

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PENNY S. DUCHENE and DEPARTMENT OF DEFENSE,
DEFENSE DISTRIBUTION REGION WEST

*Docket No. 01-1602; Submitted on the Record;
Issued February 20, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained permanent impairment of the upper or lower extremities due to her accepted cervical or lumbar spine conditions; and (2) whether the Office of Workers' Compensation Programs abused its discretion on March 8, 2001 in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 14, 1997 appellant, then a 48-year-old transportation assistant, filed a traumatic injury claim, alleging that on April 11, 1997 she sustained injuries to her ankle, thigh, arm, left hand and left hip when she fell into a deep hole in the performance of duty. The Office accepted appellant's claim for lumbar, cervical and left shoulder strains and subsequently expanded its acceptance to include left rotator cuff tendinitis.

On June 28, 1999 appellant requested a schedule award. In support of her claim, appellant submitted progress notes from her treating physicians, Drs. Andris Lazdins and Jinmei Woan. The progress notes, dating from April 11, 1997 through July 22, 1999, document appellant's continuing complaints of left shoulder and lower back pain and discuss the planned treatment. In a narrative report dated February 9, 1998, Dr. Woan, a Board-certified neurologist, noted that appellant was 10 months post-injury but still had some pain in the left cervical area with some numbness on the left side of the scalp and occasionally pain in the left gluteus area. Physical examination revealed tenderness in the left lower cervical area and left sacral iliac junction region, but full range of motion of both the cervical and lumbar spine. Dr. Woan stated that appellant's condition was permanent and stationary with residual on and off pain in the left low cervical area and sacroiliac junction region. He further noted that appellant was working full time but would continue to have on and off chronic pain as a residual deficit causing her some inconvenience. Dr. Woan concluded that appellant could continue to perform her regular job as it did not require heavy lifting.

In a decision dated September 27, 1999, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence of record does not describe any

permanent impairment of a scheduled member or function of the body as set forth in section 8107 of the Federal Employees' Compensation Act.

By letter dated March 6, 2000, appellant requested reconsideration and asserted that she continued to have pain in her left shoulder, arm and leg. She stated that her physician had advised her that injuries to the nerves and muscles in her neck and buttock were affecting her left arm, shoulder and leg. Appellant asked that if Dr. Woan's reports remained insufficient to establish her claim, that the Office send her for a second opinion evaluation. In support of her reconsideration request, appellant submitted an October 6, 1999 report from Dr. Woan, who stated that physical examination revealed tenderness to palpation in the left suprascapular region and left mid-sacral area, but that motor strength, deep tendon reflexes and sensory examinations were within normal limits. Dr. Woan listed her impression as post-traumatic left suprascapular and sacral area pain due to local tendomuscular strain or direct trauma.

On March 23, 2000 the Office referred appellant, together with a statement of accepted facts and copies of the medical evidence of record, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion. The Office specifically asked Dr. Swartz to determine the extent, if any, of appellant's left upper extremity impairment.

In his report dated April 12, 2000, Dr. Swartz listed his findings on physical examination, with respect to appellant's upper extremity range of motion, muscle strength, grip strength and circumferential measurements. Dr. Swartz listed his diagnosis as chronic rotator cuff tendinitis, left shoulder, with associated left myofascial strain of the soft tissues surrounding the left shoulder girdle. He further noted that appellant had some weakness of the left shoulder girdle and had substantial deficits in left shoulder internal rotation and left grip strength. Dr. Swartz concluded that appellant had reached maximum medical improvement by April 11, 1998 but did not offer an opinion as to the degree of appellant's permanent impairment.

Dr. Swartz's report and the case record were referred to the Office's medical adviser who determined a 23 percent impairment of appellant's upper extremity resulting from her left shoulder injury, but noted that the record contained no evidence of any upper or lower extremity impairment due to her accepted lumbar or cervical spine strains.

In a decision dated May 31, 2000, based on the Office medical adviser's review of Dr. Swartz's report and the medical evidence of record, the Office found appellant entitled to a schedule award for her left upper extremity. The Office further found, however, that there was no evidence of record to support a finding that appellant had any impairments of the upper or lower extremities due to her accepted cervical or lumbar spine conditions and, therefore, declined to modify the September 27, 1999 decision.

