United States Department of Labor
Employees' Compensation Appeals Board

G.P., Appellant	)	
and	)	**Docket No. 09-1951**
	)	**Issued: May 14, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 July 27, 2009 appellant, through his attorney, filed a timely appeal from a March 26, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased schedule award and a June 4, 2009 nonmerit decision denying his request for reconsideration.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision and the denial of reconsideration.

ISSUES

The issues are: (1) whether appellant has more than a nine percent permanent impairment of the right lower extremity, for which he received a schedule award; and

[1] By decision dated August 7, 2008, the Office found that appellant received an overpayment of $1,785.67 for the period April 14 through May 10, 2008, because he received compensation for disability after he returned to work. Appellant has not appealed this decision and therefore it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c); *N.M.*, 58 ECAB 273 (2007).

(2) whether the Office properly refused to reopen his case for further merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On May 7, 1990 appellant, then a 44-year-old housekeeping aid, filed a claim alleging that he sustained a traumatic injury to his lower back and knee on April 23, 1990 in the performance of duty. The Office accepted the claim for left knee strain, lumbar strain and a herniated nucleus pulposus at L5-S1. Appellant stopped work on April 23, 1990 and returned to work on June 20, 1990. He sustained a recurrence of disability on September 3, 1992.

On April 14, 2008 appellant returned to full-time limited-duty employment. On June 11, 2008 the Office requested that Dr. Z. Mark Hongs, an attending physiatrist, provide an impairment evaluation in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). On July 24, 2008 Dr. Hongs opined that appellant reached maximum medical improvement on November 27, 2007. He identified the affected nerve root as L4-5 on the right side and graded weakness as 4/5. Dr. Hongs found that appellant had a 60 percent lower extremity impairment due to sensory loss and a 25 percent lower extremity impairment due to decreased strength.

On August 25, 2008 an Office medical adviser reviewed the medical evidence. He noted that appellant's physical examination revealed no sensory abnormalities and mildly decreased strength. The Office medical adviser applied Table 15-16 and Table 15-18 on page 424 of the A.M.A., *Guides* to his interpretation of the evidence to find that appellant had a nine percent permanent impairment of the right lower extremity.

By decision dated September 11, 2008, the Office granted appellant a schedule award for a nine percent permanent impairment of the right lower extremity. The period of the award ran for 25.92 weeks from August 21, 2007 to February 18, 2008.

On September 28, 2008 appellant requested a review of the written record. Following a preliminary review, on December 10, 2008 an Office hearing representative vacated the September 11, 2008 schedule award decision. She found that Dr. Hongs' opinion was insufficiently explained to establish the degree of permanent impairment. The hearing representative also noted that the Office medical adviser had found no evidence of sensory loss. She instructed the Office to refer appellant for a second opinion examination.

On February 4, 2009 the Office referred appellant to Dr. David H. Trotter, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 18, 2009, Dr. Trotter discussed the history of injury and reviewed the evidence of record. On physical examination he found a "completely unremarkable straight leg raise bilaterally with negative tension signs," a negative Faber maneuver of the hips and intact sensation of the lower extremities. Dr. Trotter found a "positive Waddell sign of complaints of pain upon superficial palpation of his lumbosacral spine." He determined that the accepted conditions of left knee strain, lumbago, lumbar neuritis and a disc herniation at L5-S1 had resolved completely. Dr. Trotter diagnosed chronic degenerative arthritis of the spine and knees "not materially affected by the injury sustained on April 23, 1990." He asserted that appellant's complaints and

symptoms were "compatible with a degree of symptom magnification *i.e.* the positive Waddell." Dr. Trotter found no evidence of a herniated disc or impingement of a nerve root based on the normal neurological examination and the results of diagnostic studies. He further opined that appellant had no deficit or residuals of his left knee injury. Dr. Trotter determined that appellant had no "sensory abnormalities or a loss of strength in the spine or legs as a result of the work injury." He concluded that he had no impairment under the A.M.A., *Guides*.

On March 4, 2009 an Office medical adviser again reviewed the evidence of record. He discussed Dr. Trotter's findings of symptoms magnification, a fully resolved left knee condition and no loss of sensation or strength in the spine. The Office medical adviser concurred with Dr. Trotter's determination that appellant had no impairment of either lower extremity.

By decision dated March 26, 2009, the Office denied appellant's claim for an increased schedule award. It found that the evidence did not establish more than the previously awarded nine percent impairment of the right lower extremity.

