United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 08-1896**
	)	**Issued: February 20, 2009**
DEPARTMENT OF HOMELAND SECURITY, U.S. SECRET SERVICE, Washington, DC, 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 25, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 5, 2007 concerning his schedule award and a nonmerit decision dated May 7, 2008, denying his 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 schedule award claim and the nonmerit issue.

ISSUES

The issues are: (1) whether appellant has established more than a 16 percent left lower extremity impairment, for which he received a schedule award; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 24, 2004 appellant, then a 38-year-old special agent, injured his left knee while running on a treadmill as part of his fitness program. The Office accepted his claim for left side lateral meniscus tear and authorized left knee surgery, which he underwent May 7, 2004 and November 20, 2006, to repair meniscal damage and a patellofemoral condylar defect along the trochlear groove.[1] It paid for all appropriate periods of disability, including a recurrence of November 20, 2006.

On July 28, 2004 appellant requested a schedule award. By decision dated October 19, 2004, the Office granted appellant a schedule award for a two percent impairment of the left lower extremity for a partial lateral meniscectomy. Under file number xxxxxx583, appellant received an 11 percent impairment of the left lower extremity as a result of a left meniscus tear sustained from a slip and fall on September 25, 1996.[2]

On June 5, 2007 appellant requested an increased schedule award. In a June 26, 2007 report, Dr. W. Chris Kostman, a Board-certified orthopedic surgeon, stated that appellant reached maximum medical improvement on June 5, 2007. He stated that appellant's last evaluation of the left knee demonstrated a full range of motion of flexion with continued pain with kneeling and squatting activity. Some patellofemoral tenderness to palpation was present along with pain on lateral motion. Dr. Kostman stated that he believed appellant's quadriceps strength was 80 percent of his contralateral right knee and that he was at risk for increased degenerative change at this joint in the future. He opined that appellant had a 20 percent permanent impairment of his left knee.

In a November 12, 2007 report, an Office medical adviser reviewed appellant's medical record. He noted that appellant continued to have anterior knee pain, mostly when running, following his knee arthroscopy. Based on Dr. Kostman's physical examination, the medical adviser noted all incisions had healed, range of motion was full and no significant effusion was present. As appellant had patellofemoral tenderness to palpation, the medical adviser found that he had a five percent left lower extremity impairment for residual patellofemoral pain without joint space narrowing on x-rays according to the footnoted section at the bottom of Table 17-31, page 544 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Kostman noted that, while there was a perceived weakness in the quadriceps on the right when compared to the left, no additional impairment could be awarded according to Table 17-2, page 526 of the A.M.A., *Guides*. David H. Garelick, MD advised that appellant reached maximum medical improvement May 1, 2007 as discussed by Dr. Kostman.

On November 23, 2007 the Office advised the medical adviser that appellant received a schedule award for a 2 percent permanent impairment of the left lower extremity as well as an 11 percent permanent impairment of the left lower extremity under file number xxxxxx583. It

[1] Appellant also underwent anterior cruciate ligament reconstruction in 1997.

[2] This was comprised of two percent for a partial lateral meniscectomy, one percent for pain and eight percent for atrophy.

requested that the medical adviser review the medical record for both claims and evaluate whether the additional five percent permanent impairment recommended in his November 12, 2007 report remained. In a November 26, 2007 report, the Office medical adviser opined that appellant had a 16 percent total lower extremity permanent impairment of the left lower extremity. The medical adviser noted reviewing his reports of September 20, 2004, May 30 and June 27, 2005 and November 12, 2007 reports, in the present claim and his May 18, 1998 report under file number xxxxxx583. He advised that for the left lower extremity appellant had been awarded one percent permanent impairment for pain; eight percent permanent impairment for quadriceps atrophy; two percent permanent impairment for lateral meniscus resection; and five percent for patellofemoral pain without joint space narrowing. The medical adviser utilized the combined values table at page 604 of the A.M.A., *Guides* and found appellant had a 16 percent total left lower extremity permanent impairment. He additionally recommended the Office combine the two case numbers as the awards described the same condition.

On December 5, 2007 the Office combined the current case with file number xxxxxx583, with the latter case being the master file.

By decision dated December 5, 2007, the Office found that appellant was entitled to a schedule award for 16 percent left lower extremity impairment. As appellant already received an 11 percent impairment of the left lower extremity under file number xxxxxx583 and a 2 percent impairment of the left lower extremity under the current claim, the Office awarded an additional 3 percent left lower extremity impairment. The period of the award ran from May 1 to June 30, 2007 for a total of 8.64 weeks of compensation.

On December 17, 2007 appellant disagreed with the Office's decision and requested an oral hearing, which was scheduled April 10, 2008. He subsequently withdrew his oral hearing request and requested reconsideration on April 23, 2008. In his April 23, 2008 letter, appellant referenced various portions of the A.M.A., *Guides* which he claimed Dr. Kostman failed to use in assessing his permanent impairment. He also noted that he was retaining another physician to reevaluate his left lower extremity impairment. Copies of a November 20, 2006 physical therapy report were received.

