

Office accepted his claim for back strain and aggravation of preexisting lumbar radiculopathy. Appellant stopped work on April 4, 1999 and did not return.

Appellant came under the care of Dr. Bruce J. Ammerman, a Board-certified orthopedist, who, in reports dated April 5, 1999 to May 23, 2001, noted a history of injury and indicated that his medical history was significant for a lumbar laminectomy 20 years prior. He diagnosed recurrent lumbar radiculopathy and advised that appellant was temporarily disabled. In reports dated January 20 to November 14, 2001, Dr. Ammerman noted appellant's complaints of persistent pain in his lower back with weakness and numbness in the right lower extremity. In reports dated November 20, 2002 and October 23, 2003, he noted that appellant could not return to work due to chronic back and leg pain and opined that appellant sustained a 10 percent impairment related to the April 4, 1999 accident. A magnetic resonance imaging (MRI) scan dated April 7, 1999 revealed a mild disc bulge at L4-5. A computerized tomography (CT) scan of the lumbar spine dated October 10, 2001 revealed mild symmetrical posterior bulging of the L4-5 and L5-S1 intervertebral disc. A myelogram of the lumbar spine of the same date revealed degenerative disc disease at L4-5 and L5-S1.

On December 1, 2003 appellant filed a claim for a schedule award.

In a letter dated January 7, 2004, the Office advised appellant of the type of evidence needed to establish his claim for a schedule award. The Office particularly requested that appellant submit a report from his physician with regard to his impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹ (A.M.A., *Guides*).

Appellant submitted a report from Dr. Ammerman, dated February 10, 2004, who noted that appellant returned with complaints of persistent pain in his low back and right lower extremity. Dr. Ammerman noted positive straight leg raises, no gross weakness, paralumbar tenderness and restriction of motion. He opined that appellant reached maximum medical improvement and determined that he sustained a 10 percent impairment based on the A.M.A., *Guides*.

By letters dated February 27 and June 30, 2004, the Office advised appellant of the type of factual and medical evidence needed to establish his claim for a schedule award and requested that he submit such evidence, particularly requesting that appellant submit a report from his physician with regard to his impairment in accordance with the A.M.A., *Guides*.²

On August 13, 2004 appellant filed a claim for a schedule award. He submitted a report from Dr. Ammerman dated August 5, 2004, who noted findings upon physical examination of positive straight leg raises, mild residual weakness of dorsiflexion on the right and moderate

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.*

restriction of lumbar motion.³ He opined that appellant reached maximum medical improvement and rated his impairment at 13 percent based on Table 15-3, page 384 of the A.M.A., *Guides*.⁴

The Office referred Dr. Ammerman's report and the case record to its medical adviser. In a report dated October 19, 2004, the medical adviser indicated that Dr. Ammerman improperly calculated appellant's impairment rating for the whole body impairment as opposed to the lower extremities. He noted that, for there to be impairment to the left lower extremity, there must be evidence of impingement or impairment of the exiting nerve roots in the lumbar spine which supply the lower extremities. The Office medical adviser indicated that there was no evidence of impingement of the nerve roots, impairment or spinal stenosis. He reviewed the MRI scan of the lumbar spine dated April 7, 1999 which noted disc bulging; however, the study did not reveal nerve root impingement or evidence of neurologic impairment which would result in permanent impairment of the lower extremities. The Office medical adviser concluded that, based on the injury of April 4, 1999, appellant had no ratable impairment in accordance with the A.M.A., *Guides*.

In a decision dated April 21, 2005, the Office denied appellant's claim for a schedule award.

