United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 07-1037**
	)	**Issued: September 12, 2007**
DEPARTMENT OF DEFENSE, DECA - SOUTHERN REGION, Fort Lee, VA, Employer	)	

Appearances:
Alan J. Shapiro, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 8, 2007 which denied her request for reconsideration. The record also contains merit decisions dated August 10, 2006, denying modification of its previous decision that she was not entitled to a schedule award, and a January 5, 2007 decision, denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has any permanent impairment of the left lower extremity causally related to her accepted condition; (2) whether the Office properly denied appellant's request for an oral hearing as reconsideration was previously requested; and (3) whether the Office properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 19, 2001 appellant, then a 54-year-old cashier, filed an occupational disease claim alleging that she developed heel pain due to standing for long periods of time. She first became aware of her condition and its relation to her employment on June 19, 2001. The Office accepted the condition of exacerbation of left plantar fasciitis. Appellant voluntarily retired from the employing establishment effective April 30, 2003.

On June 3, 2003 appellant filed a claim for a schedule award. To further develop appellant's claim, the Office, in a letter dated December 15, 2004, requested that appellant's treating physician provide an opinion as to whether appellant had a lower extremity impairment causally related to her accepted condition under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (hereinafter A.M.A., *Guides*).

In a February 25, 2005 report, Dr. John B. Bieltz, an orthopedic surgeon, advised that appellant had been treated in the military for quite some time, but she was being seen as a new patient. He advised that he reviewed appellant's records, noted that her chronic plantar fasciitis had been treated for four years and opined that maximum medical improvement had been reached. Dr. Bieltz noted that appellant also had some mild degenerative joint disease in her right knee and mild carpal tunnel in her right hand. Under Table 17-33 of the A.M.A., *Guides*, he determined that appellant had a 4 percent whole person impairment, 10 percent lower extremity impairment and 14 percent foot impairment for her bilateral heel spurs. Dr. Bieltz also determined that appellant had five percent lower extremity impairment for her knee and five percent upper extremity impairment for her carpal tunnel. No examination findings were provided.

In a March 28, 2005 report, an Office medical adviser reviewed Dr. Bieltz's February 25, 2005 report. He opined that the date of maximum medical improvement was unknown and the claimant's medical records were not sufficient to show a permanent impairment of the left foot or leg under the A.M.A., *Guides.* The Office medical adviser advised that findings on the left foot or leg were needed to show permanent impairment under the A.M.A., *Guides.*

In an April 21, 2005 letter, the Office advised Dr. Bieltz of the deficiencies in his impairment rating and requested that he provide additional information to show how appellant's impairment of the left leg was calculated. It further requested that Dr. Bieltz limit his rating to appellant's left leg as that was where the accepted condition was.

In a May 6, 2005 report, Dr. Bieltz indicated that, according to appellant's military records, she has calcaneal heel spurs on both feet. He advised that appellant's examination was consistent with chronic plantar fasciitis and that maximum medical improvement had been reached. In accordance with Table 17-33 of the A.M.A., *Guides*, Dr. Bieltz opined that appellant had 4 percent whole person impairment, 10 percent lower extremity impairment and 14 percent foot impairment.

By decision dated June 8, 2005, the Office determined that appellant did not meet her burden of proof to establish that she has a permanent impairment of her left leg which entitled

her to schedule award compensation. The Office indicated that Dr. Bieltz's reports failed to demonstrate a measurable impairment.

In a July 5, 2005 report, Dr. Bieltz stated that, when appellant was examined on May 6, 2005, he performed a complete physical examination, x-rays, and a review of the medical records regarding her left foot. He stated that her past and present examinations were consistent with chronic plantar fasciitis. Dr. Bieltz reiterated his opinion that appellant had 4 percent whole person, 10 percent lower extremity and 14 percent foot impairment under Table 17-33 of the A.M.A., *Guides*.

In a letter dated August 4, 2005, appellant requested both a hearing before an Office hearing representative and reconsideration of the June 8, 2005 Office decision. Following the Office's letter requesting clarification of her appeal process, appellant requested a hearing in a letter dated September 22, 2005.