By decision dated May 7, 2008, the Office denied appellant's request for reconsideration of the merits.[3]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a

[3] Appellant submitted new evidence with his appeal. The Board has no jurisdiction to review new evidence on appeal. *See* 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.

[4] 5 U.S.C. §§ 8101-8193.

matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[5] As February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[6] Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.[7]

ANALYSIS -- ISSUE 1

Appellant received a schedule award representing a 16 percent total impairment for his left lower extremity conditions. The Office based its award on the November 12 and 26, 2007 reports of its Office medical adviser, who reached his impairment rating after reviewing Dr. Kostman's most recent reports and previous schedule awards received in the current file as well in file number xxxxxx583. The Board finds that the medical evidence does not establish that appellant has greater than 16 percent impairment of the left lower extremity, for which he received schedule awards.

In his June 26, 2007 report, Dr. Kostman opined that appellant had a 20 percent permanent disability of his left knee, but failed to provide any explanation for his impairment rating or cite to appropriate tables in the A.M.A., *Guides.* Thus, the impairment rating of Dr. Kostman is of diminished probative value.[8]

In his November 12, 2007 report, the Office medical adviser reviewed Dr. Kostman's physical examination findings and opined that appellant was entitled to an additional five percent left lower extremity impairment. As appellant demonstrated patellofemoral tenderness to palpation, the Office medical adviser found five percent left lower extremity impairment for residual patellofemoral pain without joint space narrowing on x-rays under the footnoted section at the bottom of Table 17-31, page 544 of the A.M.A., *Guides*. Although he was documented to have a perceived weakness in the quadriceps, under Table 17-2, page 525 of the A.M.A., *Guides*, the Office medical adviser properly noted no additional impairment could be awarded as a decrease in strength can not be combined with an arthritic impairment.[9] Thus, the Office

[5] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[6] *See* A.S., 58 ECAB ___ (Docket No. 06-1613, issued November 29, 2006); FECA Bulletin No. 01-05 (issued January 29, 2001).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[8] *See Linda Beale*, 57 ECAB 429 (2006).

[9] The Office medical adviser found the quadriceps weakness occurred on the right side compared to the left side. It is unclear whether the Office medical adviser confused the two sides, as this claim pertains only to the left lower extremity.

medical adviser concluded that appellant had five percent impairment for arthritis under Table 17-31 of the A.M.A., *Guides*. After the Office apprised its medical adviser that appellant previously received schedule awards for 2 percent left leg impairment and 11 percent left leg impairment, the medical adviser found further reviewed his previous reports and noted that appellant had received 1 percent permanent impairment for pain; 8 percent permanent impairment for quadriceps atrophy; and 2 percent permanent impairment for lateral meniscus resection, for an 11 percent total schedule award of the left lower extremity.[10] The 11 percent total schedule award previously received combined with the additional 5 percent left lower extremity impairment appellant is entitled to for arthritis results in a 15 percent total left lower extremity impairment.[11] Appellant has been compensated for a 16 percent left lower extremity impairment. Thus, he has not established that he is entitled to compensation for more than the 16 percent total schedule award received.

LEGAL PRECEDENT -- ISSUE 2

The Act[12] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[13] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[14]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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.[15]

An application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[16] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is

[10] Although the previously accepted impairments actually total 13 percent, the record indicates that appellant received 2 percent impairment for partial lateral meniscectomy in the present claim and also in file number xxxxxx583. As this is duplicative, it was proper for the medical adviser to consider it only once in combining appellant's ratable impairments.

[11] A.M.A, *Guides* at 604, Combined Values Chart.

[12] 5 U.S.C. § 8101 *et. seq*.

[13] *Id*. at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[14] 20 C.F.R. § 10.605.

[15] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[16] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17]

ANALYSIS -- ISSUE 2

On April 23, 2008 appellant requested reconsideration. However, he did not submit any new evidence or arguments with his request. While appellant referenced various portions of the A.M.A., *Guides* which he believed his physician should have incorporated, this is not evidence of error or constitute a new argument. Although the November 20, 2006 physical therapy report is new evidence, this report does not constitute competent medical evidence as a physical therapist is not a physician under the Act.[18] Thus, this report is not relevant to the medical issue of the extent of appellant's left lower extremity impairment.

Because appellant did not raise new arguments or present new evidence that the Office erroneously applied or interpreted a specific point of law; advance any relevant legal arguments not previously considered by the Office; or present any relevant and pertinent new evidence not previously considered by the Office, he is not entitled to further review of the merits of his claim under any of the criteria of section 10.606(b)(2).[19]

As appellant did not meet any of the regulatory requirements for review of the merits of his claim, the Board finds that the Office properly denied his April 23, 2008 request for reconsideration.

CONCLUSION

The Board finds appellant has no more than 16 percent total left lower extremity impairment, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for merit review of his claim pursuant to section 8128.

[17] *Id.* at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[18] 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357.

[19] *Id.* at § 10.606(b)(2); *see W.C.*, 59 ECAB ___ (Docket No. 07-2257, issued March 5, 2008).

[19] 5 U.S.C. §§ 8101-8193.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2008 and December 5, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 20, 2009
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