United States Department of Labor
Employees' Compensation Appeals Board

C.N., Appellant	)	
and	)	**Docket No. 08-1569**
	)	**Issued: December 9, 2008**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Marilyn Murano, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 9, 2008 appellant timely appealed a September 13, 2007 merit decision of the Office of Workers' Compensation Programs granting a schedule award and a February 26, 2008 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than eight percent permanent impairment of her right lower extremity for which she received a schedule award; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 23, 2004 appellant, then a 56-year-old letter carrier, filed an occupational disease claim alleging that she sustained a right knee condition in the performance of duty. Her claim was accepted for right knee medial collateral ligament strain and meniscus tear.

On July 12, 2004 appellant filed a claim for a schedule award. In a November 17, 2004 letter, the Office informed appellant that her claim would not be adjudicated until the medical evidence established that she had reached maximum medical improvement. Appellant underwent surgery on her right knee in May 2005.

Appellant was referred for an evaluation of any permanent impairment by Dr. Alan Kimelman, Board-certified in physical medicine and rehabilitation. In an August 16, 2007 report, Dr. Kimelman reviewed appellant's history of injury and medical treatment. He found that she had mild right knee pain which interfered with squatting. On examination, Dr. Kimelman noted equal leg strength between the muscle groups of both the right and left legs and advised that sensory examination was normal for both extremities. He measured appellant's calves and found atrophy of the right calf of two centimeters (cm) when compared to the left. Dr. Kimelman noted that appellant underwent a partial meniscectomy which represented 10 percent impairment due to loss of shock absorption.

In a September 2, 2007 report, Dr. Leonard Simpson, an Office medical adviser, reviewed the report of Dr. Kimelman. He noted that two cm of calf atrophy represented eight percent impairment under Table 17-6 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[1] The Office medical adviser noted appellant's complaint of pain with squatting, which he stated represented a Grade 4 deficit, or 25 percent sensory deficit, under Table 16-10, page 482. He identified the affected femoral nerve for which a maximum of seven percent impairment was allowed under Table 17-37, page 552. This represented two percent impairment for dysthesia; however, the medical adviser noted that impairment for atrophy could not be combined with the sensory impairment under the cross-usage chart at Table 17-2. In the alternative, the medical adviser noted that diagnosis-based impairment for the partial meniscectomy represented two percent impairment under Table 17-33, page 546. The method which provided the highest impairment rating was that based on calf atrophy of the right leg.

In a September 13, 2007 decision, the Office granted appellant a schedule award for eight percent impairment of the right lower extremity. The award ran for 23.04 weeks from May 6 to October 14, 2005.

On November 1, 2007 appellant requested reconsideration, contending that she should be referred for another examination as Dr. Kimelman did not adequately examine her and that she experienced constant knee pain. She did not enclose any additional evidence.

In a February 26, 2008 decision, the Office denied appellant's request for reconsideration finding that she did not submit new and relevant evidence in support of her claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions

[1] A.M.A., *Guides* (5th ed. 2001).

and organs of the body.[2] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[3] Effective February 1, 2001, schedule awards were determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[4]

In rating impairment of a lower extremity, the A.M.A., *Guides* provide a cross usage chart at Table 17-2 that provides which methods of impairment may be combined. It is the responsibility of the evaluating physician to explain the particular method by which an impairment rating is made.[5]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for a right medial collateral ligament strain and tear of the medial meniscus. She underwent surgery in May 2005. Appellant was examined by Dr. Kimelman, who made findings on physical examination of the right leg. Dr, Kimelman noted atrophy of the right calf when compared to the left and also addressed appellant's complaint of pain with squatting. However, he did not provide a final impairment rating.

Dr. Simpson, an Office medical adviser, reviewed the medical evidence and provided alternative impairment ratings for the right leg under the A.M.A., *Guides*. He noted that two cm atrophy of the right calf was measured by Dr. Kimelman. Under Table 17-6, page 530, the range of 2 to 2.9 cm of atrophy of the calf represents 8 to 13 percent impairment. Dr. Simpson properly determined that, as appellant's atrophy of two cm was at the lower end of the impairment range, it represented eight percent impairment. He considered alternative methods for rating impairment, noting that, under Table 17-37, dysthesia of the femoral nerve represented a maximum impairment of seven percent. Dr. Simpson advised that appellant's pain with squatting represented a Grade 4 deficit, or 25 percent sensory deficit. He noted that 25 percent of the 7 percent maximum value represented 2 percent impairment. Dr. Simpson also rated impairment based on the partial medial meniscectomy, which represents two percent impairment under Table 17-33, page 546. He properly noted that the cross-usage chart at Table 17-2 does not allow combining the three methods of impairment. Therefore, Dr. Simpson advised that the atrophy impairment rating provided the highest impairment rating.

According to the A.M.A., *Guides*, Table 17-2, page 526, the eight percent impairment for atrophy cannot be combined with the two percent impairment for the diagnosis-based meniscectomy rating or with the two percent impairment femoral nerve impairment. The two percent impairment for the meniscectomy may be combined with the two percent impairment femoral nerve impairment, but this would result in four percent impairment. The medical adviser

[2] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[3] 20 C.F.R. § 10.404.

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

[5] A.M.A., *Guides* 526.

properly determined that the eight percent atrophy impairment provided appellant the largest impairment rating. The Office medical adviser's impairment rating constitutes the weight of the medical evidence.[6]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7]

Section 8128(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 review on the merits.[8] 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.[9] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[10]

ANALYSIS -- ISSUE 2

On reconsideration, appellant contended that she should be referred for another medical evaluation based on her belief that she was not adequately examined by Dr. Kimelman. She did not submit any relevant and pertinent new evidence. Appellant's contention does not represent an argument that the Office erroneously applied a point of law or a new relevant legal argument. Moreover, she did not submit any medical evidence relevant to the issue of the extent of permanent impairment of the right lower extremity. Appellant did not meet any of the requirements for reopening her case for merit review under section 10.606(b)(2). The Office properly denied further consideration of appellant's case on the merits.

CONCLUSION

The Board finds that appellant has no more than eight percent impairment of the right lower extremity. The Board also finds that the Office properly denied her request for reconsideration.

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

[7] 20 C.F.R. § 10.606(b)(2)(i-iii).

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Helen E. Paglinawan*, 51 ECAB 407, 591 (2000).

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

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2008 and September 13, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: December 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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