United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
	)	
and	)	**Docket No. 07-2296**
	)	**Issued: April 10, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Los Angeles, CA, 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 September 27, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' August 16, 2007 nonmerit decision and a February 8, 2007 merit hearing representative decision. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a one percent impairment to her right upper extremity; and (2) whether the Office properly refused to reopen her case for reconsideration of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

Appellant, a 34-year-old baggage screener, injured her right bicep while lifting heavy luggage on July 1, 2004. She filed a claim for benefits on July 5, 2004, which the Office accepted for right upper arm strain.

On October 18, 2004 appellant filed a (Form CA-7) claim for a schedule award based on loss of use of her right arm.

In a report dated November 29, 2004, Dr. Ibraham Yashruti, Board-certified in orthopedic surgery, related appellant's complaints of intermittent, throbbing pain in the right biceps, on a level of about 3 out of 10. He stated that she experienced this pain while engaged in heavy lifting with her right arm. Dr. Yashruti's examination of the right arm indicated normal sensory and neurological findings and normal range of motion. He noted no abnormalities other than the mild tenderness and annoying discomfort in the right biceps. Dr. Yashruti also completed a form in which he noted that appellant had elbow pain, which could be localized to the area of the biceps and that the pain interfered with heavy lifting activities.

In a report dated December 18, 2004, Dr. Arthur S. Harris, an Office medical adviser reviewed Dr. Yashruti's findings and conclusions and applied them to the applicable figures and tables of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*) fifth edition. The Office medical adviser determined that appellant had a one percent permanent impairment of the right upper extremity. He stated:

> "[Appellant] does not have any impairment for muscle weakness, atrophy, instability or neurological deficit. [She] does have Grade 4 pain/decreased sensation that is forgotten with activity [1 to 25 percent], Table 16-10, page 482 of the radial nerve [5] Table 16-15 page 492, which results in 1 percent impairment of the right upper extremity for pain that is forgotten with activity.
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> "[Appellant] has one percent impairment of the right upper extremity. The one percent impairment of the right upper extremity is the sole impairment of the right upper extremity resulting from the accepted work injury of July 1, 2004. The date of maximum medical improvement is November 29, 2004, when the patient was seen for evaluation by Dr. Yashruti."

Regarding appellant's right elbow, Dr. Harris noted that she did have complaints of pain in the right elbow as well as in the upper arm. He also noted that examination of the right elbow was normal, with full range of motion, no evidence of motor weakness, muscle atrophy or neurologic deficit. Dr. Harris concluded that the diagnosis of right elbow tendinitis/strain had been established, but that appellant did not have any impairment of the elbow for schedule award purposes.

On January 10, 2005 the Office granted appellant a schedule award for a one percent permanent impairment of the right upper extremity for the period November 29 to December 20, 2004, for a total of 3.12 weeks of compensation.

In a report dated January 11, 2005, Dr. William Kim, a Board-certified orthopedic surgeon, stated:

> "[Appellant's] right shoulder bursitis has much improved, but she still has residual tenderness over the biceps muscle. This is with forced resistance to flexion. I have no surgical treatment to benefit her for the elbow, as this is more musculotendinous. I would recommend continued restricted activity. No

pushing, pulling and heavy lifting. With respect to her right shoulder, [appellant] feels her shoulder condition has resolved. I will see her back for final evaluation.

"She does have full range of motion [of the] right shoulder, but she does have mild positive impingement sign."

In a report dated April 6, 2005, Dr. Kim stated:

"[Appellant] comes to me today with the right arm pain and right forearm pain. She denies any frank numbness, tingling. It is not associated with neck movement. [Appellant] has had injection in her buttock with a week's relief. Most likely, this was steroid.... She probably does have rotator cuff impingement tend[i]nitis component. Today, [appellant] has pain into her arm with resisted supination indicating her biceps tend[i]nitis. Her forearm pain is less clearly defined. I believe this is just a general musculoligamentous strain in the forearm, perhaps related to her biceps. Neurologically, she is intact."

Dr. Kim diagnosed right biceps strain and right forearm strain.

On May 1, 2005 appellant filed a Form CA-7 claim for an additional schedule award based on a partial loss of use of her right lower extremity.

In a report dated July 25, 2006, Dr. Ghol Bahman Ha-Eri, Board-certified in orthopedic surgery, stated that appellant had nagging pain in the right upper arm with occasional muscle spasm. On examination, he calculated normal circumferential measurement and range of motion of the right upper extremity, right shoulder and right elbow. Motor strength and grip strength and sensory examination were also normal. Dr. Bahman Ha-Eri did not provide an impairment rating for the right arm.

