United States Department of Labor
Employees' Compensation Appeals Board

VINCENT COLASANTI, Appellant	)	
and	)	**Docket No. 06-88**
	)	**Issued: March 21, 2006**
DEPARTMENT OF THE AIR FORCE, MacDILL AIR FORCE BASE, MacDill, FL, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 13, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs nonmerit decision dated September 22, 2005, denying his request for further merit review of his claim. Because more than one year has elapsed between the most recent merit decision dated Office's May 27, 2004 and the filing of this appeal, 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 June 8, 2001 appellant, then a 50-year-old supervisory chemist, filed a traumatic injury claim alleging that he sustained a right arm injury due to lifting equipment in the

performance of duty. Appellant stopped work on June 8, 2001. He also returned to work on that same date. On July 12, 2001 the Office accepted appellant's claim for right shoulder strain, ruptured right biceps tendon and aggravation of cervical degenerative disc disease.[1]

The Office continued to develop the claim and on August 5, 2002 appellant filed a claim for a schedule award.[2]

In support of his claim, appellant submitted a June 17, 2002 report from his treating physician, Dr. Steven Mirabello, an orthopedic surgeon, who opined that appellant was at maximum medical improvement and had impairment of 30 percent of the elbow or a total body impairment of 5 percent. On physical examination, he noted that appellant had some weakness and lacked 5 degrees of extension and approximately 25 degrees of supination compared to the other side. He also noted that appellant had full flexion and mild weakness of the biceps.

By letter dated January 24, 2003, the Office requested that Dr. Mirabello provide an impairment rating utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001).

In a March 11, 2003 report, an Office medical adviser utilized the A.M.A., *Guides* and determined that appellant had seven percent impairment to the right upper extremity.

In a March 20, 2003 memorandum, the Office determined that a conflict existed between appellant's treating physician and the Office medical adviser regarding the extent of the permanent impairment to his right arm. On April 2, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Shekhar S. Desai, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Mirabello and the Office medical adviser, regarding the extent of appellant's permanent impairment to his right arm.

In a May 5, 2003 report, Dr. Desai utilized the A.M.A., *Guides* and noted appellant's history of injury and treatment and conducted a physical examination. He opined that appellant had a 15 percent permanent impairment of the right upper extremity. In a June 9, 2003 report, the Office medical adviser reviewed Dr. Desai's May 5, 2003 report and concurred with his findings. He opined that appellant had an impairment of 15 percent of the right upper extremity.

On June 18, 2003 the Office granted appellant a schedule award for an eight percent impairment of the right upper extremity. The award covered a period of 24.96 weeks from November 7, 2002 to April 30, 2003.

By letter dated July 2, 2003, appellant, through his attorney, requested a hearing, which was held on March 9, 2004.

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[1] Appellant underwent an authorized right biceps tendon repair, which was performed by Dr. Steven C. Mirabello, a Board-certified orthopedic surgeon. Appellant stopped work in connection with such surgery and returned to work in August 2001.

[2] Appellant filed a claim for recurrence on December 1, 2004, which was accepted by the Office.

By decision dated July 7, 2003, the Office adjusted appellant's wage-loss compensation to reflect his actual earnings as a chemist.

In a March 23, 2004 report, Dr. Mirabello utilized the A.M.A., *Guides* and referred to Figure 16-3,[3] Figure 16-10,[4] Figure 16-11,[5] Figure 16-34,[6] Figure 16-35[7] and Figure 16-40.[8] He determined that appellant had an impairment of 27 percent of the right upper extremity, which was equivalent to a whole body impairment of 16 percent.

In a May 19, 2004 decision, the Office hearing representative affirmed the Office's June 18, 2003 decision, as modified. The Office hearing representative modified the June 18, 2003 schedule award to reflect that appellant had a 15 percent impairment rather than the 8 percent indicated in the decision.

On May 27, 2004 the Office granted appellant an amended schedule award to reflect 15 percent impairment of the right upper extremity. The Office noted that seven percent was paid on March 20, 2003 and the remaining eight percent was paid on June 18, 2003.

By letter dated May 10, 2005, appellant, through his attorney, requested reconsideration, contending that Dr. Mirabello's March 23, 2004 report should carry greater weight than that of Dr. Desai. He also contended that Dr. Desai should be considered as second opinion as there was never a second opinion physician. He enclosed a copy of Dr. Mirabello's March 23, 2004 report.

By decision dated September 22, 2005, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and was insufficient to warrant further merit review.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[9] 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] A.M.A., *Guides* 442, Figure 16-3.

[4] *Id*. at 455, Figure 16-10.

[5] *Id*. at 455, Figure 16-11.

[6] *Id*. at 472, Figure 16-34.

[7] *Id*. at 473, Figure 16-35.

[8] *Id*. at 476, Figure 16-40.

[9] 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 [the Office]."[10]

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.[11]

ANALYSIS

Appellant disagreed with the denial of his schedule award and requested reconsideration on May 10, 2005. The underlying issue on reconsideration was medical in nature, whether appellant has more than 15 percent impairment. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he had more than the 15 percent impairment found by Dr. Desai.

Appellant's attorney contends that the March 23, 2004 report of Dr. Mirabello should carry greater weight and that appellant has more than 15 percent impairment. However, this report was not new as it was previously considered by the Office hearing representative. 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.[12] While it was asserted that Dr. Desai was a second opinion physician, this argument is without any color of validity as an Office medical adviser, a physician acting on behalf of the government, arrived at different findings on impairment than Dr. Mirabello.[13] Therefore, the record reflects Dr. Desai was

[10] 20 C.F.R. § 10.606(b).

[11] 20 C.F.R. § 10.608(b).

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

[13] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity. *Robert P. Mitchell*, 52 ECAB 116 (2000).

selected to resolve a medical conflict between the Office's medical adviser and appellant's physician.[14]

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. 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 denied his request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).[15]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2005 is affirmed.

Issued: March 21, 2006
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

[14] *See* 5 U.S.C. § 8123(a) (if there is a disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination). *See also Melvina Jackson*, 38 ECAB 443 (1987) (where the Board held that an Office medical adviser may create a medical conflict in appropriate situations under 5 U.S.C. § 8123(a)).

[15] 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).