United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 06-1231**
	)	**Issued: October 3, 2006**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Madisonville, KY, Employer	)	

Appearances:
K.R., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On May 9, 2006 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated November 8, 2005 decision which granted him a 37 percent impairment of his left lower extremity. He also appealed a January 25, 2006 decision which denied his request for reconsideration of a June 25, 2004 decision on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error and a March 24, 2006 decision denying merit review of the November 8, 2005 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISUES

The issues are: (1) whether appellant has more than a 37 percent impairment of his left lower extremity for which he received a schedule award; (2) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error; and (3) whether the Office properly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 22, 2003, the Board affirmed Office decisions dated July 31 and October 3, 2002 which found that appellant's right cubital tunnel syndrome and surgical release were not causally related to his federal employment.[1] The law and the facts of the previous Board decision are incorporated herein by reference.[2]

Subsequent to the Board's April 22, 2003 decision, on May 29 and July 24, 2003 and March 23, 2004, appellant requested reconsideration. In merit decisions dated July 21 and September 3, 2003 and June 25, 2004 respectively, the Office denied modification regarding acceptance of his cubital tunnel syndrome. The Office continued to develop the claim regarding appellant's left hip condition and on December 15, 2004 referred him, along with the medical record, a statement of accepted facts and a set of questions, to Dr. Bryant A. Bloss, Board-certified in orthopedic surgery, for a second opinion evaluation. Based on his January 5, 2005 report, on April 12, 2005, the Office expanded the accepted conditions to include severe strain and avascular necrosis of the left hip and authorized total hip replacement surgery which had been done on August 21, 2003. On June 6, 2005 appellant filed a schedule award claim and submitted reports from his attending Board-certified orthopedic surgeon, Dr. Jacob M. O'Neill. In a March 12, 2004 report, Dr. O'Neill provided an impairment rating in accordance with the fifth edition of the A.M.A., *Guides*[3] and advised that, under the point system found at Table 17-34, appellant's pain was rated as light for 40 points. No limp was present for 11 points and he did not need a supportive device for 11 points. Walking was unlimited for 11 points and stair climbing was performed using a rail for 2 points. Putting on socks and shoes with ease equaled 4 points, sitting in a chair for one hour equaled 4 points and using public transportation equaled 1 point. An additional 5 points was added for no fixed deformity of the hip and another 5 points for range of motion deficit, for a total of 94 points. Dr. O'Neill then advised that, under Table 17-33, this equated to a 15 percent whole person impairment.

The Office referred the medical record, including Dr. O'Neill's March 12, 2004 report, to an Office medical adviser for an opinion regarding appellant's entitlement to a schedule award. In a September 18, 2005 report, the Office medical adviser noted his review of Dr. O'Neill's impairment rating. He opined that maximum medical improvement had been reached on March 3, 2004 and, utilizing the A.M.A., *Guides*, agreed with Dr. O'Neill's analysis and impairment rating for appellant's left hip. The Office medical adviser noted that, under Table 17-33, appellant would be entitled to a 37 percent lower extremity impairment rating.

By decision dated November 8, 2005, the Office granted appellant a schedule award for a 37 percent impairment of the left lower extremity, for a total of 106.56 weeks, to run from

[1] Docket No. 03-218.

[2] The accepted conditions at that time were right contusions of the shoulder, elbow and forearm, lumbar strain and displacement of lumbar intervertebral disc.

[3] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

October 30, 2005 to November 14, 2007.[4] In letters dated November 20, 2005, appellant requested reconsideration of the schedule award and of the June 25, 2004 Office decision that denied his claim for employment-related cubital tunnel syndrome. He submitted an April 6, 2005 report for a duplex venous ultrasound of the left lower extremity which was interpreted as negative and a December 7, 2005 treatment note in which Dr. O'Neill noted that appellant was approximately two years post total hip replacement and had complaints of pain, intermittent muscle spasms and an occasional limp favoring his left leg with bilateral lower extremity edema. X-ray examination demonstrated satisfactory left total hip replacement.

By decision dated January 25, 2006, the Office denied appellant's reconsideration request of the June 25, 2004 decision on the grounds that it was untimely filed and failed to present clear evidence of error. In a March 24, 2006 decision, the Office denied appellant's reconsideration request of the November 8, 2005 schedule award.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[5] and section 10.404 of the implementing federal regulations,[6] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*[7] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[8] Chapter 17 provides the framework for assessing lower extremity impairments.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not establish that he is entitled to an impairment rating for his left lower extremity greater than the 37 percent awarded. Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[10] The Office, therefore, properly referred Dr. O'Neill's March 12,

[4] The Board notes that the schedule award apparently contains a typographical error as it states that the award is for appellant's right lower extremity when his accepted condition and impairment rating were for his left lower extremity.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] A.M.A., *Guides*, (5th ed. 2001), *supra* note 3.

[8] *See Joseph Lawrence, Jr., supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[9] A.M.A., *Guides*, *supra* note 3 at 523-564.