In a letter dated June 29, 2005, appellant requested reconsideration. He asserted that Dr. Ammerman's reports established that he sustained an impairment and were more persuasive than the medical adviser who did not personally examine him. In a report dated May 17, 2005, Dr. Ammerman noted that appellant presented with continuing pain in his back and right lower extremity and diagnosed persistent right lumbar radiculopathy caused by the April 4, 1999 injury. He opined that appellant sustained a 10 percent impairment based on the A.M.A., *Guides*.⁵

In a decision dated July 20, 2005, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions, nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

In a letter dated January 12, 2006, appellant requested reconsideration. He indicated that his impairment was at least 10 percent and the evidence established that he sustained a severe residual injury to his right leg and has chronic pain. Appellant attached a summary of Dr. Ammerman's reports from April 4, 1999 to May 17, 2005. He submitted a new report from Dr. Ammerman dated October 25, 2005, who noted appellant's history was significant for a lumbar laminectomy in 1979 and opined that his work injury of April 4, 1999 caused a reaggravation of his lumbar radiculopathy. Dr. Ammerman further opined that appellant's current condition was permanent. Also submitted was a report from Dr. George J. Thorpe, a Board-certified orthopedist, dated November 16, 2000, who saw appellant in consultation for

³ *Id.*

⁴ Table 15-3, page 384 of the A.M.A., *Guides* (5th ed. 2001).

⁵ Table 15-3, page 384 of the A.M.A., *Guides* (5th ed. 2001).

low back and leg pain. He noted a history of injury and diagnosed status post laminectomy and disc excision from 20 years ago, recurrent lumbar disc syndrome with radiculopathy, hypertension, high cholesterol and anxiety.

In a decision dated January 25, 2006, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions, nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ sets 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 to 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* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁹ 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.¹⁰ The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."¹¹ 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.¹²

ANALYSIS -- ISSUE 1

On appeal appellant alleges that he is entitled to a schedule award for 15 percent impairment of the lower extremities and back. The Office accepted his claim for back strain and aggravation of preexisting lumbar radiculopathy. However, as noted above, the Act does not permit a schedule award based on impairment to the back or spine. Appellant may only be

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁰ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹¹ 5 U.S.C. § 8101(19).

¹² *Thomas J. Engelhart*, *supra* note 9.

awarded a schedule award for impairment to the upper or lower extremities if such impairment is established as being due to his accepted back condition.

In support of his claim, appellant submitted a report from Dr. Ammerman dated August 5, 2004. The Board has carefully reviewed his report and notes that, while Dr. Ammerman determined that appellant sustained a 13 percent impairment, he did not adequately explain how he reached his determination in accordance with the relevant standards of the A.M.A., *Guides*.¹³ Dr. Ammerman noted positive straight leg raises, mild residual weakness of dorsiflexion on the right and moderate restriction of lumbar motion. He advised that, based on the fifth edition of the A.M.A., *Guides*, appellant sustained 13 percent impairment of the whole person.¹⁴ However, the Board notes that impairment to the whole person¹⁵ or back¹⁶ is not compensable under the Act. Dr. Ammerman found no other basis on which to attribute impairment under the A.M.A., *Guides*.

The medical adviser properly reviewed the medical record and in a report dated October 19, 2004, found no basis on which to attribute permanent impairment, based on the findings presented by Dr. Ammerman, to a schedule member of the body.¹⁷ While the Office medical adviser noted that appellant had spinal impairment, he noted that the spine is not a schedule member of the body. As noted above, the Act specifically excludes the back from the list of organs for which a schedule award may be paid. The Office medical adviser explained that for there to be impairment to the left lower extremity there must be evidence of impingement or impairment of the exiting nerve roots in the lumbar spine which supply the lower extremities which was absent in appellant's case. He reviewed the MRI scan of the lumbar spine dated April 7, 1999 which revealed disc bulging but no nerve root impingement or evidence of neurologic impairment which would result in an impairment of the lower extremities. The Office medical adviser properly concluded that, based on the injury of April 4, 1999, appellant's impairment rating is zero percent in accordance with the A.M.A., *Guides*.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* to the findings of Dr. Ammerman and determined that appellant was not entitled to a schedule award. There is no other evidence of record, conforming with the A.M.A., *Guides*, which would provide appellant with an impairment rating.

