

In reports dated November 18, 2002 and February 28, 2003, Dr. Brian E. Kozar, an attending Board-certified orthopedic surgeon, determined that appellant had an eight percent permanent impairment of her whole person due to her left shoulder impingement syndrome and adhesive capsulitis and her cervical syndrome with bulging/protruding discs and internal disc disruption.[2]

The Office referred appellant to Dr. Jeffrey Fried, a Board-certified orthopedic surgeon, for a second opinion regarding the extent of her permanent impairment. In a report dated July 1, 2003, Dr. Fried determined that appellant's left arm impairment was comprised of a 13 percent impairment due to limited left shoulder motion, a 1 percent impairment due to limited left wrist motion, a 4 percent impairment due to sensory loss and a 1 percent impairment due to motor loss associated with the median nerve. Dr. Fried used the Combined Values Chart on page 604 of the A.M.A., *Guides* to determine that the total impairment of appellant's left arm was 18 percent.

On July 24, 2003 an Office district medical adviser reviewed Dr. Fried's evaluation and determined that appellant had a five percent impairment of her left arm which was comprised of a four percent impairment due to sensory loss and a one percent impairment due to motor loss.[3]

The Office expanded its list of accepted employment-related conditions to include left shoulder impingement with subacromial bursitis, left adhesive capsulitis and left bicipital tendinitis. On August 14, 2003 an Office district medical adviser again provided an opinion regarding appellant's impairment and determined that she had a five percent impairment of her left arm.

The Office determined that there was a conflict in the medical evidence and referred appellant to Dr. Sean F. McCue, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the extent of permanent impairment. In a report dated October 23, 2003, Dr. McCue determined that appellant had not reached maximum medical

[2] On April 2, 2003 an Office district medical adviser posited that Dr. Kozar's evaluation was not carried out in accordance with the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses. *See* 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999).

[3] The district medical adviser indicated that it was not appropriate to include appellant's limited left shoulder and wrist motion in the impairment calculation.

improvement and posited that therefore he could not provide an impairment rating for her left arm.

The Office referred appellant to Dr. James W. Spivey, Jr., a Board-certified orthopedic surgeon, for another impartial medical examination.[4] In a report dated March 18, 2004, Dr. Spivey determined that appellant had no permanent impairment due to residuals of her cervical, left carpal tunnel or low back conditions. He concluded that appellant had a five percent permanent impairment of her left arm due to limited motion of her left shoulder.

On April 13, 2004 an Office district medical adviser reviewed the findings of Dr. Spivey and indicated that he agreed that appellant had a five percent impairment of her left arm.

By award of compensation dated April 16, 2004, the Office granted appellant a schedule award for a five percent permanent impairment of her left arm. The award ran for 15.6 weeks from October 25, 2003 to February 11, 2004.

By letter dated January 12, 2005, appellant requested reconsideration of her claim. She argued that Dr. Spivey did not conduct an adequate evaluation of her permanent impairment and claimed that she had an 18 percent impairment of her left arm as calculated by Dr. Fried.

Appellant submitted a copy of the April 13, 2004 calculations of the district medical adviser; a March 18, 2004 report of Dr. Spivey; reports and notes from the Hughston Clinic and the Columbus Pain Clinic dated between early 2004 and early 2005; a December 13, 2004 report of left shoulder surgery; arthroscopic pictures of the left shoulder taken on December 13, 2004; physical therapy notes; and medical reports concerning the treatment of an emotional condition. Most of the reports and notes from the Hughston clinic were produced by Dr. Patrick J. Fernicola, an attending Board-certified orthopedic surgeon and most of those from the Columbus Pain Clinic were produced by Dr. Daniel H. Serrato, an attending Board-certified anesthesiologist. Appellant also submitted a March 24, 2004 report in which Dr. Kozar stated that she was "known to have" a permanent impairment of eight percent due to her cervical and left shoulder problems.

By decision dated February 25, 2005, the Office denied appellant's request for merit review of her claim.

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

[4] The Office made some corrections to the accepted employment injuries listed on the statement of accepted facts.

[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 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]

ANALYSIS

The Office accepted that appellant sustained left carpal tunnel syndrome and multiple cervical, left shoulder and low back conditions due to a vehicular accident at work on September 14, 2000. By award of compensation dated April 16, 2004, the Office granted her a schedule award for a five percent permanent impairment of her left arm. Appellant requested reconsideration of the Office's April 16, 2004 decision on January 12, 2005.

In support of her reconsideration request, appellant submitted reports and notes from the Hughston Clinic and the Columbus Pain Clinic dated between early 2004 and early 2005; a December 13, 2004 report of left shoulder surgery; arthroscopic pictures of the left shoulder taken on December 13, 2004; and medical reports concerning the treatment of an emotional condition. However, this evidence is not relevant to the issue of the present case, *i.e.*, the extent of appellant's left arm impairment, because none of these documents contains an evaluation or calculation of her left arm impairment. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9]

On reconsideration appellant argued that Dr. Spivey, a Board-certified orthopedic surgeon who served as an impartial medical examiner, did not conduct an adequate evaluation of her permanent impairment and claimed that she had an 18 percent impairment of her left arm as calculated by Dr. Fried, a Board-certified orthopedic surgeon who served as an Office referral physician. However, this argument is not relevant because the main issue of the present case is medical in nature and an opinion from a nonphysician on such medical matters would not constitute probative evidence.[10] She did not submit new or relevant medical evidence rating her impairment.

Appellant also submitted a copy of the April 13, 2004 calculations of an Office district medical adviser and a March 18, 2004 report of Dr. Spivey. However, these reports were previously of record and considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis

[6] 20 C.F.R. §§ 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

[8] 20 C.F.R. § 10.608(b).

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

[10] As causal relationship is a medical question that can only be resolved by medical opinion evidence, the reports of a nonphysician cannot be considered by the Board in adjudicating that issue. *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993). Similarly, the reports of physical therapists submitted by appellant would not be relevant to the merit issue of this case.

for reopening a case.[11] Appellant also submitted a March 24, 2004 report in which Dr. Kozar, an attending Board-certified orthopedic surgeon, stated that she was "known to have" a permanent impairment of eight percent due to her cervical and left shoulder problems. This report is similar to earlier reports of Dr. Kozar, dated November 18, 2002 and February 28, 2003, which had been considered by the Office.

Appellant has not established that the Office improperly denied her request for further review of the merits of its April 16, 2004 decision under section 8128(a) of the Act, because the evidence and argument 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.[12]

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 Office of Workers' Compensation Programs' February 25, 2005 decision is affirmed.

Issued: October 19, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[11] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[12] Appellant submitted additional evidence after the Office's February 25, 2005 decision, but the Board cannot consider such evidence for the first time on appeal.(R 997-1186) *See* 20 C.F.R. § 501.2(c).