United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 09-633**
	)	**Issued: October 7, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
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 January 5, 2009 appellant filed a timely appeal from an August 28, 2008 decision of the Office of Workers' Compensation Programs, which denied her request for further merit review, and an August 11, 2008 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant sustained any permanent impairment of either upper extremity; and (2) whether the Office properly refused to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 6, 2006 appellant, then a 54-year-old loan specialist, slipped on a wet floor and fell on her right knee at work. She stopped work on that date. The Office accepted appellant's claim for bilateral medial meniscus tear, bilateral knee contusion, bilateral knee/leg sprain, lumbosacral sprain and cervical sprain. On October 17, 2006 appellant underwent authorized surgery for right knee arthroscopy, bilateral meniscectomy, anterior cruciate ligament

(ACL) repair, and patellar and lateral tibial chondral arthroplasty. She returned to full-time modified duty on October 29, 2007. The record reflects that appellant received schedule awards for 20 percent impairment to the left leg and 10 percent impairment to the right leg on June 27, 2007.

On January 9, 2008 appellant filed a claim for an additional schedule award. On December 11, 2007 Dr. Carlton E. Smith, Board-certified in family medicine, reviewed appellant's history of injury and medical treatment. He diagnosed cervical and lumbar sprain/strain. With reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (hereinafter A.M.A., *Guides*), Dr. Smith advised that appellant had 10 percent whole person impairment based on the diagnosis-based criteria at pages 384 and 392 pertaining to the lumbar and cervical spines. He noted that she had received a prior rating for her knees, which he did not include.[1] Dr. Smith rated impairment as five percent for the cervical spine and five percent for the lumbar spine. Appellant reached maximum medical improvement as of December 11, 2007.

In a January 25, 2008 report, an Office medical adviser reviewed Dr. Smith's report and noted that impairment ratings were of the spine or whole person for which schedule awards were precluded. He recommended further development of the medical evidence.

On February 18, 2008 Dr. Smith advised that he had further reviewed his records. He rated appellant's impairment as 12 percent of the whole person to the knees and 10 percent of the whole person to the spine, or a combined impairment of 21 percent. In a March 26, 2008 report, the Office medical adviser addressed the deficiencies in the rating by Dr. Smith and recommended referral to another physician.

On May 1, 2008 the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Zvi Kalisky, a Board-certified physiatrist. In a June 16, 2008 report, Dr. Kalisky advised that he examined appellant on June 9, 2008 and listed his review of her medical treatment. He found no objective evidence of cervical radiculopathy; no evidence of pain or paresthesias in a dermatomal distribution, no motor or sensory loss and no muscle atrophy or loss of the deep tendon reflexes in either upper extremity. Dr. Kalisky stated that appellant did not fit the diagnostic criteria of section 15.12, page 423, for nerve root and/or spinal cord lesions. He concluded that appellant did not have any impairment of her arms due to her accepted cervical condition. Dr. Kalisky also stated that there were no objective findings of lumbar radiculopathy; no evidence of pain or paresthesias in the dermatomal distribution, no motor or sensory loss, muscle atrophy or loss of the deep tendon reflexes in the lower extremities.[2]

[1] In a January 4, 2007 report, Dr. Smith evaluated permanent impairment attributable to appellant's bilateral knee conditions. On June 22, 2007 an Office medical adviser calculated appellant's bilateral leg impairment based on findings provided by Dr. Smith. Thereafter, the Office issued its June 27, 2007 schedule award decision.

[2] Dr. Kalisky also had bilateral knee x-rays taken for him on June 11, 2008. While he offered findings relative to appellant's knees and legs, the matter presently before the Board pertains to whether appellant has work-related impairment of the arms.

On July 24, 2008 the Office medical adviser reviewed the report of Dr. Kalisky and agreed with his determination that the examination did not support impairment to either of the upper extremities due to her accepted conditions.

By decision dated August 11, 2008, the Office denied appellant's claim for a schedule award. It found that the evidence did not establish any permanent impairment to her right or left arms.

Appellant requested reconsideration on August 19, 2008. She contended that Dr. Kalisky did not examine her neck or back but only her knees and had obtained an x-ray. Appellant argues that Dr. Smith did not perform a full evaluation of her neck or back. She submitted the June 11, 2008 x-rays of the right and left knees, taken for Dr. Kalisky, which noted mild to moderate bi-compartment degenerative joint disease.

By decision dated August 28, 2008, the Office denied appellant's request for reconsideration without further review of the merits. It found that her request failed to raise substantial legal questions or included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[3] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[4] 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes a method to be used for rating impairment to the upper extremities due to sensory and motor loss from unilateral spinal nerve root impairment.[7] The affected nerves are first identified and then the maximum percentages of impairment allowed for each nerve root is derived from Table 15-17. Thereafter, Tables 15-15 and 15-16 are used to grade the extent of deficit based on sensory or motor loss. The severity of the sensory or motor impairment is derived by multiplying the maximum impairment value of the affected nerve by the grade classification of the sensory or motor loss.[8] If there is both sensory and motor loss to a nerve root, the impairment percentages are then combined.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id*. at § 8107.