[10] *See Thomas J. Fragale*, 55 ECAB ____ (Docket No. 04-835, issued July 8, 2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

2004 impairment rating to an Office medical adviser and, based on his findings and analysis, the Office medical adviser assessed appellant's left lower extremity impairment and provided a basis for his rating in accordance with the A.M.A., *Guides*. Dr. O'Neill first analyzed appellant's left lower extremity under the point system found in Table 17-34, used for rating hip replacement results.[11] He rated his pain, function, activity, deformity and range of motion and added the points found to reach a 94 point total. Dr. O'Neill then properly used Table 17-33,[12] finding that a 94 point total equaled a good result and concluded that appellant had a 15 percent whole person impairment. In his September 18, 2005 report, the Office medical adviser also advised that maximum medical improvement had been reached on March 3, 2004 the date of Dr. O'Neill's impairment rating. He then properly found that Table 17-33 of the A.M.A., *Guides* provides that a total hip replacement with a good result, which is based on the point system found at Table 16-34, yielded a 37 percent lower extremity impairment.[13]

While the A.M.A., *Guides* provides for both impairments to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person.[14] In this case, the Office medical adviser properly converted Dr. O'Neill's whole person impairment rating to a lower extremity rating in accordance with Table 17-33 which allows for conversion of a whole person rating to that of the lower extremity[15] to find that a 15 percent whole person impairment equaled a 37 percent lower extremity impairment of that member.[16] The Board, therefore, concludes that, in this case, as the Office medical adviser properly analyzed Dr. O'Neill's March 12, 2004 report and provided a basis for his impairment rating by referencing the specific tables in the A.M.A., *Guides* on which he relied, appellant has not established that he is entitled to a schedule award for his left lower extremity greater than the 37 percent awarded.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.[17] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[18] When an application for review is untimely, the Office undertakes a

[11] A.M.A., *Guides*, *supra* note 3 at 548.

[12] *Id.* at 546.

[13] *Id*. at 546, 548.

[14] *Robert Romano*, 53 ECAB 649 (2002).

[15] A.M.A., *Guides*, *supra* note 3 at 546.

[16] *Id.*; *see Robert Romano*, *supra* note 14.

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[19]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.[20]

ANALYSIS -- ISSUE 2

The Board finds that, as more than one year had elapsed from the date of issuance of the last Office merit decision on June 25, 2004 regarding appellant's claim for cubital tunnel syndrome and his request for reconsideration dated November 20, 2005, his request for reconsideration was untimely.

The Board further finds that appellant failed to establish clear evidence of error. With his reconsideration request, he merely reiterated his contention that his cubital tunnel syndrome was caused by employment factors. The medical evidence submitted was in reference to appellant's left hip condition and not his cubital tunnel syndrome. In order to establish clear evidence of error, a claimant must submit evidence that is positive, precise and explicit and must manifest on its face that the Office committed an error.[21] In the case at hand, the Office previously found and the Board affirmed, that appellant failed to establish that his cubital tunnel syndrome was employment related. The medical evidence submitted with his reconsideration request was irrelevant to this issue. There is, therefore, no positive, precise and explicit evidence in this case to show that the Office committed error.[22] Consequently, appellant has not met his burden to establish clear evidence of error on the part of the Office such that it erred in denying merit review.

The Board, therefore, finds that in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's argument to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

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[19] *Cresenciano Martinez*, 51 ECAB 322 (2000).

[20] *Nancy Marcano*, 50 ECAB 110 (1998).

[21] *Id*.

[22] *Id.*

LEGAL PRECEDENT -- ISSUE 3

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[23] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[24] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[25] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[26]

ANALYSIS -- ISSUE 3

In his November 20, 2005 letter requesting reconsideration of the November 8, 2005 schedule award, appellant contended that his hip pain should be considered in his schedule award evaluation and that he had problems with numbness and trouble sleeping. The Board, however, finds that these arguments do not demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Regarding appellant's opinion that pain should be considered in assessing his schedule award, section 18.3b of the fifth edition of the A.M.A., *Guides* provides that pain-related impairment should not be used if the condition can be adequately rated under another section of the A.M.A., *Guides*. Office procedures provide that, if the conventional impairment adequately encompasses the burden produced by pain, the formal impairment rating is determined by the appropriate section of the A.M.A., *Guides*.[27] Table 17-34, which was used in conjunction with Table 17-33 by both Dr. O'Neill and the Office medical adviser, includes an analysis for pain and other activities and functions in its point-rating system.[28] Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[29]

With respect to the third above-noted requirement under section 10.606(b)(2), with his reconsideration request appellant submitted a negative duplex venous ultrasound of the left lower extremity and a treatment note dated December 7, 2005 in which Dr. O'Neill advised that he was approximately two years post total hip replacement and had complaints of pain, intermittent

[23] 20 C.F.R. § 10.606(b)(2).

[24] 20 C.F.R. § 10.608(b).

[25] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[26] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[27] *See Philip A. Norulak*, 55 ECAB ____ (Docket No. 04-817, issued September 3, 2004).

[28] A.M.A., *Guides*, *supra* note 3 at 549.

[29] 20 C.F.R. § 10.606(b)(2).

muscle spasms and an occasional limp favoring his left leg with bilateral lower extremity edema. X-ray examination demonstrated satisfactory left. Neither of these reports provides findings or analysis that indicates that appellant is entitled to an increased impairment rating for his left lower extremity.[30] 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.[31] Thus, the reports submitted with appellant's reconsideration request are insufficient to warrant merit review as they do not address the degree of his left lower extremity impairment which could entitle him to an increased schedule award. As he did not submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied appellant's reconsideration request.[32]

CONCLUSION

The Board finds that appellant has failed to establish that he is entitled to a schedule award greater than the 37 percent right lower extremity impairment previously awarded. The Board further finds that the Office properly found that his request for reconsideration of the denial of his cubital tunnel claim was untimely filed and, as he failed to establish clear evidence of error, the Office properly denied a merit review of this claim. The Office also properly refused to reopen appellant's schedule award claim for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 24 and January 25, 2006 and November 8, 2005 be affirmed.

Issued: October 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[30] Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury. *Edward W. Spohr*, 54 ECAB 806 (2003).

[31] *Jacqueline E. Brown*, 54 ECAB 583 (2003).

[32] *Id.*