United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 09-1743**
	)	**Issued: March 17, 2010**
U.S. POSTAL SERVICE, SOUTHEASTERN PROCESSING & DISTRIBUTION CENTER, Southeastern, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 30, 2009 appellant, through her attorney, filed a timely appeal from a March 12, 2009 merit decision of the Office of Workers' Compensation Programs granting her a schedule award and a May 28, 2009 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case and over the May 28, 2009 decision.

ISSUES

The issues are: (1) whether appellant has more than a six percent permanent impairment of the left upper extremity; and (2) whether the Office properly denied her request for further review of the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On October 15, 2003 appellant, then a 43-year-old mail processor, filed a claim alleging that on or about October 9, 2003 she injured her left shoulder due to repetitive work duties.[1] The Office accepted the claim for a left shoulder strain.

On June 7, 2005 appellant underwent an excision of a ganglion cyst on the left shoulder. On June 20, 2006 she underwent a left shoulder arthroscopic superior labrum anterior to posterior (SLAP) lesion repair. The Office paid her compensation for periods of disability resulting from the surgeries.[2]

On November 21, 2008 appellant, through her attorney, requested a schedule award. In a report dated August 7, 2008, Dr. Nicholas P. Diamond, an osteopath, discussed appellant's complaints of pain and stiffness in the left shoulder and difficulties performing activities. On examination, he found tenderness of the acromioclavicular joint and anterior and posterior rotator cuff. Dr. Diamond measured range of motion of 150 degrees forward elevation, 135 degrees abduction, 50 degrees adduction, 90 degrees external rotation and 65 degrees of internal rotation. He tested manual muscle strength and found 3/5 to 4/5 strength of the supraspinatus and deltoids and 5/5 strength of the triceps and biceps. Dr. Diamond measured grip strength as 27 kilograms (kg) on the right and 11.50 kg on the left and pinch strength of 5.75 kg on the right and 2.0 kg on the left. He further measured the circumference of appellant's lower arm as 25.5 centimeters (cm) on the right and 26.5 cm on the left. Dr. Diamond found that the circumference of the upper arm was 33.5 cm on the right and 34 cm on the left. He diagnosed cumulative and repetitive trauma disorder, a left shoulder complex ganglion cyst formation and a post-traumatic SLAP lesion tear and repair. Appellant completed a form rating the severity of her pain performing activities, which yielded an 81 percent quick disabilities of arm, shoulder and hand (DASH) score. She indicated that her pain level was a 5 to 8 out of 10 using the visual analogue scale. Dr. Diamond concluded that, for the left shoulder, appellant had a two percent impairment due to loss of flexion,[3] a two percent impairment due to loss of abduction[4] and a two percent impairment for loss of internal rotation,[5] for a six percent total impairment due to loss of range of motion. He added an additional three percent impairment due to pain using Figure 18-1 on page 574 of the A.M.A., *Guides* to find a total left upper extremity impairment of nine percent. Dr. Diamond opined that appellant reached maximum medical improvement on August 7, 2008.

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[1] Appellant filed a traumatic injury claim; however, her supervisor noted on the claim form that it should be an occupational disease claim. The Office adjudicated the claim as an occupational disease as she alleged work factors occurring over the course of more than one workday. *See* 20 C.F.R. § 10.5(q).

[2] On January 24, 2007 appellant accepted a limited-duty work assignment with the employing establishment. By decision dated December 12, 2007, the Office reduced her compensation to zero on the grounds that her actual earnings fairly and reasonably represented her wage-earning capacity.

[3] The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) at 476, Figure 16-40.

[4] *Id*. at 477, Figure 16-43.

[5] *Id*. at 479, Figure 16-46.

On January 31, 2009 an Office medical adviser reviewed Dr. Diamond's August 7, 2008 report. He noted that 150 degrees of flexion yielded a two percent impairment, 130 degrees abduction yielded a two percent impairment, 60 degrees internal rotation yielded a two percent impairment and 90 degrees external rotation yielded no impairment, for a total impairment due to loss of range of motion of six percent. The Office medical adviser found that appellant was not entitled to an additional three percent impairment due to pain under Chapter 18. He related that she did not meet the criteria described in Chapter 18 on page 570 of the A.M.A., *Guides,* which provides an additional award for pain when a verifiable medical condition causes excess pain, when there is an established pain syndrome without identified organ dysfunction explaining the pain and when there are other associated pain syndromes.

By decision dated March 12, 2009, the Office granted appellant a schedule award for a six percent permanent impairment of the left upper extremity. The period of the award ran for 131.04 days from August 7 to December 16, 2008.

On April 21, 2009 appellant, through her attorney, requested reconsideration. He asserted that the quick DASH pain index supported Dr. Diamond's finding of an additional three percent impairment due to pain. The attorney resubmitted Dr. Diamond's August 7, 2008 report.

