United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 09-278**
	)	**Issued: September 22, 2009**
U.S. POSTAL SERVICE, GRAND CROSSING POST OFFICE, Chicago, IL, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 7, 2008 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated May 30, 2008, denying appellant's request for reconsideration of the merits of her claim. Her appeal is also timely filed from the June 27, 2008 decision, denying review of the written record. Because more than one year has elapsed between the last merit decision, *i.e.*, the hearing representative's decision dated April 30, 2007 and the appeal filed on November 7, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly denied appellant's request for review of the written record as she first requested reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant raises various arguments with regard to the manner in which the Office dealt with her claim and argues various substantive issues, including, but not limited to,

whether the schedule award was properly issued. Her specific arguments include, *inter alia*, that the Office erroneously issued a decision on September 25, 2007 denying a reconsideration request when, in fact, no request had been filed and therefore making all decisions after it invalid; that the Office ignored evidence; that the Office abused its discretion and that the Office erred in evaluating the amount of the schedule award under the American Medical Association, *Guidelines to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). Appellant also contends that the July 23, 2007 report of Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, constitutes new evidence requiring merit review.

FACTUAL HISTORY

On April 5, 2000 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that, as a result of her federal duties in casing and pulling mail, she suffered from lumbar radiculopathy; pain in her right leg and right foot possibly secondary to sympathetic hyperactivity; and facet joint arthropathy on the right side at level L4 and L5. The Office accepted her claim for lumbar radiculopathy radiating to the right leg.

On July 18, 2005 appellant submitted a claim for a schedule award. In support thereof, she submitted a June 26, 2006 report by Dr. Chmell wherein he indicated that he applied the A.M.A., *Guides* and determined that appellant had a 100 percent impairment of her right lower extremity as a result of injuries she sustained on March 1, 1999 at work causing her lumbar disc herniation with radiculopathy.[1] The Office medical adviser reviewed appellant's file and determined that appellant had an eight percent impairment of the right lower extremity.[2] On

[1] Dr. Chmell indicated that appellant's physical examination demonstrated that she had diminished strength at the right ankle and foot, Grade 4- plantar flexion strength, Grade 4- dorsiflexion strength, Grade 4- inversion and eversion strength and Grade 4- great toe extension and flexion. He noted that, as a result of these muscle strength deficits, there was a 40 percent degree of permanent impairment to the right lower extremity. Dr. Chmell also noted that appellant demonstrated a gait derangement with a limp in the right leg. He noted that she demonstrated that she can rise to a standing position and can walk some distance with difficulty, but is limited to level surfaces in her ambulation. Dr. Chmell noted that this indicated a 15 percent impairment. He also noted a deficiency with regard to sensory testing on physical examination with diminished sensation and pain in her right leg, ankle and foot interfering with activity, which comprised 40 percent permanent impairment to the right lower extremity. Dr. Chmell noted that, as a result of these deficits, appellant had a 100 percent impairment to her right lower extremity. In support of his figures, he attached copies of pages from the A.M.A., *Guides*, (4th ed. 1995).

[2] Using the fifth edition of the A.M.A., *Guides*, the Office medical adviser noted that an impairment could not be awarded for the axial skeleton for the person as a whole, only for extremities. He also noted that muscle strength cannot be combined with gait derangement, muscle atrophy, range of motion and arthritis. A.M.A., *Guides* 526, Table 17-2. The Office medical adviser indicated that, with regard to the L5 nerve root, appellant had a one percent permanent impairment resulting from Grade 4 pain/sensory deficit in the distribution of the L5 nerve root. A.M.A., *Guides* 424, Tables 15-15 and 15-18. The Office medical adviser also noted that appellant had a four percent permanent impairment resulting from Grade 4 motor deficit in the distribution of the L5 nerve root. A.M.A., *Guides* 424, Table 15-16 and 15-18. Using the Combined Values Chart, he noted that appellant had a five percent impairment resulting from an L5 nerve root radiculopathy. With regard to the S1 nerve root, the Office medical adviser found a one percent permanent impairment resulting from Grade 4 pain/sensory deficit in the distribution of the S1 nerve root. A.M.A., *Guides* 424, Tables 15-15 and 15-18. The Office medical adviser also noted a two percent permanent impairment due to Grade 4 motor deficit in the distribution of the S1 nerve root. A.M.A., *Guides* 424, Tables 15-16 and 15-18. Using the Combined Values Chart, the Office medical adviser found that appellant was entitled to a three percent impairment of the right upper extremity for S1 nerve root radiculopathy. He then determined that, using the Combined Values Chart, appellant should receive and award as based on an eight percent right lower extremity impairment.

August 30, 2006 the Office issued a schedule award for an eight percent impairment of her right lower extremity. On September 13, 2006 appellant requested an oral hearing. On March 7, 2007 she submitted her own calculations wherein she discussed the A.M.A., *Guides* and the medical evidence and indicated that she was entitled to a schedule award of 62 percent of her right lower extremity. At the hearing held on February 13, 2007, appellant argued that she was entitled to a greater schedule award than she received. By decision dated April 30, 2007, the hearing representative affirmed the finding that appellant had no more than an eight percent impairment of her right lower extremity.

By letter dated July 23, 2007, Dr. Chmell responded to the Office's request that he recalculate appellant's permanent impairment due to her lumbar disc herniation with radiculopathy. He noted that his previous calculations were criticized because he used the 4th edition of the A.M.A., *Guides* rather than the 5th edition. Dr. Chmell indicated that his determinations and calculations had not changed. He stated that the tables had not changed between the 4th and 5th edition, that the A.M.A., *Guides* had been reorganized and reissued so that the A.M.A., *Guides* could make more money. Dr. Chmell sent his prior calculations to the Office but attached a copy of selected pages from the 5th edition of the A.M.A., *Guides*.

