United States Department of Labor
Employees' Compensation Appeals Board

O.C., Appellant	)	
and	)	**Docket No. 09-1016**
	)	**Issued: January 12, 2010**
DEPARTMENT OF THE AIR FORCE, AIR LOGISTICS CENTER, ROBINS AIR FORCE BASE, GA, 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 March 9, 2009 appellant filed a timely appeal from a July 28, 2008 merit decision of the Office of Workers' Compensation Programs concerning his entitlement to schedule award compensation and a January 5, 2009 nonmerit decision of the Office denying his request for further review of the merits of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a five percent permanent impairment of his right arm and a five percent permanent impairment of his left arm, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

In October 2003, the Office accepted that appellant, then a 52-year-old painter, sustained bilateral carpal tunnel syndrome and right middle trigger finger due to the repetitive duties of his job. On January 26, 2004 Dr. Martin A. Baggett, an attending Board-certified orthopedic surgeon, performed right carpal tunnel release and right middle trigger finger release surgery and on April 5, 2004 he performed left carpal tunnel release surgery. The procedures were authorized by the Office. Appellant participated in physical therapy and received Office compensation for periods of partial and total disability.

In December 2005, Dr. Baggett indicated that diagnostic testing showed degenerative changes of the left carpus with possible broadening of the scaphoid-lunate distance, a condition which he felt was aggravated by appellant's work duties. On March 21, 2006 Dr. Gary R. McGillivary, an attending Board-certified orthopedic surgeon, indicated that appellant had a suggestion of carpal instability of his left wrist which was related to an osteophyte that was distal to the distal radius. He recommended surgery to resolve this problem. In April 2006, the Office expanded the accepted conditions to include joint derangement of the left forearm.

On April 26, 2007 Dr. McGillivary performed left wrist surgery, including arthroscopy, debridement and open excision of dorso-ulnar osteophyte. On January 18, 2007 he stated that appellant had full range of motion of his left wrist and no longer had left dorso-ulnar pain, the condition that the left wrist surgery was intended to treat. On November 13, 2007 Dr. McGillivary indicated that appellant reported occasional symptoms in his arms but they were "nothing dramatic."

On January 21, 2007 Dr. Baggett determined that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a five percent permanent impairment of each arm due to scar tenderness and weakness.[1] On March 15, 2007 appellant filed a claim for a schedule award due to his accepted employment conditions. On March 20, 2007 an Office medical adviser indicated that appellant had mild residual symptoms of carpal tunnel syndrome in both hands and concluded that he had a five percent permanent impairment in each hand. He noted that appellant had an osteophyte in his left wrist but that the April 2006 surgery had resolved the symptoms caused by the osteophyte.

On April 18, 2007 Dr. McGillivary stated that, on examination, appellant exhibited no swelling or deformity of his arms, he had full shoulder, elbow, wrist, and digital motion, and medial, ulnar and radial nerves were all normal. The ulnar nerves seemed to be tender and a little irritable, but not compromised, and there were no true Tinel's or ulnar nerve-type symptoms.

In a May 29, 2007 decision, the Office granted appellant a schedule award for a five percent permanent impairment of his right arm and a five percent permanent impairment of his left arm. The award ran for 31.2 weeks from February 14 to September 20, 2007.

[1] On February 13, 2007 a physical therapist indicated that appellant had a 10 percent permanent impairment of each arm due to sensory loss and limited wrist motion.

In a July 30, 2007 report, Dr. McGillivary stated that he believed that appellant had a 10 percent permanent impairment of each arm.[2] In an October 19, 2007 report, an Office medical adviser indicated that the medical evidence added to the record since March 2007 did not show that appellant had more than a five percent permanent impairment in each arm.

In an October 31, 2007 decision, the Office affirmed its May 29, 2007 decision regarding appellant's entitlement to schedule award compensation. It indicated that Dr. McGillivary did not explain how his impairment rating comported with the A.M.A., *Guides*.

On April 22, 2008 a physical therapist stated that, under the A.M.A., *Guides*, appellant had an eight percent permanent impairment of his left wrist due to mild instability of the triquetrolunate joint. On June 20, 2008 an Office medical adviser stated that the April 22, 2008 report did not change his opinion that appellant had a five percent permanent impairment in each arm. In a July 28, 2008 decision, the Office affirmed its October 31, 2007 decision.

