

**United States Department of Labor
Employees' Compensation Appeals Board**

L.G., Appellant)

and)

ENVIRONMENTAL PROTECTION AGENCY,)
HUMAN STUDIES FACILITY, Chapel Hill, NC,)
Employer)

Docket No. 09-1517
Issued: March 3, 2010

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 11, 2009 appellant filed a timely appeal from the January 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs' denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the December 18, 2007 decision of the Office granting a schedule award compensation and the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

The Office accepted that on April 15, 2005 appellant, then a 39-year-old division secretary, sustained a work-related injury when she twisted her ankle while walking. It accepted her claim for fracture, strain and acute osteomyelitis of her right ankle. In a June 25, 2005 statement, appellant noted that she had a prior claim accepted for a September 29, 2003 right ankle injury in claim No. xxxxxx518. Appellant noted that she had received a schedule award under the prior claim for 10 percent impairment of her right foot. She underwent surgery on September 29, 2005 for repair of the anterior talofibular ligament.

On October 31, 2006 appellant filed a claim for an increased schedule award. In an October 25, 2006 note, Dr. James A. Nunley, an attending orthopedic surgeon, advised that appellant had five percent impairment of her right foot.² On March 26, 2007 Dr. Nunley advised that he rated impairment to appellant's foot under the North Carolina Industrial reference guide. He advised that he was not trained in the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

Appellant was referred by the Office for a second opinion examination concerning the extent of impairment due to her accepted injury.³ On September 26, 2007 Dr. Williams A. Somers, a Board-certified orthopedic surgeon, reviewed the history of injury and medical treatment. On examination, he noted that appellant exhibited 8 degrees of dorsiflexion of her right ankle, 12 degrees of plantar flexion of her right ankle, 10 degrees of inversion of her right hindfoot and 5 degrees of eversion of her right hindfoot. Dr. Somers rated impairment based on Table 17-11 and 17-12 of the fifth edition of the A.M.A., *Guides* (5th ed. 2001).⁴ He noted that appellant had 10 percent impairment under Table 17-11 for mild ankle motion impairment of the right foot. Under Table 17-12, she had three percent of the right foot based on mild impairment of hindfoot motion. He noted that total impairment was obtained by adding the values, which was 13 percent to the right foot.⁵ On October 18, 2007 an Office medical adviser agreed with Dr. Somers' assessment that appellant had 13 percent permanent impairment to her right foot.

In a December 18, 2007 decision, the Office granted appellant a schedule award for an additional 3 percent permanent impairment to her right foot, or a total of 13 percent permanent impairment. The award ran for 6.15 weeks from September 13 to October 26, 2006.

In a December 15, 2008 letter, appellant requested reconsideration of her claim. She argued that her prior schedule award evaluations were deficient because impairment ratings were

² Dr. Nunley made general reference to a September 13, 2006 report in which he noted that appellant was able to tiptoe and heel walk with normal gait; had no drawer, talar tilt, effusion, crepitus or tenderness over the lateral gutter. He reported normal sensation and that the scar was not tender. Dr. Nunley rated impairment as five percent of the right foot based on persistent pain with normal range of motion, strength and stability.

³ Appellant was initially referred to Dr. David W. Boone, an orthopedic surgeon, who provided a 16 percent impairment rating to the right foot. On August 9, 2007 an Office medical adviser noted that Dr. Boone had not provided sufficient information on which to base a schedule award.

⁴ See A.M.A., *Guides* 537, Table 17-11 and 17-12.

⁵ Dr. Somers noted providing impairment estimates based on the foot and the right leg.

not included for pain and scarring under the standards of the A.M.A., *Guides*. Appellant also claimed that her impairment rating should have been based on impairment of her right leg rather than on impairment of her right foot. She cited numerous Board cases, which involved assessment of leg impairment and suggested that the holdings in these cases required that her own impairment be assessed with respect to her right leg. Appellant cited Board precedent indicating that where the residuals of an injury to a member of the body specified in the schedule award provisions of the Federal Employees' Compensation Act extend into an adjoining area of a member also enumerated in the schedule, such as an injury of the finger into the hand, of a hand into the arm, or of a foot into the leg, the schedule award should be made on the basis of the percentage of loss of use of the larger member. She suggested that this precedent showed that her impairment should have been assessed with respect to her right leg.

In a January 5, 2009 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ 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.⁷ 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.⁸ 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.⁹

While a 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.¹⁰

ANALYSIS

The underlying issue in this case is the determination that appellant sustained 13 percent impairment to her right foot. This rating was premised on the September 26, 2007 report of Dr. Somers. Appellant sought reconsideration of the December 17, 2007 schedule award on December 15, 2008. Her request to the Office raised several contentions that she believed

⁶ 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).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ See *Jennifer A. Guillary*, 57 ECAB 485 (2006).

warranted further merit review; however she did not submit any medical evidence in support of her arguments.¹¹ The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration under section 8128.

Appellant contended that she has greater impairment than that awarded by the Office. Her reconsideration request argued that Dr. Somers noted "mild pain laterally with eversion on the left compared to the right." Appellant noted that the Office erred by not considering pain or an ankle scar as impairments. The Board notes, however, that she did not submit any pertinent new or relevant medical evidence to the Office in support of her claim that these factors constituted impairment in her case. The Board has held that the degree of functional impairment to a scheduled member is essentially a medical question that can only be established by probative medical opinion.¹² Appellant did not submit any medical evidence from a physician addressing how pain caused impairment or addressing her right ankle scar. The Board notes that Dr. Somers provided findings on examination and rated appellant's impairment based on loss of ankle motion and the hindfoot under Table 17-11 and 17-12. He did not advise that pain or her ankle scar constituted impairment. While appellant has cited to the A.M.A., *Guides* and Board case law, her lay opinion concerning the extent of impairment is not a probative medical opinion or sufficient to warrant the Office reopening her claim for further merit review. Moreover, the portion she quoted from the report of Dr. Somers, as noted, addresses mild pain laterally with eversion on the left when compared to the right. Appellant's schedule award was for impairment to her right foot.¹³ The medical evidence on which she based her arguments was previously reviewed and considered by the Office.

Similarly, her contention that her impairment extends from her foot to her right lower extremity was not supported with probative medical evidence addressing this issue. The Board cases she cited do not establish that the Office erroneously applied or interpreted a specific point of law in her case. The question of whether impairment extends from the foot to the lower extremity is also a medical question. The evidence from her attending surgeon, Dr. Nunley, rated impairment in terms of her right foot; however, the physician did not provide an estimate conforming to the A.M.A., *Guides*. He did not address whether impairment extended into the leg. Dr. Somers noted that he was providing impairment estimates in terms of appellant's right foot and lower extremity; however, he did not ever address the issue of whether her impairment extended into the larger adjoining area. Rather, he stated in his report that "[o]n one form, not specifically sent to me, but in the medical records it indicates that the impairment requested related to the right leg. I will give an impairment based upon the foot and the leg so that there will be no confusion." Appellant's argument does not establish error by the Office in granting an additional schedule award based on impairment to her right foot and not the larger member.

¹¹ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² See *R.S.*, 58 ECAB 362 (2007).

¹³ Appellant argued that she should receive three percent impairment under Chapter 18, page 574 of the A.M.A., *Guides*. Office procedures, however, state that a separate pain calculation under Chapter 18 is not to be used in combination with the other methods for rating impairment as outlined in the other chapters of the A.M.A., *Guides*. See *T.H.*, 58 ECAB 334 (2007); *Frantz Ghassan*, 57 ECAB 349 (2006).

Appellant's arguments do not require reopening of her claim for further merit review. She did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new medical evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board