

FACTUAL HISTORY

On March 6, 2003 appellant, then a 47-year-old nurse, filed a traumatic injury claim alleging that on March 5, 2003 she injured her right elbow after lifting a patient from a wheelchair. She stopped work intermittently to attend medical appointments. The Office accepted appellant's claim for right lateral epicondylitis.²

Initial reports included a March 13, 2003 treatment note from Dr. Barry Oliver, a Board-certified orthopedic surgeon, who diagnosed recurrent lateral epicondyle. In an April 23, 2003 report, Dr. Thomas Ewart, a Board-certified orthopedic surgeon, also diagnosed recurrent epicondylitis of the right elbow.

On September 4, 2003 appellant filed a schedule award claim. In an April 2, 2004 report, an Office medical adviser indicated that appellant reached maximum medical improvement on June 30, 2003, when Dr. Ewart discharged appellant from his care to regular duty with no physical or permanent limitations. The medical adviser opined that there was no evidence of permanent impairment of appellant's right upper extremity due to her accepted condition.

In an April 16, 2004 decision, the Office denied appellant's schedule award claim finding there was no evidence of permanent impairment due to her accepted condition.

On April 26, 2004 appellant requested reconsideration. She submitted a March 15, 2004 report from Dr. Oliver who noted that appellant was referred to a rehabilitation clinic for an impairment rating that found two percent impairment for wrist extension and two percent impairment for wrist flexion. Dr. Oliver indicated that he agreed with this impairment rating. On August 28, 2003 he noted appellant's complaint of continued right elbow pain. Dr. Oliver recommended surgery. Appellant continued submitting treatment notes from Dr. Oliver.

In a May 13, 2004 report, an Office medical adviser noted that, through a previous claim, appellant received a schedule award for nine percent impairment for right lateral epicondylitis. He indicated that the medical evidence showed that appellant's right wrist range of motion was not as severe, and therefore, no additional right upper extremity impairment was appropriate. The medical adviser opined that additional right arm impairment was zero percent.

In a May 19, 2004 decision, the Office modified its April 16, 2004 decision to reflect that appellant had been previously awarded nine percent impairment of the right arm and that there was zero percent additional impairment of the right arm.

In reports dated between April 10 and June 12, 2006, Dr. Oliver found significant tenderness over the lateral epicondyle with full range of motion without crepitus. He diagnosed persistent right lateral epicondylitis and right de Quervain's disease. Dr. Oliver also recommended surgery for tennis elbow release.

² Appellant filed a previous claim for a traumatic injury on May 1, 2001, which was assigned case number xxxxxx867. The Office accepted this claim for right lateral epicondylitis and issued a schedule award for nine percent permanent impairment of the right upper extremity on February 4, 2003.

In a December 17, 2007 work capacity evaluation, Dr. Eleanya Ogburu-Ogbonnaya, a neurologist, found that appellant was able to perform her usual job for eight hours per day with permanent restrictions. Appellant also submitted several physical therapy notes.

Appellant filed a schedule award claim on July 8, 2008.

On July 16, 2008 an Office medical adviser reviewed the medical evidence of record and determined that appellant reached maximum medical improvement on August 23, 2003. He opined that the medical record contained no new information or objective findings to warrant additional impairment. The medical adviser determined that appellant's schedule award remained at nine percent permanent impairment of the right upper extremity.

In a July 17, 2008 decision, the Office denied appellant's schedule award claim finding the evidence insufficient to support an increase in the impairment already compensated.

In support of her claim, appellant submitted a June 20, 2008 report from Dr. Justin Hutcheson, a Board-certified anesthesiologist, who diagnosed degenerative disc disease and cervical radiculopathy. Dr. Hutcheson also performed a cervical epidural steroid injection. On September 10, 2008 he noted appellant's complaint of chronic neck and low back pain. Dr. Hutcheson diagnosed myofascial pain syndrome, lumbar radiculopathy, cervical radiculopathy and degenerative disc disease.

