United States Department of Labor
Employees' Compensation Appeals Board

G.P., Appellant	)	
	)	**Docket No. 07-1825**
and	)	**Issued: October 10, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, 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 June 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 25, 2007 nonmerit decision denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's December 15, 2006 decision which is within one year of appellant's appeal, therefore, the Board also has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a permanent impairment to a scheduled member and (2) whether the Office properly denied further merit review of appellant's claim.

FACTUAL HISTORY

On September 8, 1999 appellant, then a 46-year-old carrier, filed a traumatic injury claim alleging that on June 15, 1999 his postal vehicle was hit in the rear causing a lower back

condition. On March 19, 2001 his claim was accepted for lumbar herniated nucleus pulposus (HNP) L4-5. Appellant's claim was subsequently also accepted for displacement of lumbar intervertebral disc without myelopathy, lumbosacral spondylosis without myelopathy, disorders of sacrum and pain in joint, pelvic region and thigh, left.

On July 17, 2006 appellant filed a claim for a schedule award. In a July 27, 2006 letter, the Office asked his orthopedic surgeon, Dr. Steve Nolan, to render an impairment rating of appellant's lower extremities by using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Nolan was asked to include in his report the date of maximum medical improvement, objective findings, diagnosis of the condition and percentage of impairment with an explanation of how it was calculated using the tables in the A.M.A., *Guides*. In a separate letter, the Office informed appellant that the information was needed from his physician to process his claim. It received a July 26, 2006 visit note from Dr. Nolan who diagnosed lumbosacral pain with chronic pain secondary to failed back syndrome. Dr. Nolan opined that there was good strength and sensation in both lower extremities and noted that straight leg raising was equivocal on the right and negative on the left.

On September 8, 2006 the Office denied appellant's claim for a schedule award on the grounds that the evidence was insufficient to establish that appellant sustained a permanent impairment of a scheduled member.

On October 24, 2006 appellant requested reconsideration. The Office received additional information. In a September 13, 2006 letter, Dr. Nolan stated that appellant was having chronic back pain radiating into both lower extremities and noted that straight leg raising caused pain bilaterally. He also diagnosed lumbosacral pain secondary to failed back syndrome. In an August 22, 2006 letter, Dr. Tova Alladice, a physiatrist, opined that appellant had reached maximum medical improvement and that he had a five percent impairment based on the A.M.A., *Guides*, fourth edition. In her letter, she noted that appellant had continuing pain and weakness in the left leg and that strength was slightly diminished in the left. In an August 30, 2006 medical evaluation report, Dr. Alladice diagnosed backache and opined that appellant reached maximum medical improvement on August 8, 2006. In an October 9, 2006 report, Dr. Jesse S. Hironymous, a chiropractor, opined that appellant had a 14 percent impairment of the lumbar spine based on Table 75 of the fourth edition of the A.M.A., *Guides*. He noted appellant's pain in valsalva with pain running down the left leg as well as decreased sensation of the left lateral thigh and increased sensation of the left medial leg. In an October 9, 2006 medical evaluation report, Dr. Hironymous diagnosed "lumbar region" and opined that appellant had reached maximum medical improvement on October 9, 2006. In an October 25, 2006 letter, Dr. Nolan diagnosed lumbosacral pain secondary to failed back syndrome and stated that appellant had an impairment rating of 14 percent of the whole body.

By December 15, 2006 merit decision, the Office denied modification of the prior decision on the grounds that the evidence was insufficient to support permanent impairment of appellant's lower extremities.[1]

[1] The December 15, 2006 decision states that there was no evidence of a "permanent impairment in excess of six percent," however, none of the Office's prior decisions accepted an impairment.

On April 6, 2007 appellant requested reconsideration. The Office received additional information from her physicians. In a December 6, 2006 letter, Dr. Nolan stated that appellant had an impairment rating of 14 percent of the whole body. He noted that appellant still had pain in his back with intermittent radiation to both lower extremities but good strength and sensation in both legs. In a January 17, 2007 letter, Dr. Nolan stated that appellant's impairment rating was unchanged. On March 5, 2007 he concurred with the results, conclusion and whole person impairment rating in the amended evaluation report from Dr. Scott Neuburger, a chiropractor, who related to an evaluation on October 9, 2006. The amended report stated that it was for an "impairment rating evaluation of the lumbar spine." The report used the A.M.A., *Guides* fourth edition in finding that appellant had a "*lumbar* spine whole person impairment" of 14 percent. In a March 19, 2007 letter, Dr. Nolan stated that appellant had intermittent pain in both lower extremities and an unchanged impairment rating.

In an April 25, 2007 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that there was no substantive legal questions or new and relevant evidence submitted.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

No schedule award is payable for a member, organ or function of the body that is not specified in the Act or in the implementing regulations.[4] Because neither the Act nor the regulation provide for the payment of a schedule award for permanent loss of use of the back,[5] no claimant is entitled to such an award.[6]

Amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (2002). FECA Bulletin No. 01-05 issued January 29, 2001, provides that all claims examiners and hearing representatives should begin using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. This bulletin does not contain a separate attachment of mutually exclusive tables that must be used in lieu of the applicable tables in the fifth edition of the A.M.A., *Guides*.

[4] *Tania R. Keka*, 55 ECAB 354 (2004). *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment).