By decision dated December 19, 2005, the Office found that appellant was not entitled to a hearing as a matter of right as her August 2005 request was not made within 30 days of the June 8, 2005 decision. The Office further considered the matter and denied a discretionary hearing because appellant could further pursue her claim by submitting new evidence with a reconsideration request.

On June 7, 2006 appellant requested reconsideration. She requested that her claim be expanded to include bilateral heel spurs. In a November 21, 2005 report, Dr. Bieltz repeated the history of appellant's left heel pain and medical history. He reported the results of his physical examination and noted that x-rays showed bilateral heel spurs. Dr. Bieltz diagnosed chronic plantar fasciitis and opined that appellant's condition was caused or aggravated by the prolonged standing on hard surfaces. He opined that her condition was permanent and under Table 17-33 of the A.M.A., *Guides,* she had 4 percent whole person impairment, 10 percent lower extremity impairment and 14 percent foot impairment. Dr. Bieltz further opined that appellant could engage in sitting-type work and that she must wear custom orthotics in her shoes at all times.

By decision dated August 10, 2006, the Office denied modification of its June 8, 2005 decision. It noted that it could neither expand appellant's claim to include bilateral heel spurs as a consequential injury or issue a schedule award for such condition as bilateral heel spurs had neither been claimed as resulting from occupational factors or exposure nor claimed as consequential to the already accepted medical condition.[1]

On December 2, 2006 appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review. By decision dated January 5, 2007, the Office denied appellant's request for a hearing on the grounds that reconsideration was already requested. The Office additionally denied appellant's request for a hearing on the grounds that the issues involved could be addressed equally well by requesting reconsideration and submitting new

[1] In a letter dated August 10, 2006, the Office advised appellant that the evidence of file was not sufficient to proceed with further development on her claim for bilateral heel spurs. It further advised her on how to pursue this issue as either a consequential injury claim or a new claim.

evidence which established that she sustained a permanent impairment to a scheduled member due to her accepted work injury.

In a January 30, 2007 letter, appellant requested reconsideration. In support of her claim, she submitted an October 20, 2006 letter from the Social Security Administration, noting that she met the medical requirements for disability benefits, and medical reports from Dr. Bieltz dated October 9 and November 3, 2006. In his October 9, 2006 report, Dr. Bieltz provided range of motion findings for appellant's hands. In his November 3, 2006 report, he diagnosed mild right carpal tunnel syndrome and bilateral plantar fasciitis, which he opined were causally related to her job which involved prolonged standing and walking. Dr. Bieltz stated that appellant's examination was consistent with chronic plantar fasciitis and, in accordance with the A.M.A., *Guides*, Table 17-33, she had 4 percent whole person impairment, 10 percent lower extremity impairment, and 14 percent foot impairment.

By decision dated February 8, 2007, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a review of the case on the merits. It found that appellant failed to submit new and relevant medical evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[3]

The schedule award provision of the Act[4] and its implementing regulation[5] 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.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left plantar fasciitis. Appellant later claimed entitlement to schedule award compensation and submitted reports dated February 25,

[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See id.*

May 6, July 5 and November 21, 2005 in which Dr. Bieltz, an attending orthopedic surgeon, determined that appellant had a 4 percent whole person, 10 percent permanent impairment to her lower extremity and 14 percent foot impairment under Table 17-33 of the A.M.A., *Guides*. The Board finds that appellant did not meet her burden of proof to establish that she has permanent impairment of her left leg because she has not shown that the impairments reported by Dr. Bieltz are causally related to her accepted condition.