By decision dated May 28, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening her case for further review of the merits under section 8128. It found that the attorney did not raise a substantive legal argument and that the August 7, 2008 report duplicated evidence already of record.

On appeal, appellant's attorney contends that a conflict in medical opinion exists between Dr. Diamond and the Office referral physician necessitating referral to an impartial medical examiner. He asserts that Dr. Diamond properly determined that she was entitled to an additional three percent impairment due to pain using the quick DASH disability score and her description of her pain level using the visual analogue scale.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing federal regulations,[7] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

claimants.[8] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[9]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a left shoulder strain and authorized a left shoulder excision of a ganglion cyst on June 7, 2005 and a SLAP lesion repair on June 20, 2006. On November 21, 2008 appellant requested a schedule award.

In an August 7, 2008 impairment evaluation, Dr. Diamond discussed appellant's subjective complaints of left shoulder pain and stiffness with restrictions in daily activities. He found that she had a DASH disability score of 81 percent and identified her pain level as 5 to 8 on the visual analogue scale. Dr. Diamond measured range of motion of the left shoulder as 150 degrees forward elevation, 135 degrees abduction, 50 degrees adduction, 90 degrees external rotation and 65 degrees internal rotation. He found that 150 degrees flexion constituted a two percent impairment,[10] 135 degrees abduction constituted a two percent impairment[11] and 65 degrees internal rotation constituted a two percent impairment.[12] Dr. Diamond added the impairments due to loss of range of motion to find that appellant had a six percent impairment of the left upper extremity. He added a three percent impairment due to pain and concluded that she had a total left upper extremity impairment of nine percent.[13]

An Office medical adviser reviewed Dr. Diamond's findings and agreed with his determination that appellant had a six percent impairment due to loss of range of motion. He disagreed with Dr. Diamond's finding that she was entitled to an additional three percent impairment due to pain as he found that she did not fit with the criteria under Chapter 18 for an additional pain award. The Board notes that examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[14] Dr. Diamond did not address why appellant's condition could not be adequately rated under other chapters. The Board finds that the evidence supports that appellant has no more than a six percent permanent impairment of the left upper extremity.

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[8] *Id*. at § 10.404(a).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003). As of May 1, 2009, the sixth edition will be used. FECA Bulletin No. 09-03 (issued March 15, 2008).

[10] A.M.A., *Guides* at 476, Figure 16-40.

[11] *Id*. at 477, Figure 16-43.

[12] *Id*. at 479, Figure 16-46.

[13] *Id*. at 574, Figure 18-1.

[14] *See* Federal (FECA) Procedure Manual, *supra* note 9; A.M.A., *Guides* at 18.3(b); *see also Philip Norulak*, 55 ECAB 690 (2004).

On appeal, appellant's attorney asserts that there is an unresolved conflict in medical opinion between Dr. Diamond and the Office medical adviser. Both Dr. Diamond and the Office medical adviser concurred that appellant had a six percent impairment of the left upper extremity due to loss of range of motion. Dr. Diamond awarded an additional three percent impairment due to pain under Chapter 18. As noted, however, Chapter 18 is not to be applied without an explanation of why pain cannot be rated in accordance with other chapters of the A.M.A., *Guides*.[15]

Appellant's attorney also maintains that Dr. Diamond properly assessed her pain as warranting an additional three percent impairment using the quick DASH disability score and her description of the pain using the visual analogue scale. However, as noted, without an explanation of why the pain cannot be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*, the additional impairment due to pain is of little probative value.[16]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[17] the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.[18] 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.[19] 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.[20]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[21] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[22] While the reopening of a case may be predicated

[15] *Id*.

[16] *Id*.

[17] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[18] 20 C.F.R. § 10.606(b)(2).

[19] *Id*. at § 10.607(a).

[20] *Id*. at § 10.608(b).

[21] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[22] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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.[23]

ANALYSIS -- ISSUE 2

In his request for reconsideration, appellant's attorney argued that Dr. Diamond's quick DASH pain index supported his finding that appellant had an additional three percent impairment due to pain. An Office medical adviser, however, previously reviewed Dr. Diamond's report, including the DASH pain index and properly found that his opinion that appellant was entitled to an additional award for pain was not in accordance with the A.M.A., *Guides*. Consequently, the attorney's argument does not have a reasonable color of validity such that it would warrant reopening her case for merit review.[24]

Appellant also resubmitted the August 7, 2008 report from Dr. Diamond. Evidence which repeats or duplicates evidence already in the case record, however, has no evidentiary value and does not constitute a basis for reopening a case.[25]

Appellant 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 new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has more than a six percent permanent impairment of the left upper extremity. The Board further finds that the Office properly denied her request for further review of the merits of her claim under section 8128.

[23] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[24] *Elaine M. Borghini*, 57 ECAB 549 (2006).

[25] *F.R.*, 58 ECAB 607 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 28 and March 12, 2009 are affirmed.

Issued: March 17, 2010
Washington, DC

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

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

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