[5] *Tania R. Keka*, *supra* note 4. The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[6] *E.g.*, *Timothy J. McGuire*, 34 ECAB 189 (1982).

whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.[7]

The Board has long held that a medical opinion regarding permanent impairment which is not based upon the A.M.A., Guides, the standard 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.[8]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a back condition: lumbar HNP L4-5, displacement of lumbar intervertebral disc without myelopathy, lumbosacral spondylosis without myelopathy, disorders of sacrum and pain in joint, pelvic region and thigh, left. Although appellant may not receive a schedule award for permanent impairment to his back, he may be entitled to a schedule award for permanent impairment to his lower extremities if the accepted back condition caused such impairment.

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated. Neither the Act nor its implementing federal regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ."[9] Appellant is only entitled to receive a schedule award if he establishes that his back conditions caused impairment to a scheduled member of his body. The medical evidence of record, however, does not establish that he has any permanent impairment to a scheduled member due to his back conditions.

The Office received reports from Dr. Nolan dated July 26, September 13 and October 25, 2006. In each of his reports, Dr. Nolan diagnosed lumbosacral pain secondary to failed back syndrome. In his September 13, 2006 letter, he noted that appellant had chronic back pain radiating into both lower extremities but did not explain how appellant's back pain caused an impairment to his lower extremities. In his October 25, 2006 letter, Dr. Nolan opined that appellant had an impairment rating of 14 percent of the whole body. However, he failed to explain how he calculated the impairment based on the tables in the A.M.A., *Guides*. Even if Dr. Nolan had used the A.M.A., *Guide*s schedule awards are not permitted for the body as a whole,[10] therefore, his opinion is not probative. The Office also received reports from

[7] *Rozella L. Skinner*, 37 ECAB 398 (1986); *see* 5 U.S.C. § 8107(c)(2) (providing 288 weeks of compensation for the complete loss of a leg).

[8] *Carolyn Sellers* 50 ECAB 393 (1999).

[9] *James E. Mills*, 43 ECAB 215 (1991).

[10] 5 U.S.C. § 8101(19).

Dr. Alladice dated August 22 and 30, 2006, who opined that appellant had reached maximum medical improvement and had a five percent impairment but failed to identify which part of the body had the impairment. As stated previously, schedule awards are not permitted for the body as a whole,[11] therefore, Dr. Alladice's opinion is not probative.

Two reports dated October 9, 2006 from Dr. Hironymous were also submitted. He is a chiropractor. Section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[12] As Dr. Hironymous is not considered a physician under the Act, his report is not a proper basis for a schedule award.

Appellant did not submit any reports which established that he sustained a permanent impairment to a specified member, organ or function of the body identified in the Act or implemented regulations. The reports offer opinions as to percentage of permanent impairment but only for the whole body which is not an identified member under the Act and not eligible for a schedule award.

LEGAL PRECEDENT -- ISSUE 2

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 own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13]

In schedule award cases, a distinction is made between an application for an additional schedule award and a request for reconsideration of the existing schedule award. When a

[11] 5 U.S.C. § 8101(19).

[12] 5 U.S.C. § 8101(2).

[13] *Eugene F. Butler*, 36 ECAB 393 (1984).

claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this is a request for reconsideration. A claim for an additional schedule award may be based on new exposure to employment factors or on the progression of an employment-related condition, without new exposure, resulting in a greater permanent impairment.[14]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the denial of his request for a schedule award. He may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent new evidence not previously considered by the Office. Appellant did not argue that the Office erroneously applied a point of law nor did he advance a relevant legal argument not previously considered. He did submit additional evidence with his reconsideration request. The issue is whether the evidence submitted constitutes relevant and pertinent new evidence which would require a merit review by the Office. Appellant submitted reports from Dr. Nolan dated December 6, 2006 to March 19, 2007. In the December 6, 2006 report, Dr. Nolan opined that appellant had an impairment rating of 14 percent for the whole body but did not identify how he calculated the percentage. On March 5, 2007 Dr. Nolan concurred with an amended evaluation report by Dr. Neuburger which gave a "lumbar spine whole person impairment" rating of 14 percent. As previously stated, the Act and the regulations do not provide schedule awards for impairment to the body as a whole or for loss of use, of the back.[15]

Evidence that does not address the particular issue involved does not constitute a basis for reopening a claim.[16] The underlying issue with respect to appellant's claim is whether he has a permanent impairment to a scheduled member as identified by the Act or the regulations. None of the reports submitted gave an impairment rating for a scheduled member, nor do they identify how appellant's accepted back conditions cause permanent impairment to a scheduled member.

While the evidence submitted by appellant was new in that the reports themselves had not been previously reviewed by the Office, they were duplicative as they gave the same opinion and same information as previously submitted reports. As the evidence put forth did not constitute relevant and pertinent new evidence a merit review by the Office was not warranted.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award and properly refused to reopen appellant's case for further review of the merits of his claim.

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[14] *Rose V. Ford*, 55 ECAB 449 (2004); *Linda T. Brown*, 51 ECAB 115 (1999). This distinction is also made at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002).

[15] *Tania R. Keka*, note 5.

[16] *Betty A. Butler*, 56 ECAB ___ (Docket No. 04-2044, issued May 16, 2005).

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2007 and December 15, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 10, 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