[5] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[6] 20 C.F.R. § 10.404.

[7] Chapter 16 provides alternative tables for rating impairment to the upper extremities.

[8] A.M.A., *Guides* 424; *see also B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she sustained any impairment of her left or right arms due to her accepted conditions.

On December 11, 2007 Dr. Smith, Board-certified in family medicine, reviewed appellant's medical records and provided an impairment rating. He found that appellant had 10 percent whole person impairment based on the DRE estimates for the lumbar and cervical spine.[9] In a February 18, 2008 supplemental report, Dr. Smith found 21 percent impairment, based on 12 percent whole person attributable to the knees and 10 percent whole person attributable to her spine. However, the Board notes that neither the Act nor its implementing regulations provide for a schedule award for impairment to the back, spine or to the body as a whole.[10] The back is specifically excluded from the definition of organ under the Act.[11] Therefore, Dr. Smith failed to provide impairment ratings of those parts of the body listed under the schedule of section 8107 and the regulations. He did not explain how he made his rating without any description of specific motor or sensory loss. Dr. Smith did not provide sufficient findings on examination of the upper extremities.[12] Thus, his estimates of impairment are of diminished probative value.

On June 16, 2008 Dr. Kalisky reported on his evaluation of appellant but advised that she did not have any impairment to her upper extremities due to her accepted cervical condition. He noted that, based on the lack of objective findings for sensory or motor loss, she did not fit into any of the diagnostic criteria of section 15.12 on page 423 of the A.M.A., *Guides* for nerve root impairment. The Office medical adviser reviewed the findings of Dr. Kalisky and concurred that appellant had no ratable impairment of the upper extremities. There was no medical evidence that supported impairment of either the left or right arms.

As noted, the Office evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden to submit probative medical evidence establishing that she sustained permanent impairment to a scheduled member of the body.[13] The evidence submitted in this case is not probative on the issue of her entitlement to a schedule award for permanent impairment.

On appeal, appellant contends that she has a whole person impairment of five percent under the cervical DRE category and five percent under the lumbar spine DRE category. However, schedule awards are not payable for impairment to the back or spine, or to the body as a whole. Any impairment contributed to by her back or spine must be described in terms of the effect such condition has on her arms. When an attending physician fails to provide an estimate

[9] A.M.A., *Guides* 384, 392.

[10] *See D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008); *N.D.*, 59 ECAB ___ (Docket No. 07-1981, issued February 1, 2008).

[11] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(19).

[12] Before the A.M.A., *Guides* may be utilized, the record must contain medical evidence describing the claimant's alleged permanent impairment. The description of impairment must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations. *See A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009).

[13] *See Annette M. Dent*, 44 ECAB 403 (1993).

of impairment conforming to the protocols of the A.M.A., *Guides*, his opinion is of diminished probative value.[14] The Office properly relied on the report of Dr. Kalisky as the weight of medical opinion.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[15] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[16]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[17]

ANALYSIS -- ISSUE 2

Appellant disagreed with the Office's denial of schedule awards for impairment to her arms. The underlying issue on reconsideration is whether she submitted medical evidence to establish that she sustained any impairment to either upper extremity. Appellant failed to provide any relevant or pertinent new evidence to this issue.

On reconsideration, appellant asserted that Dr. Kalisky's evaluation was flawed and that Dr. Smith provided proper impairment ratings after examination and with reference to the A.M.A., *Guides*. However, her argument is not relevant to the issue on which her claim was denied. The question of whether she has any permanent impairment of her arms is medical in nature. The Office had previously reviewed the medical evidence from Dr. Smith and addressed the deficiencies in his impairment ratings. Appellant's argument does not constitute a basis for reopening her claim for further merit review.[18] Her general allegations regarding the examination by Dr. Kalisky do not have a reasonable color of validity or support by any evidence of bias on his part.[19] The June 11, 2008 x-ray reports were also previously of record. The submission of evidence which repeats or duplicates evidence already in the case record does

[14] *See John L. McClenic*, 48 ECAB 552 (1997); *see also Paul R. Evans*, 44 ECAB 646, 651 (1993).

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b).

[17] *Id*. at § 10.608(b).

[18] *Robert P. Mitchell,* 52 ECAB 116 (2000); *Alan G. Williams,* 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward,* 52 ECAB 140 (2000).

[19] *See E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

not constitute a basis for reopening a case.[20] Appellant failed to meet any of the regulatory criteria for reopening her claim for further merit review. Therefore, the Office properly denied her request for reconsideration.[21]

CONCLUSION

The Board finds that appellant failed to establish that she has any impairment to her arms warranting a schedule award. The Board also finds that the Office properly refused to reopen her claim for further review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 28 and 11, 2008 are affirmed.

Issued: October 7, 2009
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

[20] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[21] The Board notes that subsequent to the Office's August 28, 2008 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).