United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 08-1692**
	)	**Issued: July 14, 2009**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 29, 2008 appellant, through counsel, filed timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated February 5, 2008 denying reconsideration. Because more than one year has elapsed between the most recent merit decision of the Office dated December 19, 2006 and the filing of this appeal on May 29, 2008, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

On March 15, 1989 appellant, then a 41-year-old metal processor/light item handler, filed a traumatic injury claim alleging that he injured his left shoulder when he tripped and fell on

March 14, 1989.[1] The Office accepted the claim for left shoulder contusion and cervical and lumbar strains and authorized C5-6 anterior cervical discectomy, which occurred on July 12, 1989.

On October 31, 1989 appellant filed a traumatic injury claim alleging that on October 26, 1989 he reinjured a prior injury when a chair he was in tilted over backwards while he was trying to get up.[2] The Office accepted the claim for neck sprain and cervical spondylosis.[3] By letter dated November 9, 1990, it placed appellant on the periodic rolls for temporary total disability.

In a decision dated July 19, 1991, the Office issued a schedule award for a 15 percent permanent impairment of the left arm. The period of the award was September 7, 1990 to July 31, 1991.

On June 29, 2004 appellant accepted the employing establishment's offer of a light-duty job as a motor vehicle operator working 32 hours per week and started work on July 19, 2004.[4]

On September 8, 2004 appellant filed a claim for a schedule award.

By decision dated July 13, 2005, the Office issued a schedule award for an 18 percent permanent impairment of the left upper extremity. The period of the award was from March 20, 2005 to April 17, 2006.

In a February 7, 2006 report, Dr. Patricia A. Knott, a second opinion Board-certified physiatrist, diagnosed cervical and lumbar degenerative disc disease. Using the American Medical Association, *Guides to the Evaluation of Permanent* Impairment (hereinafter A.M.A., *Guides*), she determined that appellant had a Grade 4 strength impairment based upon his left knee extension and flexion. Using Table 17-8, page 532, she found that appellant had a 12 percent left impairment for flexion and a 12 percent impairment for extension. Dr. Knott then used the Combined Values Chart find a 23 percent left lower extremity impairment. Next, she used Table 17-37, page 562 to find a two percent left lower extremity impairment for decreased sensation. Using the Combined Values Chart, Dr. Knott found that appellant had a total of 25 percent left lower extremity impairment.

In a March 2, 2006 report, Dr. Ronald Blum, an Office medical adviser, reviewed the statement of accepted facts and Dr. Knott's February 7, 2006 report. Using Tables 17-7 and 17-8, pages 531 and 532, he determined that appellant had a 12 percent impairment for a Grade 4 left knee flexion impairment and a 12 percent impairment for a Grade 4 left knee extension, resulting in a total impairment of 23 percent. Next, Dr. Blum used Tables 15-15 and 15-18, page

[1] This claim was assigned file number xxxxx427.

[2] This claim was assigned file number xxxxxx951. On May 3, 1990 the Office combined file numbers xxxxxx427 and xxxxxx951 with the former as the master file number.

[3] Appellant was terminated from the employing establishment effective July 19, 1990.

[4] By decision dated September 13, 2004, the Office reduced appellant's wage-loss compensation based upon his earnings as a motor vehicle operator.

424 to find a two percent impairment for sensory nerve root impairment. In reaching this conclusion he noted 5 percent using Table 15-18, page 424, which he multiplied by 40 percent (for Grade 3), which resulted in a 2 percent impairment. Using the Combined Values Chart, Dr. Blum concluded that appellant had a total left lower extremity impairment of 25 percent.

In a report dated April 21, 2006, Dr. H. Mobley, an Office medical adviser, reviewed the statement of accepted facts and the medical evidence to concluded that appellant had a 25 percent left lower extremity impairment.

By decision dated May 17, 2006, the Office issued a schedule award for a 25 percent permanent impairment of the left lower extremity. The period of the award was from April 18, 2006 to September 3, 2007.

On May 25, 2006 appellant requested an oral hearing before an Office hearing representative, which was held on October 19, 2006. At the hearing he was represented by counsel who argued that the Office failed to include appellant's loss of use of his toes when it calculated his schedule award.

By decision dated December 19, 2006, the Office hearing representative affirmed the May 17, 2006 schedule award decision. However, the hearing representative found that the Office failed to address any impairment to the right lower extremity and remanded for the Office to develop the evidence with respect to a right lower extremity impairment.

In letters dated November 6 and 20, 2007 appellant, through counsel, requested reconsideration of the December 19, 2006 hearing representative's decision. Counsel argued that the Office failed to include his impairment for loss of use of his left toes.

Subsequent to appellant's request for reconsideration, the Office received reports dated November 16 and December 3, 2007 by Dr. R. Paul Tucker, a treating physician, and a December 2, 2007 report by Dr. Roshan Sharma, a treating Board-certified physiatrist. Neither Dr. Tucker nor Dr. Sharma addressed appellant's left lower extremity impairment.

By decision dated February 5, 2008, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[5] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[6] 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.[7]

[5] 5 U.S.C. §§ 8101 *et seq.*

[6] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[7] 20 C.F.R. § 10.605.

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.[8]

An application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[9] 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 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.[10]

ANALYSIS

The Office denied merit review on the grounds that appellant did not raise a new legal argument or submit new and relevant medical evidence. In requesting reconsideration, he 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. Appellant's counsel contended that the Office failed to include any impairment rating for appellant's loss of use of his left toes. However, the record contains no evidence with respect to appellant's loss of use of his toes. Thus, the Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[11]

With respect to the third above-noted requirement under section 10.606(b)(2), the Office received reports dated November 16 and December 3, 2007 report by Dr. Tucker, a treating physician, and a December 2, 2007 report by Dr. Sharma, a treating Board-certified physiatrist. While this evidence is new, the reports are not relevant to the issue of whether appellant sustained more than a 25 percent impairment of his left lower extremity. 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.[12]

On appeal, appellant's counsel contends that appellant is entitled to a total 60 percent left lower extremity permanent impairment based upon the report of Dr. William Rutledge.

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

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

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

[11] *Id*. at § 10.606(b)(2).

[12] *C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008); *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007); *D. Wayne Avila*, 57 ECAB 642 (2006).

However, a review of the record reveals that this medical report is not contained in the record. As it is not in the record, appellant's allegation that this establishes entitlement to a greater schedule award does not constitute a basis for reopening appellant's claim for merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office. As he did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.[13]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2008 is affirmed.

Issued: July 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] *See supra* note 10; *Richard Yadron*, 57 ECAB 207 (2005).