United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 07-899**
	)	**Issued: October 22, 2007**
DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT HOUSING SERVICE, Washington, DC, Employer	)	

Appearances
Appellant, pro se
No appearance, for the Director

Oral Argument September 19, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated December 18, 2006 which denied her request for reconsideration. Because more than one year has elapsed between the November 25, 2005 merit decision and the filing of this appeal on February 14, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

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 February 7, 1994 appellant, then a 51-year-old computer specialist, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome from

typing and writing at work. She did not stop work. The Office accepted appellant's claim for bilateral carpal tunnel syndrome. On August 24, 1994 it authorized a release of the median nerve on the right carpal tunnel and the ulnar nerve of the right wrist. Appellant received appropriate compensation benefits and the Office continued to develop her claim.[1] By decision dated June 25, 2001, the Office granted appellant a schedule award for 15 percent permanent impairment of the right arm.

On March 2, 2002 appellant applied for an additional schedule award. In support of her claim, she submitted a July 19, 2002 report from Dr. Jimmy Chow, a Board-certified hand surgeon and plastic surgeon. Dr. Chow noted appellant's history of injury and treatment and rated impairment using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001). He concluded that she had an impairment of 33 percent to the left hand.

In a report dated December 6, 2002, the Office medical adviser indicated that an updated electromyography (EMG) scan and new studies were needed to use the A.M.A., *Guides.* On January 28, 2003 the Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In a February 11, 2003 report, Dr. Smith noted appellant's history of injury and treatment, utilized the A.M.A., *Guides,* conducted an examination and opined that she had seven percent impairment of the left arm.

By letter dated January 29, 2004, the Office referred appellant to Dr. J. Michael Joly, a Board-certified orthopedic surgeon, for an examination to resolve the conflict of medical opinion between Dr. Chow and Dr. Smith regarding the extent of appellant's impairment.[2] In a February 19, 2004 report, Dr. Joly reviewed appellant's history of injury and treatment, conducted an examination and utilized the A.M.A., *Guides.* He determined that she had a normal range of motion, normal strength, no signs of instability and no tenderness. Dr. Joly recommended that appellant did not require anything more than observation and an occasional cortisone shot.

By decision dated May 3, 2004, the Office denied appellant's claim for an additional schedule award.

On August 18, 2004 appellant requested reconsideration and submitted a July 22, 2004 report from her treating physician, Dr. Daniel Ignacio, Board-certified in physical medicine and

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[1] In a May 16, 1996 decision, the Office found that appellant was employed as a program specialist with wages equal to or greater than the date-of-injury pay. It determined that her employment in the position fairly and reasonably represented appellant's wage-earning capacity.

[2] The record reflects that on August 12, 2003 the Office referred appellant to Dr. Roger L. Raiford, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between appellant's physician, Dr. Chow, and the second opinion physician, Dr. Smith, regarding the extent of appellant's impairment. Dr. Raiford provided a report dated September 22, 2003 in which he determined that appellant had a 16.72 percent impairment of the left upper extremity. However, in a November 25, 2003 report, the Office medical adviser indicated that Dr. Raiford's examination failed to rate appellant due to entrapment neuropathy of the median nerve due to carpal tunnel syndrome. The Office subsequently determined that a new impartial medical examination was needed.

rehabilitation. He noted appellant's history of injury and treatment and utilized the A.M.A., *Guides.* Dr. Ignacio opined that appellant had a 65 percent impairment of the right upper extremity which was related to her chronic right median neuritis and the right shoulder-hand syndrome. He also opined that she had a 45 percent impairment of the left upper extremity due to her chronic sensorimotor dysfunction. Dr. Ignacio reiterated his opinion in subsequent reports.

By decision dated November 19, 2004, the Office found that Dr. Ignacio's reports were incomplete and insufficient to support an increased award.

On May 20, 2005 appellant requested reconsideration. In a May 13, 2005 report, Dr. Ignacio repeated his previous impairment rating.

By letter dated October 12, 2005, the Office requested that the Office medical adviser review the record and provide an opinion on impairment. In an October 20, 2005 report, the Office medical adviser determined that appellant had 14 percent impairment of her right arm which did not warrant an increased schedule award.

By decision dated November 25, 2005, the Office denied appellant's claim for an increased schedule award.

On January 15, November 15 and 20, 2006 appellant requested reconsideration. She submitted a December 14, 2005 report from Dr. Ignacio who repeated the findings contained in his July 22, 2004 report. Dr. Ignacio found that appellant had a 65 percent impairment of the right arm which was related to her chronic right median neuritis and the right shoulder-hand syndrome. He also opined that she had a 45 percent impairment of the left arm due to her chronic sensorimotor dysfunction. On November 21, 2006 Dr. Ignacio reiterated his opinion regarding the extent of appellant's impairment. Appellant also submitted reports from Dr. Ignacio which did not address her impairment and numerous physical therapy reports.

By decision dated December 18, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant's request for reconsideration did not raise substantial legal questions nor included new and relevant evidence. The Office determined that appellant's request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[3] 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

[3] 5 U.S.C. § 8128(a).

review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[4]

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.[5]

ANALYSIS

Appellant disagreed with the Office's November 25, 2005 decision which denied her claim for an increased schedule award and requested reconsideration on January 15, November 15 and 20, 2006. The underlying issue on reconsideration was whether she has established more than a 15 percent impairment of the right arm. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether she had greater than a 15 percent impairment of the right arm.

Appellant submitted two reports from Dr. Ignacio dated December 14, 2005 and November 21, 2006. However, these reports repeated the content and impairment rating of his reports dated July 22, 2004 and May 13, 2005. 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.[6] Appellant also submitted additional reports from Dr. Ignacio which did not address the schedule award. These are not relevant as the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[7]

Appellant also submitted records from physical therapists; however, they are not relevant because physical therapists are not considered physicians under the Act[8] and the underlying deficiency in the claim is the absence of medical evidence addressing the increased schedule award. As only a physician can competently address the issue, reports from physical therapists and other nonphysicians are irrelevant to the deficiency in the claim.

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[4] 20 C.F.R. § 10.606(b).

[5] 20 C.F.R. § 10.608(b).

[6] *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999).

[7] *Robert P. Mitchell*, 52 ECAB116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[8] *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See David P. Sawchuk*, 57 ECAB___ (Docket No. 05-1635, issued January 13, 2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act).

The evidence submitted by appellant on reconsideration does not satisfy the third criterion noted above for reopening a claim for merit review. She 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 denied appellant's requests for reconsideration.[9]

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 decision of the Office of Workers' Compensation Programs dated December 18, 2006 is affirmed.

Issued: October 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[9] Appellant, however, retains the right to file a claim for an increased schedule award based 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).