On June 20, 2007 appellant filed requests for review of the April 30, 2007 decision with this Board. However, she subsequently requested that her appeal be withdrawn so that she could pursue reconsideration before the Office. Accordingly, by orders dated August 16, 2007, the Board dismissed appellant's appeal.[3]

On September 25, 2007 the Office issued a decision, denying modification after reviewing the merits of appellant's case. By letter to appellant dated November 19, 2007, it indicated that she correctly stated that the Office erroneously indicated that she had requested reconsideration. The Office noted that it had erroneously interpreted the Board's dismissal of the appeal as a request for reconsideration. It noted that this had no impact on appellant's appeal rights as she still had one year from the last merit decision, the April 30, 2007 hearing representative's decision, to request reconsideration.

On April 21, 2008 appellant filed a request for reconsideration of the April 30, 2007 hearing representative decision. She alleged that the Office's decision was biased, that the claim's examiner ignored evidence, that the A.M.A., *Guides* were not properly applied and that the Chicago District Office has adopted "a culture of denial." Appellant also noted that Dr. Chmell submitted an amended award determination on July 23, 2007. She also submitted evidence that had been submitted previously.

By decision dated May 30, 2008, the Office denied appellant's request for reconsideration without merit review.

On June 27, 2008 appellant requested review of the written record. By decision dated September 15, 2008, the Office denied her request. It noted that the record revealed that a reconsideration had previously been requested under section 8128 and therefore appellant was not entitled to a review of the written record as a matter of right. The Office also reviewed

[3] Docket Nos. 07-1777 and 07-1778.

appellant's request under its discretionary powers and further denied her request as the issue could be equally well addressed by requesting reconsideration and submitting further evidence.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[5] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[7]

ANALYSIS -- ISSUE 1

In the instant case, on April 21, 2008 appellant filed a timely request for reconsideration of the April 30, 2007 decision of the hearing representative affirming the Office's determination that she had an eight percent impairment of the right lower extremity. In a decision dated May 30, 2008, the Office denied her request for reconsideration without merit review. The Board finds that the Office properly denied reconsideration. Appellant has not submitted any new relevant legal argument nor showed that the Office erroneously applied or interpreted a specific point of law. She repeated arguments made and rejected earlier that the Office improperly applied the A.M.A., *Guides.* It is well established that to ensure consistent results and equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[8] Furthermore, the 5th edition of the A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9] Schedule award calculations are made by a physician; appellant's calculations of her level of impairment are not entitled to any weight. Accordingly, appellant has not met the criteria for the first two elements for showing that she was entitled to reconsideration.

With regard to the third element, submissions of pertinent new evidence not previously considered by the Office, the only new evidence, the July 23, 2007 report by Dr. Chmell, is repetitive of his prior report. Basically, Dr. Chmell xeroxed his old report of June 26, 2006. He

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at § 10.607(a).

[7] *Id*. at § 10.608(b).

[8] *Id*. at § 10.404(a).

[9] *Id.*

provided no further explanation other than to attach pages from the 5th edition of the A.M.A., *Guides*. The Board has held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[10] This type of material is *prima facie* insufficient to warrant review.[11]

Appellant has not established that the Office improperly refused to reopen her claim for review of the merits under section 8128(a) of the Act. She 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 submit relevant and pertinent new evidence not previously considered by the Office.

The majority of appellant's remaining argument's made on appeal regard the merits of her case. As stated *supra*, the Board does not have jurisdiction over the merits of this case and will only consider on appeal whether the Office properly exercised its discretion in denying reconsideration of the merits. Furthermore, appellant's argument that, as the Office issued a decision denying a request for reconsideration on September 25, 2007 when she had not filed a request for reconsideration at the time, all subsequent decisions were not valid is without merit. The Office acknowledged by letter dated November 19, 2007 that appellant had not filed a request for reconsideration at that time. Appellant was in no way harmed by this decision. The Board further notes that an award for or against payment of compensation may be reviewed at any time on the Director's own motion.[12] Accordingly, appellant's arguments are without merit.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[13]

The claimant can choose between two formats: an oral hearing or a review of the written record. The requirements are the same for either choice.[14] The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark

[10] *Eugene F. Butler*, 36 ECAB 393 (1984).

[11] *Id.*

[12] 5 U.S.C. § 8128(a); 20 C.F.R. § 10.610.

[13] 20 C.F.R. § 10.615.

[14] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

or other carrier's date marking[15] and before the claimant has requested reconsideration.[16] When the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion grant or deny a hearing or review of the written record and must exercise this discretion.[17]

ANALYSIS -- ISSUE 2

Appellant is not entitled to review of the written record if she has previously requested reconsideration. She filed her request for review of the written record on June 27, 2008. Appellant had previously requested reconsideration of the April 30, 2007 hearing representative decision on April 21, 2008, which the Office denied on May 30, 2008. Accordingly, she was not entitled to a review of the written record as a matter or right.

The Office then properly exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[18] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for a review of the written record was proper under the law and the facts of this case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). The Board further finds that the Office properly denied appellant's request for review of the written record, as she first requested reconsideration pursuant to 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

[16] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

[17] *Id.*

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15 and May 30, 2008 are affirmed.

Issued: September 22, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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