Appellant requested reconsideration of his claim and submitted an April 2, 2008 form authorizing a functional capacity evaluation and a May 22, 2008 authorization request form for past medical care. In a January 5, 2009 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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 implementing regulation as the appropriate standard for evaluating schedule losses.[5] Physical therapists are not physicians under the Act and are not qualified to provide the necessary medical evidence to meet a claimant's burden of proof to establish entitlement to compensation.[6]

The A.M.A., *Guides* evaluates the permanent impairment caused by carpal tunnel syndrome by determining whether such a condition falls within one of three categories discussed in section 16.5d.[7] Under the first category, if there are positive clinical findings of median nerve

[2] Dr. McGillivary indicated that he believed that he "signed off on" an impairment rating, but the record does not contain such a document.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] *Jane A. White*, 34 ECAB 515, 518-19 (1983).

[7] *See* A.M.A., *Guides* 495.

dysfunction and an electrical conduction delay, the condition is rated under the standards found earlier in Chapter 16 for evaluating sensory or motor deficits due to peripheral nerve disorders. Under the second category, if there is normal sensibility (evaluated by two-point discrimination and Semmes-Weinstein monofilament testing) and normal opposition strength with abnormal sensory and/or motor latencies or abnormal electromyogram (EMG) testing of the thenar muscles, an impairment rating not to exceed five percent of the upper extremity may be justified. Under the third category, if sensibility, opposition strength and nerve conduction study findings are normal, there is no objective basis for an impairment rating.[8]

ANALYSIS -- ISSUE 1

The Office initially accepted that appellant sustained bilateral carpal tunnel syndrome and right middle trigger finger due to the repetitive duties of his job. It later expanded the accepted conditions to include joint derangement of the left forearm. On January 26, 2004 Dr. Baggett, an attending Board-certified orthopedic surgeon, performed right carpal tunnel release and right middle trigger finger release surgery and on April 5, 2004 he performed left carpal tunnel release surgery. On April 26, 2007 Dr. McGillivary, an attending Board-certified orthopedic surgeon, performed left wrist surgery, including arthroscopy, debridement and open excision of dorso-ulnar osteophyte.

Appellant submitted a July 30, 2007 report in which Dr. McGillivary stated that he believed that he had a 10 percent permanent impairment of each arm.[9] The opinion of Dr. McGillivary is of limited probative value regarding appellant's entitlement to schedule award compensation in that he failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[10]

In a February 13, 2007 report, a physical therapist indicated that appellant had a 10 percent permanent impairment of each arm due to sensory loss and limited wrist motion. In an April 22, 2008 report, another physical therapist stated that he had an eight percent permanent impairment of his left wrist due to mild instability of the triquetrolunate joint. These reports are of limited probative value because physical therapists are not physicians under the Act and are not qualified to provide the necessary medical evidence to meet appellant's burden of proof to establish entitlement to compensation.[11]

Appellant did not submit any evidence showing that he has more than a five percent permanent impairment of his right arm and a five percent permanent impairment of his left arm.

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[8] *Id.*

[9] Dr. McGillivary indicated that he believed that he "signed off on" an impairment rating, but the record does not contain such a document.

[10] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[11] *See supra* note 6.

The Board further notes that Dr. Baggett and several Office medical advisers all provided opinions that appellant has a five percent impairment in each arm.[12] For these reasons, the Office properly determined that appellant is not entitled to additional schedule award compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, 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.[13] 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.[14] 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.[15] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 2

In support of his reconsideration request, appellant submitted an April 2, 2008 form authorizing a functional capacity evaluation and a May 22, 2008 authorization request form for past medical care. The submission of this nonmedical evidence would not require reopening of appellant's claim for further review of the merits of his claim because the evidence is not relevant to the main issue of the present case. The issue of appellant's entitlement to schedule award compensation is medical in nature and can only be resolved by the submission of medical evidence. Appellant did not submit any medical evidence in support of his reconsideration request.

Appellant has not established that the Office improperly denied his request for further review of the merits of its July 28, 2008 decision under section 8128(a) of the Act, because he did not submit evidence or argument showing that the Office erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered by the Office, or constituting relevant and pertinent new evidence not previously considered by the Office.

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[12] While it is not entirely clear from the record, it appears that the five percent rating in each arm was based on a finding that appellant fell under the second category for evaluating carpal tunnel syndrome found on page 495 of the A.M.A., *Guides*. Appellant had normal sensibility and opposition strength, but he did have some sensory deficits in both arms. *See supra* notes 7 and 8.

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id.* at § 10.607(a).

[15] *Id.* at § 10.608(b).

[16] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a five percent permanent impairment of his right arm and a five percent permanent impairment of his left arm, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2009 and July 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 12, 2010
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