United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 08-391**
	)	**Issued: November 3, 2008**
DEPARTMENT OF HOMELAND SECURITY, Austin, TX, Employer	)	

Appearances:
Appellant, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 19, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated May 2, 2007 which denied his claims for schedule awards.[1] He also filed a timely appeal of the November 7, 2007 nonmerit decision[2] which denied his reconsideration request.[3]

[1] By decision dated May 2, 2007, the Office denied appellant's claim for a schedule award in case number xxxxxx830, which had been accepted for "chondromalacia right knee." By decision on the same date, it denied appellant's claim for a schedule award in case number xxxxxx605, which had been accepted for "aggravation of chondromalacia and aggravation of shoulder impingement." Finally, by decision on the same date, the Office denied appellant's claim for a schedule award also in case number xxxxxx605 which had been accepted for "carpal tunnel syndrome, bilateral and trigger finger (acquired) left."

[2] The November 7, 2007 decision was issued in case number xxxxxx830. There was no further decision issued under case number xxxxxx605.

[3] The record includes evidence received in OWCP case number xxxxxx605 after the Office issued the November 7, 2007 decision. The Board cannot consider new evidence for the first time on appeal. 20 C.F.R. § 501.2(c) (2004).

Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained a permanent impairment to a scheduled member; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that he did not provide any additional evidence or legal argument to establish that he was entitled to a schedule award.

FACTUAL HISTORY

On October 13, 2000 appellant, then a 38-year-old detention enforcement officer, filed an occupational disease claim alleging that he sustained repetitive motion syndrome in the right knee and ankle as a result of driving in the performance of duty. Medical notes dated from April 19, 1999 to May 5, 2000 were submitted. On November 13, 2000 appellant's claim was accepted for chondromalacia of the right knee.

On December 5, 2003 appellant filed an occupational disease claim alleging that he sustained bursitis in his left shoulder as a result of driving in the performance of duty.

In a January 6, 2004 progress note, Dr. Stephen Norwood, a physician, stated that appellant was there to follow up with three medical issues. He explained that appellant's carpal tunnel was under pretty good control, his shoulder had improved 60 to 70 percent with improved impingement signs and that appellant was having increased pain in his right knee. Dr. Norwood reported that new x-rays were taken that day which were essentially normal with the exception of small lateral osteophyte and slight tilting of the patella but unchanged from the description four years ago. In a January 27, 2004 physician's report, he diagnosed right knee chondromalacia patella, and left shoulder bursitis and opined that both problems were aggravated by prolonged driving.

On February 26, 2004 appellant's claim was accepted for "aggravation of the left knee and left shoulder condition."

On April 9, 2004 appellant filed a claim for a schedule award, arising from the accepted December 2003 accepted shoulder injury.[4] On June 7, 2004 he filed a request for a schedule award, arising from the April 1999 knee injury.

In a June 28, 2004 letter, the Office informed appellant that an assessment of permanent impairment was needed which included whether maximum medical improvement occurred, the

[4] On April 12, 2004 appellant filed a claim for leave without pay and leave buyback. On October 19, 2005 the Office requested medical evidence establishing a disability for the claimed time period. No response was received. A decision addressing appellant's claim for leave without pay and leave buyback was not issued.

On April 27, 2004 appellant filed an occupational disease claim alleging that he sustained a bone-spur to the right side of the ankle as a result of driving in the performance of duty. No decision was issued addressing this claim.

percentage of impairment of the affected members according to the A.M.A. *Guides*, and a description of the subjective complaints causing impairment.

In a July 15, 2004 letter, the Office requested a permanent impairment assessment of appellant from Dr. Norwood.

In a November 9, 2004 letter, the Office again requested that appellant submit an assessment of permanent impairment.

Progress notes from Dr. J. Brad Lichtenhan, Board-certified in family medicine, were received indicating restrictions in driving but in an October 12, 2004 note, he stated that appellant could return to work without restrictions. In a January 24, 2005 note, he stated that appellant was out of work due to back pain and left shoulder pain which were identified as repetitive use injuries from extensive driving.

On February 15, 2007 appellant again filed a claim for a schedule award arising from the December 2003 shoulder injury. In two memoranda dated March 14, 2007, he reported that he was able to locate a physician, Dr. James Baker, willing to do an impairment rating for his shoulder and knee/ankle injuries.

