U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELOISE J. RILEY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, New Orleans, LA

Docket No. 02-1402; Submitted on the Record;
Issued February 11, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a ratable impairment of the left upper extremity; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On August 23, 1998 appellant, then a 47-year-old licensed practical nurse, fell while in the performance of duty. The Office accepted her claim for strains of the left shoulder and cervical and lumbosacral spine and paid appropriate compensation benefits. Appellant resigned on July 30, 1999.

On December 13, 2000 appellant filed a claim for recurrence of disability alleging a continuing disability as a result of her August 23, 1998 work-related injury.

On August 29, 2001 the Office referred appellant to Dr. Frederick Keppel, a Board-certified orthopedic surgeon, along with her records and a statement of accepted facts for a determination regarding her continuing disability.

In a report dated September 17, 2001, Dr. Keppel noted a familiarity with appellant's history of injury and reported the following:

> "On examination of her left shoulder there were no scars. The patient appears to have a full range of motion of the left shoulder. There was no instability and no atrophy present. On examination of her left upper extremity her deep tendon reflexes are intact and symmetrical. Her neurological exam[ination] was grossly intact. There was no motor weakness or any sensory deficits or any atrophy present in the upper extremity."[1]

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[1] Because neither the Federal Employees' Compensation Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the neck or back, the claimant is not entitled to such award. 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000).

In a report dated January 24, 2002, the Office medical adviser stated that he reviewed Dr. Keppel's reports, which noted no motor or sensory deficits to the upper extremities, with full range of motion to the left shoulder without instability. He added that "All the descriptions provided by Dr. Keppel result in zero percent permanent impairment for the left upper extremity."

In a decision dated February 20, 2002, the Office determined that appellant had no permanent impairment resulting from the August 23, 1998 work-related injury.

In a letter dated February 28, 2002, appellant requested reconsideration. In a March 21, 2002 decision, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established that she sustained any ratable impairment of the left upper extremity.

The schedule award provisions of the Act[2] and its implementing regulation[3] set 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 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.[4]

In this case, neither the September 17, 2001 report from Dr. Keppel nor the January 24, 2002 report from the Office medical adviser establishes any impairment of strength, sensation or loss of motion under the A.M.A., *Guides.* Consequently, appellant submitted insufficient medical evidence to establish that she sustained a ratable impairment of the left upper extremity according to the A.M.A., *Guides*.

The Board also finds that the Office properly denied appellant's request for reconsideration.

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[5]

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999) the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

In this case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. Because appellant submitted no evidence, the Office properly denied review of appellant's claim. In its March 21, 2002 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

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[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.608(b) (1999).

The March 21 and February 20, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
February 11, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member