¹³ See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

¹⁴ Table 15-3, page 384 of the A.M.A., *Guides* (5th ed. 2001).

¹⁵ *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

¹⁶ *Jay K. Tomokiyo*, *supra* note 10.

¹⁷ The Board notes that it is appropriate for an Office medical adviser to review the clinical findings of the treating physician to determine the impairment. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(c) (March 1994); *Richard R. LeMay*, 56 ECAB ____ (Docket No. 04-1652, issued February 16, 2005).

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹⁸ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹⁹ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [Office] erroneously applied or interpreted a specific point of law;
or

(ii) Advances a relevant legal argument not previously considered by the [Office];
or

(iii) Constitutes relevant and pertinent new evidence not previously considered by [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.²⁰

ANALYSIS -- ISSUE 2

Appellant’s June 29, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

Appellant’s request for reconsideration asserted that Dr. Ammerman’s reports established that he sustained an impairment and were more persuasive than the Office medical adviser who did not examine him. However, his letter did not show how the Office erroneously applied or interpreted a point of law, nor did it advance a point of law or fact not previously considered by the Office. The Office had previously considered appellant’s contentions about his entitlement to a schedule award for the lumbar spine. Consequently, he 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).

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, Dr. Ammerman’s May 17, 2005 report is new. However, this report is not relevant as it is similar to his previously submitted report dated August 5, 2004, which was considered by the Office in its decision dated April 21, 2005. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value

¹⁸ 5 U.S.C. § 8128(a).

¹⁹ 20 C.F.R. § 10.606(b).

²⁰ 20 C.F.R. § 10.608(b).

and does not constitute a basis for reopening a case.²¹ Additionally, this report is not relevant as it fails to address appellant's claim for a schedule award. Therefore, this report is insufficient to require the Office to reopen the claim for a merit review.

With regard to appellant's January 12, 2006 request for reconsideration he asserted that his impairment was at least 10 percent and the evidence established that he sustained a severe residual injury to his right leg and has chronic pain. However, as noted above, appellant's letter did not show how the Office erroneously applied or interpreted a point of law, nor did it advance a point of law or fact not previously considered by the Office. The Office previously considered his contentions about his entitlement to a schedule award for the lumbar spine. 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).

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a summary of Dr. Ammerman's reports from April 4, 1999 to May 17, 2005 as well as duplicate reports dated April 5 to June 7, 2001. However, this evidence was duplicative of evidence already contained in the record²² and was previously considered by the Office in its decision dated April 21, 2005 and found deficient. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant submitted a new report from Dr. Ammerman dated October 25, 2005, who noted his prior history of lumbar laminectomy in 1979 and opined that appellant's work injury of April 4, 1999 caused a reaggravation of his lumbar radiculopathy. However, this report is not relevant as it is similar to Dr. Ammerman's previously submitted report dated August 5, 2004 which was considered by the Office in its decision dated April 21, 2005 and found insufficient.²³ This report is also not relevant as it fails to address appellant's claim for a schedule award. Therefore, this report is insufficient to require the Office to reopen the claim for a merit review.

Also submitted was a report from Dr. Thorpe, dated November 16, 2000, who noted that appellant was referred for a consultation for low back and leg pain. He noted a history of injury and diagnosed status post laminectomy and disc excision from 20 years ago, recurrent lumbar disc syndrome with radiculopathy, hypertension, high cholesterol and anxiety. However, this report is not relevant as it fails to address appellant's claim for a schedule award. Therefore, this report is insufficient to require the Office to reopen the claim for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit

²¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

²² *Id.*

²³ *See Daniel Deparini*, *supra* note 21.

relevant and pertinent evidence not previously considered by the Office.”²⁴ Consequently, he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2).

CONCLUSION

The Board finds that the Office properly denied appellant’s claim for a schedule award. The Board further finds that the Office properly denied his requests for reconsideration dated June 29, 2005 and January 12, 2006.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2006, July 20 and April 21, 2005 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: September 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

²⁴ 20 C.F.R. § 10.606(b).