On April 21, 2009 appellant requested reconsideration. He resubmitted a July 27, 2006 magnetic resonance imaging (MRI) scan study of the lumbar spine, work capacity evaluations dated January 31, 2006 and August 21, 2007, the July 24, 2008 impairment evaluation from Dr. Hongs and a February 7, 2008 prescription for physical therapy. Appellant also submitted a June 26, 2006 right knee x-ray report, an August 9, 2007 MRI scan study and a November 19, 2008 computerized tomography scan of the lumbar spine.

By decision dated June 4, 2009, the Office denied appellant's request for reconsideration as the evidence submitted was repetitious or irrelevant and thus insufficient to warrant reopening his case for further merit review under section 8128.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[2] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[3] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment the Act, under section 8107(a), compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[4]

As a claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, it is thus the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury

[2] 5 U.S.C. §§ 8101-8193.

[3] *Lyle E. Dayberry*, 49 ECAB 369 (1998).

[4] *Renee M. Straubinger*, 51 ECAB 667 (2000).

entitling him or her to a schedule award.[5] The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury.[6] The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left knee strain, lumbar strain and a herniated nucleus pulposus at L5-S1 due to an April 12, 1990 work injury. In an impairment evaluation dated July 24, 2008, Dr. Hongs opined that appellant had a 60 percent impairment of his right lower extremity due to sensory loss and a 25 percent impairment of his left lower extremity due to loss of strength. He, however, did not explain how he applied the A.M.A., *Guides* in reaching his impairment rating and thus his report is of diminished probative value.[8]

On August 25, 2008 an Office medical adviser interpreted the evidence of record to find that appellant had a nine percent permanent impairment of the right lower extremity using Tables 15-16 and 16-18 on page 424 of the A.M.A., *Guides*. By decision dated September 11, 2008, the Office granted him a schedule award for a nine percent permanent impairment of the right lower extremity. On December 10, 2008 a hearing representative found that the record required further development to determine the extent of appellant's permanent impairment. She noted that Dr. Hongs' findings were unexplained and that the Office medical adviser found no evidence of sensory loss. The Board finds neither Dr. Hongs nor the Office medical adviser to be of probative value.

The Office referred appellant to Dr. Trotter for a second opinion examination. On February 18, 2009 Dr. Trotter diagnosed chronic degenerative arthritis of the spine and knees unrelated to appellant's work injury. He found negative straight leg raising and no loss of sensation but a positive Waddell sign on physical examination. Dr. Trotter asserted that appellant's neurological examination and diagnostic studies were normal with no evidence of a disc herniation or impingement of a nerve root. He further found no impairment due to appellant's knee injury and explained that he had no loss of strength or sensation in either his back or leg due to his employment injury. Dr. Trotter attributed his complaints to symptom magnification. The Board finds that his report is based on a detailed history and thorough findings on physical examination. Dr. Trotter provided rationale for his opinion by explaining that there were no objective findings on examination and that appellant's complaints showed symptom magnification. He concluded that appellant had no impairment under the A.M.A., *Guides* due to either his back or left knee condition. The Board finds that Dr. Trotter's opinion

[5] *See D.H.*, 58 ECAB 358 (2007); *Veronica Williams*, 56 ECAB 367 (2005).

[6] *Manuel Gill*, 52 ECAB 282 (2001).

[7] *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

[8] *See I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009).

represents the weight of the medical evidence and establishes that appellant does not have a ratable impairment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] 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.[10] 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.[11] 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.[12]

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.[13] 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.[14] While the 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.[15]

ANALYSIS -- ISSUE 2

The Office found that the medical evidence established that appellant had no more than a nine percent permanent impairment of the right lower extremity. On April 21, 2009 appellant requested reconsideration. In support of his request, he resubmitted a July 27, 2006 MRI scan study of the lumbar spine, January 31, 2006 and August 21, 2007 work capacity evaluations, the July 24, 2008 impairment evaluation from Dr. Hongs and a February 7, 2008 prescription for physical therapy. This evidence, however, was already in the case record. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[16]

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[9] 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."

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Id*. at § 10.607(a).

[12] *Id*. at § 10.608(b).

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

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

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

[16] *J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

Appellant also submitted the results of diagnostic studies taken from 2006 to 2008. The diagnostic studies, however, are not relevant to the pertinent issue of whether the medical evidence establishes that he has more than a nine percent permanent impairment of the right lower extremity. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[17]

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 he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has no more than a nine percent permanent impairment of the right lower extremity, for which he received a schedule award. The Board further finds that the Office properly refused to reopen his case for further merit review under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 4 and March 26, 2009 are affirmed.

Issued: May 14, 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

[17] *P.C.*, 58 ECAB 405 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).