

FACTUAL HISTORY

On July 20, 1990 appellant, then a 35-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on that same date she stepped on loose rocks and injured her right foot in the performance of duty.¹ Appellant stopped work on July 20, 1990.²

On August 21, 1990 the Office accepted appellant's claim for bimalleolar fracture closed of the right ankle.³

Appellant was placed on the periodic rolls and received appropriate compensation.⁴

On December 21, 2001 appellant's representative filed a claim for a schedule award.⁵ In support of the claim, appellant's representative submitted a February 3, 1994 report from Dr. James D. Hinde, Board-certified in physical medicine and rehabilitation, who noted appellant's history of injury and treatment and indicated that appellant's ankle was stable, no treatment was indicated and that appellant had reached maximum medical improvement. Dr. Hinde explained that the A.M.A., *Guides* did not really address ankle injuries and explained that he would have to apply the standards for "crepitus" of joints described for upper extremity injuries. Dr. Hinde advised that appellant's injury destabilized her ankle and required surgery which resulted in pain. He opined that "[e]xtrapolating some of the tenets in the A.M.A., *Guides* applied to other lower extremity joints and upper extremity joints, I would feel that a five percent impairment of the whole person related to her ankle injury was appropriate." Dr. Hinde noted that appellant's results were as good as could be expected given the nature of her injury. He also added an additional impairment of five percent for appellant's impairment related to her strain/sprain of the lumbar spine and that the combination of the 5 percent for appellant's ankle injury and her lumbar strain resulted in a whole person impairment rating of 10 percent.

By letter dated July 2, 2004, the Office advised appellant that it had received her claim for a schedule award. Appellant was advised that current medical evidence was needed.

By decision dated October 14, 2004, the Office denied appellant's claim for a schedule award. The Office noted that the February 3, 1994 report of Dr. Hinde was not current and that he did not use the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 166 (5th ed. 2001) (hereinafter A.M.A., *Guides*). The Office also indicated that awards were not given for impairments to the whole person.

¹ The record reflects that appellant had a previous work-related left foot injury on July 26, 1988, which had resolved.

² The employing establishment indicated that appellant was employed on an emergency basis and that the crew was terminated on July 25, 1990. The record reflects that appellant was a career seasonal employee.

³ Appellant underwent an open reduction procedure to the right ankle on July 20, 1990.

⁴ By letter dated July 15, 1997, the Office determined that appellant was reemployed as an automation clerk effective January 6, 1997 and terminated appellant's entitlement to compensation.

⁵ The record reflects that several requests were made for a schedule award.

On November 17, 2004 appellant's representative explained that Dr. Hinde had examined appellant on November 15, 2004; however, he was requesting an x-ray of the right ankle before he could complete his impairment rating.

By letter dated November 29, 2004, the Office authorized an x-ray of appellant's right ankle.

By letter dated October 7, 2005, appellant requested reconsideration. In support of her request for a schedule award, she submitted the November 15, 2004 report of Dr. Hinde. In his report, Dr. Hinde noted appellant's history of injury and treatment and conducted an examination. He also explained that he was utilizing the A.M.A., *Guides*. Dr. Hinde noted that the A.M.A., *Guides*, did not particularly address ankle injuries of the type sustained by appellant. He referred to section 17.2c; gait derangement and noted that Table 17-5 dealt with antalgic limp with a shortened stance and documented moderate to advanced arthritic changes in the hip, knee or ankle. Dr. Hinde noted that appellant's history suggested that her pain was severe as she dragged her foot, and had a "clumsy" foot which gave way. He indicated that, at present, he could not document this because it was an intermittent problem "but one which was consistent throughout the years." Dr. Hinde added that a seven percent impairment of the whole person was warranted by Table 17-4a, and that a five percent impairment was warranted. He also referred to Table 17-11 regarding ankle motion impairment but explained that appellant had normal range of motion. Furthermore, Dr. Hinde explained that appellant had malalignment of the ankle and referred to Table 17-33 at page 546 and 547 and noted that there was "nothing specific for a bimalleolar fracture operatively repaired resulting in crepitus, persistent pain, weather sensitivity and periodic antalgic gait." He opined that appellant was entitled to a five percent impairment of the whole person.

The Office also received a December 10, 2004 x-ray of the right ankle, read by Dr. Suzanne L. Shaw, a Board-certified diagnostic radiologist, which revealed tibiotalar minor degenerative osteoarthritis and heel spur.

By decision dated January 10, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,⁶ 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 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

⁶ 5 U.S.C. § 8128(a).

“(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].”⁷

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.⁸

ANALYSIS

Appellant disagreed with the denial of her claim for a schedule award and requested reconsideration on October 7, 2005.

Appellant does not make any argument that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. However, appellant did submit a new medical report, dated November 15, 2004, in which Dr. Hinde conducted an examination, provided findings, utilized the A.M.A., *Guides* and opined that appellant had a five percent whole person impairment of the right ankle. The Office denied reopening appellant’s case on the merits, finding that appellant did not raise substantive legal questions or include new and relevant evidence. However, the Board notes that the report of Dr. Hinde is new and relevant. In the October 14, 2004 decision, the Office denied appellant’s claim for a schedule award because there was no current medical evidence in the record and because Dr. Hinde did not utilize the A.M.A., *Guides*. The Board notes that Dr. Hinde’s November 15, 2004 report, submitted on reconsideration, was more current than his previous February 3, 1994 report, it noted findings from a current medical examination and provided findings regarding permanent impairment pursuant to the A.M.A., *Guides*. Unlike his previous February 3, 1994 report, Dr. Hinde noted the provision of the A.M.A., *Guides* that he used in reaching a conclusion on appellant’s permanent impairment. Consequently, Dr. Hinde’s new report is relevant because it addressed how permanent impairment was calculated under particular provisions in the A.M.A., *Guides* whereas his previous report did not provide this level of detail regarding how impairment was calculated.

The issue of whether Dr. Hinde applied the A.M.A., *Guides* and how he arrived at his impairment calculation, would go to the weight of the evidence, which goes beyond the standard to be applied to reopen a case for further review of the merits. The report of Dr. Hinde is relevant, pertinent and new to the issue of the whether appellant was entitled to a schedule award. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁹

⁷ 20 C.F.R. § 10.606(b).

⁸ 20 C.F.R. § 10.608(b).

⁹ See *Sydney W. Anderson*, 53 ECAB 347 (2002).

Accordingly, the Office should have reviewed appellant's case on the merits and discussed this relevant and pertinent new evidence not previously considered.

CONCLUSION

The Board finds that the Office improperly denied a reopening of appellant's case for a review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2006 is set aside and this case remanded for further action consistent with this decision.

Issued: October 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board