United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 06-2003**
	)	**Issued: January 18, 2007**
DEPARTMENT OF VETERANS AFFAIRS, HUMAN RESOURCE SERVICE, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record Sandra

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated May 30, 2006, denying her request for further merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The most recent merit decision of the Office pertaining to the underlying issue was the Office's May 9, 2005 schedule award decision. Because more than one year has elapsed between the last merit decision of the Office and the filing of this appeal on August 28, 2006, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 13, 2003 appellant, then a 55-year-old supply management specialist, filed a traumatic injury claim alleging that she slipped and fell on a wet bathroom floor in the performance of duty. She stopped work on March 6, 2003 and returned on March 11, 2003.

On June 18, 2003 the Office accepted appellant's claim for right shoulder rotator cuff tear/sprain and right thumb sprain. It also authorized arthroscopy of the right shoulder with debridement of detached anterior labrum, subacromial depression and excision of acromioclavicular joint arthroscopically. Appellant received appropriate compensation benefits.

The Office continued to develop appellant's claim.

On November 18, 2004 the Office received appellant's claim for a schedule award.[1] In support of her claim for a schedule award, appellant submitted a report from Dr. Chester Dilallo, a Board-certified orthopedic surgeon, who opined that appellant had an impairment of 24 percent to the right upper extremity pursuant to the fourth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a December 29, 2004 report, the Office medical adviser utilized the A.M.A., *Guides,* (5th ed. 2001). He noted that appellant had abduction of 90 degrees, which resulted in a 4 percent impairment, adduction of 30 degrees which resulted in a 1 percent impairment, internal rotation of 30 degrees which resulted in a 4 percent impairment and external rotation of 80 degrees resulting in a 0 percent impairment. Dr. Dilallo determined that appellant had an impairment of nine percent for loss of motion pursuant to Figures 16-43 and 16-46.[2] The Office medical adviser opined that appellant was also entitled to a rating of 10 percent for the excision of the distal clavicle pursuant to Table 16-27.[3] He referred to the Combined Values Chart[4] and opined that appellant was entitled to an impairment of 18 percent to the right upper extremity and reached maximum medical improvement on July 16, 2004.

By decision dated May 9, 2005, the Office granted appellant a schedule award for an 18 percent impairment of the right arm, at the two thirds basic compensation rate, for the period July 16, 2004 through March 19, 2005 for a total of 56.16 weeks of compensation.[5]

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[1] Appellant repeated her request for a schedule award on March 7, 2005.

[2] A.M.A., *Guides* 477, 479.

[3] *Id*. at 506.

[4] *Id*. at 604.

[5] The record contains an earlier schedule award decision dated April 27, 2005; however, this award did not contain the lump sum that appellant requested and it appears that the Office reissued this decision on May 9, 2005. In a memorandum to the file, the Office reviewed several reports from Dr. Dilallo, including a January 7, 2005 report.

On May 1, 2006 appellant requested reconsideration. In support of her request, appellant alleged that she was obtaining clarification and justification from her orthopedic surgeon regarding the original impairment evaluation. She also included an April 26, 2006 letter in which she discussed her attempts to have her son, born on November 16, 1975, made a dependent and her efforts to have her treating physician clarify his impairment rating.

The Office received additional evidence, which included copies of previously received documentation, a copy of lease agreement, a brochure regarding an adult psychiatric facility, tax returns, a certificate of eligibility for vocational rehabilitation services, a certificate of residency for appellant's son, a statement from appellant regarding her son and his residing with her in her home and a July 20, 2005 letter from appellant regarding her efforts to obtain "dependent compensation."

In a June 3, 2005 report, Dr. Dilallo noted that appellant had retired to South Carolina and was doing well as far as her "generalized symptoms are concerned. Unfortunately, her shoulder continues to be a problem." He also indicated that he had made an administrative error in his prior report as he had used the fourth edition of the A.M.A., *Guides.* Dr. Dilallo indicated that his examination showed limited external rotation with "very strongly positive impingement signs" and recommended a subacromial injection.[6]

By decision dated May 30, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(2) Advances a relevant legal argument not previously considered by the Office; or
>
> "(3) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[8]

[6] This report was unsigned.

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b).

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.[9]

ANALYSIS

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. The evidence she submitted is not pertinent to the issue on appeal. Appellant submitted a June 3, 2005 report from Dr. Dilallo, who noted that appellant returned for follow up of her right shoulder problems and in which he noted that he had made an administrative error with regard to the A.M.A., *Guides.* However, his report did not purport to assess appellant's permanent impairment. This evidence is not relevant to the underlying issue in this case which is the extent of appellant's right arm impairment. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[10]

Appellant also submitted copies of previously submitted reports. However, the submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[11]

Appellant also submitted documents pertaining to her attempts to have her adult son declared a dependent, which would allow her schedule compensation to be paid at the augmented, three fourths rate, for those claimants who have a dependent.[12] However, these documents and assertions are not relevant as Office procedures indicate that a determination of whether a child over the age of 18 is incapable of self-support due to a physical or mental condition, is a determination that must be based on medical evidence. Appellant did not submit any medical evidence regarding her son's ability to support himself.[13]

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[9] 20 C.F.R. § 10.608(b).

[10] *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

[11] *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

[12] *See* 5 U.S.C. § 8110.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.11.10(c) (February 2002).

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly refused to reopen her claim for a review on the merits.[14]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[14] On appeal, appellant submitted new evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c). The Board notes that appellant retains the right to file a claim for an increased schedule award before the Office based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).