United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 07-1372**
	)	**Issued: October 10, 2007**
DEPARTMENT OF HOMELAND SECURITY, FEDERAL AIR MARSHAL SERVICE, Charlotte, NC, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 26, 2006 decision regarding a schedule award and the Office's September 21, 2006 decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 6, 2005 appellant, then a 43-year-old civil aviation security specialist, filed a traumatic injury claim alleging that he sustained a left knee injury on that date when it made

contact with a concrete surface during range combat activities. He did not stop work at that time but later stopped work for intermittent periods.

The findings of July 6, 2005 magnetic resonance imaging scan testing revealed a mild intrasubstance degenerative signal of the posterior horn of the left medial meniscus. Dr. David R. Kingery, an attending Board-certified orthopedic surgeon, diagnosed a left medial meniscus tear. The Office accepted that appellant sustained a left knee sprain/strain and a left medial meniscus tear and paid compensation for periods of disability. On September 23, 2005 Dr. Kingery performed a partial left medial meniscectomy which was authorized by the Office.

On November 8, 2005 appellant returned to regular full-time work for the employing establishment.[1] On November 28, 2005 Dr. Kingery stated that appellant complained of mild pain in the medial area of his left knee but noted that he exhibited good range of motion. On January 3, 2006 he indicated that appellant had some mild pain on McMurray's maneuver of the left knee but had no swelling and exhibited excellent knee motion.

The Office requested that Dr. Kingery provide an assessment of the permanent impairment to appellant's left leg. On February 28, 2006 he indicated that appellant had full flexion and extension of the left knee and indicated that his collateral and cruciate ligaments were stable. Dr. Kingery stated that appellant had reached maximum medical improvement and was cleared to perform all his normal physical activities. He noted: "Based upon the loss of his medial meniscus and his future potential for degenerative changes, [five] percent permanent partial impairment is recommended."

On May 15, 2006 Dr. Harry L. Collins, Jr., a Board-certified orthopedic surgeon and Office district medical adviser, reviewed the medical evidence of record. He concluded that appellant had a two percent permanent impairment of his right leg due to his partial medial meniscectomy under Table 17-33 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The Office provided Dr. Kingery with a chance to comment on Dr. Collins' impairment rating, but there was no response in the time period allotted by the Office.

In a June 26, 2006 award of compensation, the Office granted appellant a schedule award for a two percent permanent impairment of his left leg.[2] The award ran for 5.76 weeks from March 1 to April 10, 2006.

On August 28, 2006 appellant requested reconsideration of his claim. He submitted a July 18, 2006 form report in which Dr. Kingery noted pain upon squatting and running which interfered with but did not prevent activity. Dr. Kingery also indicated that appellant had "weakness of quadriceps." In a September 21, 2006 decision, the Office denied appellant's request for further review of the merits of his claim.

[1] Dr. Kingery placed some restrictions on the distances that appellant could run. Appellant was periodically required to perform to pass physical fitness tests which included running tasks.

[2] The Office inadvertently indicated that the award was for the left knee but it actually was for the left leg.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee sprain/strain and a left medial meniscus tear. On September 23, 2005 Dr. Kingery, an attending orthopedic surgeon, performed a partial left medial meniscectomy. In a June 26, 2006 award of compensation, the Office granted appellant a schedule award for a two percent permanent impairment of his left leg.

The Board finds that Dr. Collins, a Board-certified orthopedic surgeon, who served as an Office district medical adviser, properly determined that appellant had a two percent permanent impairment of his left leg. Dr. Collins reviewed the medical evidence of record and correctly concluded that appellant had a two percent permanent impairment of his right leg due to his partial medial meniscectomy.[6] On February 28, 2006 Dr. Kingery noted: "Based upon the loss of his medial meniscus and his future potential for degenerative changes, [five] percent permanent partial impairment is recommended."[7] However, this opinion is of limited probative value in that the physician failed to provide an explanation of how he rated permanent impairment in accordance with the A.M.A., *Guides*, the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[8] As the report of Dr. Collins provided only evaluation which conforms with the A.M.A., *Guides*, it constitutes the

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] *See* A.M.A., *Guides* 546, Table 17-33. There is no indication that appellant had any other ratable impairments due to strength, motion or pain deficits. He consistently exhibited normal range of motion on flexion and extension of the left knee and there is no evidence that he had significant pain or weakness after reaching maximum medical improvement. *See generally id.* at 531-37, 550-53, 565-86.

[7] Dr. Kingery also indicated that appellant had full flexion and extension of the left knee and indicated that his collateral and cruciate ligaments were stable.

[8] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

weight of the medical evidence.[9] Appellant has not shown that he has more than a two percent permanent impairment of his left leg.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulation provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[13] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[14]

ANALYSIS -- ISSUE 2

In support of his timely reconsideration request, appellant submitted a July 18, 2006 form report of Dr. Kingery. The submission of this report did not require reopening of appellant's claim because it is not relevant to the underlying issue of the present case, *i.e.*, whether he has shown that he has more than a two percent permanent impairment of his left leg. Dr. Kingery's report did not provide any impairment rating for appellant's left leg which was derived in accordance with the relevant standards of the A.M.A., *Guides*.[15] Therefore, it is not relevant to the issue in this case.

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of its June 26, 2006 decision under section 8128(a) of the Act, because the evidence he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered

[9] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[10] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id.* at § 10.607(a).

[13] *Id.* at § 10.608(b).

[14] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[15] Dr. Kingery indicated that appellant had some left knee pain and quadriceps weakness, but he did not describe these ostensible deficits in enough detail to determine whether they would show a ratable permanent impairment under the standards of the A.M.A., *Guides*.

by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 21 and June 26, 2006 decisions are affirmed.

Issued: October 10, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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