In a March 30, 2007 letter to Dr. Baker, the Office listed the information needed to assess a permanent impairment for both the left shoulder impingement and right knee chondromalacia of patella. No response was received.

In three separate decisions dated May 2, 2007, the Office denied appellant's schedule award claims for the right knee, for bilateral carpal tunnel syndrome and left trigger finger, and "aggravation of chrondromalacia and aggravation of shoulder impingement" finding that the evidence was insufficient to establish that he sustained a permanent impairment to a scheduled member.

On October 17, 2007 appellant requested reconsideration, apparently only for the right knee decision. Additional information was submitted. In an April 13, 2005 magnetic resonance imaging (MRI) scan report of the right knee, Dr. Tamina Blais, a radiologist, found Grade 1 signal noted in the posterior horn and body of the medial meniscus, but no articular surface reaching medial meniscal tear was seen with minimal medial joint space degenerative chondromalacia. In a May 31, 2007 MRI scan report of the right knee, Dr. Douglas Smith, a radiologist, noted only minor osteophytosis present, abnormal signal in the posterior horn of the medial meniscus without extension to an articular surface to indicate a tear, and no other findings to explain knee pain.

In a November 7, 2007 nonmerit decision, the Office denied appellant's request for reconsideration of the denial of schedule award for the right knee finding that as appellant did not raise any substantive legal questions or include new and relevant evidence his request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulation[6] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[7] 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 regulation as the appropriate standard for evaluating schedule losses.[8] Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

The Board has previously stated that the medical evidence required for a schedule award determination, provided by the attending physician, must include a detailed description of the impairment, including where applicable the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. Additional reports should be required of the physician where the report does not meet this test.[10]

ANALYSIS -- ISSUE 1

The Office has accepted appellant's claims for chondromalacia of the right knee, and aggravation of the left knee and left shoulder condition.[11] On April 9 and February 15, 2007 appellant filed claims for a schedule award for the shoulder condition and on June 7, 2004 appellant filed a claim for a schedule award for the right knee condition.

While medical notes were submitted, appellant submitted no medical report which addressed whether he sustained a permanent impairment due to the accepted conditions. The Office met its obligation to advise appellant that a medical report detailing the claimed

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 10.404.

[7] *Michele Tousley*, 57 ECAB 130 (2005); *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986).

[8] *Michele Tousley, supra* note 5; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[9] *Dennis R. Stark*, 57 ECAB 306 (2006).

[10] *Alvin C. Lewis*, 36 ECAB 595, 596 (1985).

[11] There was also reference to acceptance of conditions of bilateral carpal tunnel syndrome and left trigger finger. There is no evidence in the record of a claim for a schedule award for this condition.

permanent impairment is required by letters dated June 28, July 15 and November 9, 2004, and March 30, 2007. The Office did not receive any medical report discussing permanent impairment. Appellant bears the burden to establish that he sustained a permanent impairment causally related to his accepted employment conditions.[12] With no medical evidence to support appellant's claim, appellant has failed to meet his burden to establish that he sustained permanent impairments which may have entitled him to schedule award compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[13] (herein "Act") does not entitle a claimant to a review of an Office decision as a matter of right.[14] The Act does not mandate that the Office review a final decision simply upon request by a claimant.[15]

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (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 Office.[16]

ANALYSIS -- ISSUE 2

The Office is required to reopen a case for merit review if an application for reconsideration demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law or present a new relevant legal argument. He submitted two MRI scan reports with his request but both of the reports were previously of record. However neither report addressed the issue in the case, whether appellant has sustained a permanent impairment, therefore they are not considered to be new and relevant evidence which would entitle appellant to a merit review.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained any permanent impairment related to his accepted employment conditions. The Board also finds that the Office properly denied appellant's request for reconsideration.

[12] *See Veronica Williams*, 56 ECAB 367, 370 (2005).

[13] 5 U.S.C. § 8128(a).

[14] *Darletha Coleman*, 55 ECAB 143 (2003).

[15] *Donna M. Campbell*, 55 ECAB 241 (2004).

[16] 20 C.F.R. § 10.606(b)(2)(iii) (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 7 and May 2, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 3, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board