In an August 21, 2008 report, Dr. Oliver noted appellant's complaint of chronic right lateral epicondylitis. He also noted that magnetic resonance imaging (MRI) scan results from Dr. Ogburu-Ogbonnaya suggested medial epicondylitis.

On June 23, 2009 Dr. Ogburu-Ogbonnaya indicated that she was reevaluating appellant for permanent impairment for the right upper extremity. She concluded that appellant's impairment had increased from nine percent and that the percentage increase would be in another letter. Dr. Ogburu-Ogbonnaya noted that appellant had also developed medial epicondylitis according to MRI scan results. A February 19, 2009 therapy prescription from Dr. Ogburu-Ogbonnaya was submitted as well as physical therapy notes.

Appellant requested reconsideration on June 25, 2009.

In a July 8, 2009 decision, the Office denied appellant's reconsideration request without a merit review finding that appellant did not provide any relevant medical evidence or legal argument to establish additional impairment due to her accepted condition.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

regulations provide 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 a review on the merits.⁴

ANALYSIS

Appellant's request for reconsideration consists of an appeal request form in which she checked a box indicating that she sought reconsideration. Her request does not attempt to show that the Office erroneously applied the law because she did not identify a point of law that was erroneously applied or interpreted. Appellant's request form also did not advance any new relevant legal arguments not previously considered by the Office.

The additional medical documents submitted by appellant, although new, are not relevant and pertinent evidence not previously considered by the Office. In her June 23, 2009 report, Dr. Ogburu-Ogbonnaya advised that she was reevaluating appellant's impairment and determined that appellant's impairment had increased from the nine percent originally issued. However, she did not clearly indicate that she had completed her evaluation of impairment, she did not indicate the degree of appellant's impairment, she did not indicate the basis for her opinion and she did not submit the additional report that she indicated would be forthcoming with more detailed findings. The Board finds that, in these circumstances, Dr. Ogburu-Ogbonnaya's conclusion that appellant had increased impairment is not relevant without an indication of a specific amount of impairment and a showing that the impairment was calculated pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁵ The report is not relevant under purposes of 20 C.F.R. § 10.606(b)(2)(iii).⁶ Dr. Ogburu-Ogbonnaya's therapy prescription is not relevant as it did not address permanent impairment.⁷

Dr. Hutcheson's reports diagnosed myofascial pain syndrome, lumbar radiculopathy, cervical radiculopathy and degenerative disc disease. These reports do not address the pertinent issue of whether appellant had increased permanent impairment for schedule award purposes. They are not relevant to the particular issue presented in this appeal and do not warrant a reopening of the case for merit review.⁸ Similarly, Dr. Oliver's report merely noted appellant's complaint of chronic right lateral epicondylitis and indicated possible medial epicondylitis. However, these findings did not discuss the issue of schedule awards, and therefore does not constitute relevant and pertinent evidence.

⁴ *Id.* at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

⁵ *See* 20 C.F.R. § 10.404 (provides that compensation for a schedule impairment is evaluated according to the standards set forth in the A.M.A., *Guides*).

⁶ *Cf. D.M.*, Docket No. 09-1506 (issued January 28, 2010) (a physician's finding that a claimant had a Category 5 impairment under an unspecified section of the A.M.A., *Guides* is too general to be relevant to determining the extent of the claimant's permanent impairment).

⁷ *See Johnnie B. Causey*, 57 ECAB 359 (2006) (the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.)

⁸ *See id.*

Additionally, the physical therapy notes submitted on reconsideration are not medical opinions because a physical therapist is not a physician under the Act. Therefore a physical therapist may not offer a medical opinion.⁹

For these reasons, appellant did not submit sufficient evidence to warrant a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 8, 2009 is affirmed.

Issued: April 5, 2010
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

⁹ *Barbara Williams*, 40 ECAB 649 (1989).