The Board notes that Dr. Bieltz did not provide a rationalized medical opinion explaining how the above-noted lower extremity impairments could be related to appellant's accepted left plantar fasciitis and the medical evidence of record does not otherwise support such a finding. Appellant's claim was only accepted for a left plantar fasciitis. The Office has not accepted that her bilateral heel spurs or bilateral plantar fasciitis were related to the employment injury. In each of Dr. Bieltz's reports, he reports that appellant has bilateral heel spurs or bilateral plantar fasciitis and fails to focus solely on her left lower extremity. While he states in his July 5, 2005 report that such impairment finding is for the left side, he fails to provide any examination findings of the left side or clearly show how the impairment rating relates solely to the left side. Such medical rationale is particularly necessary in the present case for the further reason that the medical evidence of record suggests that appellant had other lower extremity conditions on both sides. In its April 21, 2005 letter, the Office requested that Dr. Bieltz limit his rating to appellant's left leg and show how appellant's impairment of the left leg was calculated. However, Dr. Bieltz did not provide any support for his opinion. For these reasons, the Office properly found that appellant did not show that he has permanent impairment to his left lower extremity which entitles her to schedule award compensation.[7]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.[8] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[9] Office procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[10]

[7] The Office found that the condition of bilateral heel spurs had neither been claimed as resulting from occupational factors or exposure nor claimed as consequential to already accepted medical conditions. Thus, this issue is not before the Board. *See* 20 C.F.R. § 501.2(c). In an August 10, 2006 letter, the Office advised appellant how to proceed if she wished to claim either a consequential injury or a new injury.

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. §§ 10.616, 10.617.

[10] *Claudio Vasquez*, 52 ECAB 496 (2002).

ANALYSIS -- ISSUE 2

In this case, appellant requested a hearing on December 2, 2006. In its January 5, 2007 decision, the Office denied this request on the grounds that she had previously requested reconsideration under section 8128. The record shows that the Office's August 10, 2006 decision denying modification was based on appellant's June 7, 2006 reconsideration request, after a previous request for an oral hearing was denied. As noted, a claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is made after a reconsideration request.[11] As appellant had previously requested reconsideration, the Office properly found that she was not entitled to a hearing as a matter of right.

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such a matter of right. In the January 5, 2007 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[12] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion. Here, the Office informed appellant in its January 5, 2007 decision, that it had considered the matter in relation to the issue involved and denied her hearing request on the basis that appellant could further pursue the matter through the reconsideration process. There is no indication that the Office abused its discretion in this case in denying appellant's hearing request. Further, appellant was advised that she could request reconsideration and submit evidence in support of his argument that she sustained a permanent impairment to a scheduled member due to her accepted work injury. Thus, the Board finds that the Office properly denied appellant's request for a hearing in its January 5, 2007 decision.

LEGAL PRECEDENT -- ISSUE 3

Section 10.606(b)(2) of Office 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 reconsideration 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]

[11] *See supra* note 8; 20 C.F.R. § 10.616(a) (to obtain a hearing, a claimant must not have previously submitted a reconsideration request on the same decision).

[12] *See Daniel J. Perea*, 42 ECAB 214 (1990).

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.608(b).

Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[15] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 3

In her letter requesting reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[17]

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no new medical evidence relevant to whether she has a permanent impairment of the left leg to which she is entitled to a schedule award under the Act. Appellant's submission of the October 20, 2006 letter from the Social Security Administration is irrelevant to the claim as it is insufficient to establish that she was entitled to a schedule award under the Act. The Board has held that the submission of evidence irrelevant to the issue involved is not a basis for reopening a case.[18] The October 9, 2006 report of Dr. Bieltz is irrelevant to the issue involved as it pertains to examination findings on appellant's hands and does not relate to a permanent partial impairment to the left lower extremity. In his November 3, 2006 report, Dr. Bieltz diagnosed appellant with bilateral plantar fasciitis and again provided an impairment rating of 4 percent whole person, 10 percent lower extremity impairment and 4 percent foot rating. This report is duplicative of information previously provided in Dr. Bieltz's November 21, 2005 medical report, which the Office had considered in its August 10, 2006 decision. As noted, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[19] Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and, by its decision dated February 8, 2007, the Office properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an entitlement to a schedule award for her accepted condition. The Board also finds that the Office properly denied appellant's request for an oral hearing and her request for reconsideration.

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[15] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[16] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *see Daniel Deparini*, 44 ECAB 657 (1993) (in determining whether an employee is disabled under the Act, the findings of the Social Security Administration are not determinative of disability under the Act).

[19] *Helen E. Paglinawan, supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the February 8 and January 5, 2007 and August 10, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 12, 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