United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 06-1911**
	)	**Issued: April 16, 2007**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE SUPPORT BASE, Kings Bay, GA, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2006 appellant filed a timely appeal from a March 9, 2006 decision denying schedule award increases and an August 2, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.d, the Board has jurisdiction over the merits of the claim and over the nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained greater than a 29 percent impairment of the right leg and a 4 percent impairment of the left arm, for which he received schedule awards; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

The Office accepted that on July 25, 2002 appellant, then a 47-year-old police officer, sustained a fractured right femur, right knee contusion, contusion of the right lower leg and superficial injuries of the face, neck and scalp when he was thrown 10 to 15 feet in the air by rough seas, landing on a metal ship deck and heavy equipment. On July 25, 2002 he underwent open fixation of the right femur with a long interlocking intramedullary rod and screws, authorized by the Office. Appellant underwent a second procedure on January 6, 2003 to reduce a right supracondylar femur fracture at the tip of the previously placed intramedullary rod. He returned to work in a light-duty status on July 8, 2003. On January 7, 2004 appellant underwent surgical removal of two discs and two washers from the right distal femur at the knee, using medial and lateral incisions. He returned to light duty then again stopped work on March 31, 2004 when his temporary detail to a clerical light-duty position ended. Appellant returned to work as a police officer in full duty status on May 13, 2004. The Office accepted a left shoulder condition sustained on or before June 2004. Appellant again stopped work on October 25, 2004. He received appropriate wage-loss compensation for work absences from July 26, 2002 onward.

In an April 16, 2004 repot, Dr. Michael J. Sullivan, an attending Board-certified orthopedic surgeon, noted full range of motion of the right knee with good quadriceps strength. He noted no work restrictions. Dr. Sullivan released appellant to perform a physical agility test that required running, carrying a 150-pound dummy, scaling a six foot fence and running an obstacle course. He reviewed the police officer position description and opined that appellant could perform those duties. Dr. Sullivan stated that appellant would reach maximum medical improvement in May 2004. He stated that appellant had no limitations on his activities, with "no orthopedic contraindications to vigorous intensity physical exercise or physically confrontative situations."[1]

On November 29, 2004 appellant filed a claim for a schedule award. He submitted additional medical evidence.

In a November 9, 2004 report, Dr. Burton McDaniel, an attending Board-certified physiatrist, provided a history of injury and treatment, reviewed the medical record and performed a detailed clinical examination. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A. *Guides*), he performed a schedule award calculation. Regarding the right lower extremity, Dr. McDaniel opined that appellant had a 27 percent impairment of the leg due to Grade 3/5 strength in right hip abduction and 2 percent impairment for Grade 4/5 strength of the extensor hallucis longus according to Table 17-8, page 532.[2] He noted five percent impairment due to atrophy of the right thigh, according to Table 17-6 page 530.[3] Dr. McDaniel assigned two percent impairment

[1] An October 31, 2004 bone scan showed mildly increased uptake in the right femoral shaft and metaphyseal-epiphyseal area, indicative of post-traumatic status and degeneration.

[2] Table 17-8, page 532 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment Due to Lower Extremity Muscle Weakness."

[3] Table 17-6, page 530 of the fifth edition of the A.M.A., *Guides* is entitled, "Impairment Due to Unilateral Leg Muscle Atrophy."

for impairment of the right lateral femoral cutaneous nerve according to Table 17-37, page 552.[4] He added these impairments to equal a 36 percent impairment of the right lower extremity. Regarding the left upper extremity, Dr. McDaniel assigned a two percent impairment based on Grade 4/5 strength in internal rotation of the shoulder. He noted an additional two percent impairment based on Grade 4/5 strength in external rotation of the left shoulder. Dr. McDaniel added these impairments for a total four percent impairment of the left upper extremity due to residual weakness.