By letter dated March 1, 2001, appellant requested reconsideration of the Office's decision. She asserted that she did not understand why the second opinion examination by Dr. Swartz was confined to her upper extremities and did not include an evaluation of her sacral spine area. Appellant stated that she suffered from increasing left leg weakness and left radicular pain, but that Dr. Woan simply asked questions and prescribed medication, but did not take any measurements of her limitations. She further stated that she had asked Dr. Woan to refer her for a magnetic resonance imaging, but that Dr. Woan had dissuaded her on the grounds that the

Office probably would not approve the test. In support of her claim, appellant submitted progress notes dated December 6, 2000 and February 19, 2001 from Dr. Woan, as well as physical therapy treatment reports.

The Board finds that appellant has not established that she sustained permanent impairment of the upper or lower extremities, causally related to her accepted cervical or lumbar spine conditions.¹

The schedule award provision of the Act² and its implementing regulation³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, or 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,⁵ no claimant is entitled to such an award.⁶

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, 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 spine.⁷

¹ The Board notes that on appeal, appellant does not contest the Office's June 22, 2000 schedule award granting her a 23 percent impairment of her left upper extremity due to her accepted left shoulder condition. Her appeal is confined solely to the Office's denial of any additional percentage impairment of her left lower extremity based on her accepted lumbar spine condition.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁵ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

⁶ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

⁷ *Rozella L. Skinner*, 37 ECAB 398 (1986).

The medical evidence in this case, however, does not support that appellant sustained any permanent impairment of her extremities due to her accepted cervical or lumbar spine conditions.

Based on Dr. Woan's finding that appellant had a permanent residual injury of her left shoulder, a member of the body covered by the schedule, the Office properly referred appellant for a second opinion evaluation of her left upper extremity. While Dr. Woan further noted that appellant also had sacral pain, she did not indicate that appellant had objective or subjective findings with respect to her lower extremities due to her sacral condition, but rather stated that appellant's motor strength, deep tendon reflexes and sensory examinations were within normal limits. Therefore, the Office did not err in restricting the second opinion evaluation to appellant's upper extremities. Appellant asserted that she developed radiating pain, tingling and weakness in her left leg as a result of her accepted lumbar spine injury. However, appellant bears the burden of proof to establish that these claimed left leg conditions are causally related to the employment injury.⁸ As the spine is not a scheduled member as defined in the Act,⁹ and as the record contains no medical evidence indicating that appellant sustained any permanent impairment to a scheduled member as required under the Act,¹⁰ the Office properly denied appellant's request for a schedule award due to either her cervical or lumbar spine conditions.

The Board finds with respect to the Office's March 8, 2001 decision denying reconsideration, that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal 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) submitting relevant and pertinent new evidence not previously considered by the Office.¹¹ 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.¹²

Appellant's March 1, 2001 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. 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). In addition, while appellant asserted that she suffers leg pain and weakness and is therefore entitled to a schedule award for lower extremity impairment due to her back condition, she did not submit any medical evidence in support of this contention.

⁸ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁹ *See* 5 U.S.C. § 8107(c).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² 20 C.F.R. § 10.606(b).

In treatment notes dated December 6, 2000 and February 19, 2001, Dr. Woan noted that appellant complained of left hip pain and indicated that magnetic resonance imaging was ordered to rule out left lumbar radiculopathy. As Dr. Woan's reports indicate only that appellant had complaints of pain requiring further testing and do not include any findings or conclusions with respect to the cause of her pain, they are irrelevant to the instant claim, which pertains solely to the issue of whether appellant has any permanent upper or lower extremity impairments causally related to her cervical or lumbar spine strains, such that she is entitled to a schedule award.¹³ In addition, appellant submitted physical therapy treatment notes. However, a physical therapist's reports are not medical evidence as a physical therapist is not a physician under the Act.¹⁴ Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The March 8, 2001 and May 31, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 20, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ Evidence which is not relevant to the particular issue in a claim is insufficient to warrant reopening a claim on its merits; see *James E. Salvatore*, 42 ECAB 309 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

¹⁴ *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996).