In a report dated September 2, 2006, an Office medical adviser reiterated the findings he made in his December 18, 2004 report. He noted that appellant had Grade 4 pain/decreased sensation that is forgotten with activity 1 to 25 percent, Table 16-10, page 482 of the radial nerve five Table 16-15 page 492, which results in one percent impairment of the right upper extremity

On September 7, 2006 the Office found that the medical evidence of record did not establish that appellant had a right upper extremity impairment greater than the one percent already awarded. The Office indicated that the report from the Office medical adviser represented the weight of the medical evidence.

On September 28, 2006 appellant requested an oral hearing, which was held on December 12, 2006. She did not submit any additional medical evidence.

By decision dated February 8, 2007, an Office hearing representative affirmed the September 7, 2006 decision.

On May 22, 2007 appellant requested reconsideration. She submitted January 30 and April 24, 2007 reports from Dr. Kim. In his January 30, 2007 report, Dr. Kim stated findings on examination, calculated Jamar and circumferential measurements and stated:

"Previously, it was thought her pain in the right upper extremity is due to a biceps tendon problem in the elbow and the shoulder; that is, the insertion and origin originally. However, she reproducibly points to her biceps or mid-arm area as the source of maximum tenderness and pain.

"She may have a muscle partial tear or tend[i]nitis at this level. Therefore, to complete the information and data required to give an accurate ... report. I request MRI [magnetic resonance imaging] scan of the arm. I will see her back after study."

In his April 24, 2007 report, Dr. Kim noted that the MRI scan results showed no significant abnormalities, tears or muscular contraction of the right elbow and shoulder. He outlined work restrictions of no pushing, pulling or repetitive elevation of the right arm above the shoulder and no lifting exceeding 20 pounds. Dr. Kim rated a three percent whole person impairment under the A.M.A., *Guides*.

By decision dated August 16, 2007, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[2] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.[3]

ANALYSIS -- ISSUE 1

Based upon Dr. Yashruti's findings regarding appellant's right biceps in his report dated November 29, 2004, the Office medical adviser, Dr. Harris, determined that she had a one percent permanent impairment of the right upper extremity. Dr. Harris found that appellant had a Grade 4 sensory loss under Table 16-10, page 482, for a minimal abnormal sensation/pain, based on a range of 1 to 25 percent for measuring sensory deficit. Utilizing this calculation, he then found, pursuant to Table 16-15, page 492 that appellant had a one percent deficit of the radial nerve in the upper arm, based on a maximum rating of five percent. The one percent deficit was reached by multiplying the maximum value of 25 percent by 5 percent. The Office medical adviser found that there was no basis for according any additional impairment.

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[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 5 U.S.C. § 8107(c)(19).

[3] 20 C.F.R. § 10.404.

The Board finds that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a one percent permanent impairment of the right upper extremity.

Although Dr. Yashruti and Dr. Harris both found that appellant also had right elbow tendinitis/strain, in addition to the biceps strain, neither physician found that she was entitled to an additional schedule award for this elbow condition pursuant to the A.M.A., *Guides*. Dr. Bahman Ha-Eri indicated that appellant had nagging pain in the right upper arm with occasional muscle spasm. However, he noted normal findings on examination and did not provide an impairment rating for the right arm. Dr. Kim diagnosed bursitis and tendinitis of the right shoulder, right biceps strain and right forearm strain and imposed work restrictions. However, he did not indicate that appellant had any permanent impairment stemming from her work-related upper arm strain. Appellant has failed to provide probative medical evidence that she has greater than the one percent impairment of the right upper extremity already awarded. As she did not submit any additional evidence prior to the Office's February 8, 2007 decision, that decision is affirmed.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), 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 submitting relevant and pertinent evidence not previously considered by the Office.[4] 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.[5]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by the Office. The evidence she submitted is not pertinent to the issue on appeal. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[6] Appellant has not submitted any new medical evidence which addresses the relevant issue of whether she has any additional permanent impairment causally related to her accepted right bicep condition. Dr. Kim's reports, which indicated generally that appellant had pain in her right biceps without any significant abnormalities, were cumulative and repetitive of reports previously considered by the Office. Further, while he rated a three percent whole person impairment, this rating is not in conformance with the Act.[7] The Act does not allow payment of a schedule award for whole

[4] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[5] *Howard A. Williams,* 45 ECAB 853 (1994).

[6] *See David J. McDonald*, 50 ECAB 185 (1998).

[7] While the A.M.A., *Guides* provide for both impairment to the individual member and to the whole person, the Act does not provide for permanent impairment to the whole person. *Janae J. Triplette*, 54 ECAB 792 (2003).

person impairment. His reports did not contain any new medical opinion indicating that appellant had impairment greater than the one percent already awarded. Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.[8]

CONCLUSION

The Board finds that appellant has no more than a one percent permanent impairment to her right upper extremity. The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 16 and February 8, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: April 10, 2008
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

[8] On appeal, appellant has submitted new evidence. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy,* 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 501(c).