The Office referred Dr. McDaniel's report to an Office medical adviser for review. In a December 8, 2004 report, the Office medical adviser concurred with Dr. McDaniel's assessment of 27 percent impairment due to right hip weakness, 2 percent for weakness of the extensor hallucis longus and 2 percent for impairment of the lateral femoral cutaneous nerve. The medical adviser also concurred with Dr. McDaniel's assessment of four percent impairment to the left upper extremity. However, the medical adviser did not allow the two percent impairment for right thigh atrophy according to Table 17-2, page 526.[5] Using the Combined Values Chart at page 604, the medical adviser calculated a 29 percent impairment of the right lower extremity.

By decision dated January 25, 2005, the Office granted appellant a schedule award for a 29 percent permanent impairment of the right lower extremity and a 4 percent impairment of the left upper extremity. The period of the award ran from November 19, 2004 to November 21, 2006.

In a February 4, 2005 letter, appellant requested an oral hearing, held on January 6, 2006. At the hearing, he asserted that he sustained a ratable impairment of the right knee that should be considered in calculating a schedule award. Appellant submitted additional evidence.

In a September 23, 2004 letter, Dr. Sullivan stated that appellant reached maximum medical improvement on May 18, 2004 regarding the July 25, 2002 injuries and their sequelae. He opined that appellant had a 12 percent impairment of the right lower extremity according to the fifth edition of the A.M.A., *Guides*. Appellant also submitted copies of Dr. Sullivan's treatment notes from February 2002 through 2004 previously of record and chart notes from 2005 that do not address the schedule award claim.

By decision dated and finalized March 9, 2006, the Office hearing representative affirmed the January 25, 2005 decision, finding that appellant had not established that he sustained greater than a 29 percent impairment of the right leg and a 4 percent impairment of the left arm. The hearing representative found that the weight of the medical evidence rested with the Office medical adviser, who applied the A.M.A., *Guides* to Dr. McDaniel's findings. The hearing representative further found that appellant did not submit medical evidence indicating

[4] Table 17-37, page 532 of the fifth edition of the A.M.A., *Guides* is entitled, "Impairments Due to Nerve Deficits."

[5] Table 17-2, page 526 of the fifth edition of the A.M.A., *Guides* is entitled, "Guide to the Appropriate Combination of Evaluation Methods."

any greater percentages of impairment than those awarded. She noted that while appellant contended "his knee should be rated … he submitted no medical evidence indicating ratable impairment to the knee."[6]

In an undated letter received by the Office on July 26, 2006, appellant asserted that the Office hearing representative refused to review x-rays of his leg or allow him to show her his gait derangement and leg deformities. Appellant also asserted that the Office wrongfully refused to consider impairment to his knee in calculating his schedule award.

By decision dated August 2, 2006, the Office denied reconsideration of the March 9, 2006 decision on the grounds that the evidence submitted was insufficient to warrant a merit review. The Office found that appellant's letter requesting reconsideration, the only evidence he submitted, did not contain any new, relevant evidence or establish that the Office committed legal error.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[7] provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[8] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[9]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[10] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedures for

[6] The record contains evidence regarding a June 29, 2006 left index finger dislocation sustained during a defensive tactics exercise. There is no claim of record for a left index finger injury. Therefore, the issue of the left index finger injury is not before the Board on the present appeal and these documents are irrelevant to the present appeal.

[7] 5 U.S.C. §§ 8101-8193.

[8] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[9] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[10] *See Paul A. Toms*, 28 ECAB 403 (1987).

determining impairments of the upper extremities due to pain, discomfort, loss of sensation or loss of strength.[11] Chapter 17 of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a fractured right femur, right knee contusion, contusion of the right lower leg, superficial face, neck and scalp injuries and a left shoulder condition. Appellant claimed a schedule award for impairment to the left upper and right lower extremities.

Dr. McDaniel, an attending Board-certified physiatrist, submitted a November 9, 2004 schedule award evaluation. He found a 27 percent impairment of the right lower extremity due to Grade 3/5 strength in right hip abduction and 2 percent impairment for Grade 4/5 strength of the extensor hallucis longus according to Table 17-8, page 532. He assigned an additional five percent impairment due to atrophy of the right thigh, according to Table 17-6 page 530. He also found a two percent impairment for impairment of the right lateral femoral cutaneous nerve according to Table 17-37, page 552. Dr. McDaniel added these impairments to equal a 36 percent impairment of the right lower extremity. He found a four percent impairment of the left upper extremity, two percent for weakness in internal rotation of the shoulder and two percent for weakness in external rotation.

In a December 8, 2004 report, an Office medical adviser reviewed Dr. McDaniel's report. He concurred with Dr. McDaniel's assessment of a four percent impairment of the left upper extremity due to shoulder impairments. Dr. McDaniel agreed with the 27 percent impairment he assessed due to right hip weakness, 2 percent for weakness of the extensor hallucis longus and 2 percent for impairment of the lateral femoral cutaneous nerve. The medical adviser found, however, that Dr. McDaniel improperly assigned an additional two percent impairment due to right thigh atrophy, in contravention of Table 17-2, page 526, which prohibited assessing atrophy in conjunction with muscle weakness and peripheral nerve impairment. Using the Combined Values Chart, the Office medical adviser combined the 27 and 2 percent impairments for weakness to equal 28 percent. He then combined the 28 percent impairment with the 2 percent impairment for nerve dysfunction to equal 29 percent. The Board finds that the Office medical adviser applied the appropriate tables and grading schemes of the A.M.A., *Guides* to Dr. McDaniel's findings and correctly calculated the 29 percent impairment to the right lower extremity.

Appellant does not contest the correctness of the schedule award for left upper extremity impairment. He does not assert that the assessment of the impairments found by Dr. McDaniel was incorrect. Rather, appellant contends that the evaluation of his right lower extremity is incomplete. He asserts entitlement to an additional schedule award for the right lower extremity due to knee impairment. But appellant did not submit medical evidence demonstrating a ratable impairment of the right knee. Dr. Sullivan, an attending Board-certified orthopedic surgeon,

[11] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

[12] A.M.A., *Guides*, Chapter 17, "The Lower Extremities," pp. 523-561 (5th ed. 2001).

stated on April 16, 2004 that appellant had a full range of motion of the right knee with good quadriceps strength. He added that appellant had "no orthopedic contraindications to vigorous intensity physical exercise." Dr. McDaniels performed a detailed clinical examination but did not find abnormalities of the right knee. Appellant's physicians thus did not find a ratable impairment of the right knee. He has, therefore, failed to establish that he is entitled to an additional schedule award in this regard.

LEGAL PRECEDENT -- ISSUE 2

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) constituting relevant and pertinent new evidence not previously considered by the Office.[13] Section 10.608(b) provides that when an application for review of the merits of a claim 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.[14]

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.[15] Appellant need only submit relevant, pertinent evidence not previously considered by the Office.[16] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[17]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for an augmented schedule award by a March 9, 2006 decision. The hearing representative found that appellant did not submit medical evidence establishing that he sustained greater than the 29 percent impairment of the right leg and 4 percent impairment of the left arm previously awarded. Appellant requested reconsideration in a July 26, 2006 letter, asserting that the Office erred by failing to review x-rays of his left leg and by not considering impairment to the right knee in calculating his schedule award.

The critical issue at the time of the last merit decision in the case was whether appellant established that he sustained greater percentages of impairment than those previously awarded. To be relevant, the evidence submitted in support of the July 26, 2006 request for reconsideration must address that issue. Appellant's letter does not contain medical evidence establishing that he

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id*. at § 10.608(b).

[15] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[16] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[17] *Annette Louise*, 54 ECAB 783 (2003).

sustained greater than the percentages of impairment awarded. Also, his letter is insufficient to establish legal error by the Office. Therefore, the letter is irrelevant to the claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.[18] Thus, under the circumstances of this case, appellant's letter is insufficient to warrant reopening his case for a review of the merits.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he is not entitled to a review of the merits of his claim. Therefore, the Office's August 2, 2006 decision denying appellant's request for reconsideration is proper under the law and facts of this case.

CONCLUSION

The Board finds that appellant has not established that he sustained greater than a 29 percent impairment of the right leg and a 4 percent impairment of the right arm, for which he received schedule awards. The Board further finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 2 and March 9, 2006 are affirmed.

Issued: April 16, 2007
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

[18] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).