

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

Y.R., Appellant)	
)	
and)	Docket No. 10-2304
)	Issued: August 1, 2011
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Richmond, VA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 13, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated August 19, 2010 which denied her claim for a schedule award. She also appealed a September 3, 2010 decision which denied her reconsideration request. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained permanent impairment of a scheduled member; and (2) whether OWCP properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(9).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 29, 2010 appellant, then a 45-year-old clerk, filed a traumatic injury claim alleging that on March 18, 2010 she was pushing mail carts up a ramp and felt a pull in her back. OWCP accepted the claim for sprain of the low back lumbar region. Appellant did not stop work.

Appellant came under the care of Dr. Scott Thomas, a family practitioner, from March 31 to May 19, 2010. Dr. Thomas' treatment records noted appellant's case for her lumbar condition and defined her work restrictions. On April 14, 2010 appellant presented with findings of muscle and back pain with numbness, tingling and weakness. Dr. Thomas noted good flexion, extension and strength of the paraspinal muscles. He diagnosed low back strain and continued physical therapy and her work restrictions. Dr. Thomas treated appellant on May 5, 2010 for lumbar pain and noted thoracic paraspinal muscle flexion of 60 degrees. He released appellant to work full-time regular duty. On May 19, 2010 Dr. Thomas diagnosed lower back strain and released appellant from his care. Appellant also submitted physical therapy notes.

On July 29, 2010 appellant filed a claim for a schedule award.

In a decision dated August 19, 2010, OWCP denied appellant's claim for a schedule award. It noted that the medical evidence of record did not establish any permanent impairment of a scheduled body member caused by the accepted back condition.

On August 24, 2010 appellant requested reconsideration. In an August 19, 2010 statement, she indicated that OWCP improperly referenced a report from Dr. Ranjitha Gampala,² when she was treated mainly by Dr. Thomas. Appellant noted that she did not submit an impairment rating because Dr. Thomas left the practice. She submitted reports previously of record.

In a September 3, 2010 decision, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations⁴ 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, FECA 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 American Medical Association, *Guides to the Evaluation of Permanent*

² Dr. Gampala, an associate of Dr. Thomas, treated appellant on April 7, 2010.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

Impairment,⁵ has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁷ As neither FECA nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.⁸ The Board notes that section 8101(19) specifically excludes the back from the definition of “organ.”⁹ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹⁰

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.¹¹ The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.¹² The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹³

ANALYSIS -- ISSUE 1

Appellant claimed a schedule award based on a work injury which was accepted for a lumbar sprain. As noted, FECA does not provide a schedule award based on impairment to the back or spine. Appellant may receive a schedule award for impairment to the lower extremities if such impairment is established as being due to her accepted lumbar spine condition.

The Board finds that appellant failed to submit medical evidence to establish that she sustained permanent impairment of either lower extremity based on her accepted lumbar sprain. The record contains reports from Dr. Thomas who noted findings on examination, offered diagnoses and set forth work restrictions; however, Dr. Thomas did not offer any opinion on whether her accepted lumbar sprain caused permanent impairment to her legs, moreover, he did not address whether she had reached maximum medical improvement.¹⁴ As noted, not all

⁵ A.M.A., *Guides* (6th ed. 2008).

⁶ *See supra* note 4.

⁷ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁸ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

⁹ 5 U.S.C. § 8101(19).

¹⁰ *Thomas J. Engelhart*, *supra* note 7.

¹¹ *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹² *Michael S. Mina*, 57 ECAB 379, 385 (2006).

¹³ *Veronica Williams*, 56 ECAB 367 (2005).

¹⁴ Permanent impairment is premised on the employee having reached maximum medical improvement. *See Patricia J. Penny-Guzman*, 55 ECAB 757 (2004).

medical conditions accepted by OWCP result in permanent impairment to a scheduled member. Appellant has the burden of proving that her low back condition resulted in impairment. There is no medical evidence of record that specifically addresses how her accepted lumbar sprain caused permanent impairment to a scheduled body member. Without reasoned medical opinion evidence establishing that appellant sustained permanent impairment causally related to her accepted lumbar sprain, she failed to meet her burden of proof.¹⁵

On appeal, appellant asserts that she is entitled to a schedule award and that the medical evidence of record was not properly reviewed. The medical reports from Dr. Thomas do not address how the accepted lumbar sprain caused permanent impairment to her legs under the A.M.A., *Guides*. Therefore, the medical evidence is insufficient to establish that appellant sustained any permanent impairment as a result of his accepted condition.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,¹⁶ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁷

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁸

¹⁵ The record also contains physical therapy records but these are insufficient to establish entitlement to a schedule award as a physical therapist is not a physician under FECA. *See* 5 U.S.C. § 8101(2); *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician’s assistants, nurses and physical therapists are not competent to render a medical opinion under FECA).

¹⁶ 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim for a schedule award on August 19, 2010 because she did not submit medical evidence which established a permanent impairment of a scheduled body member caused by the accepted condition. It denied her August 24, 2010 reconsideration request, without a merit review and she appealed this decision to the Board. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

In her August 24, 2010 application for reconsideration and an undated statement, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She asserted that OWCP improperly based the schedule award decision on a report from Dr. Gampala when she was treated by Dr. Thomas. Appellant noted that Dr. Thomas did not submit an impairment rating because the physician left the practice. Although OWCP referenced Dr. Gampala, appellant's assertion has no color of validity as the record, as previously explained, reflects that all of the medical evidence was deficient.¹⁹ The underlying issue in this case was whether appellant sustained permanent impairment to the upper or lower extremities causally related to her accepted work injury. That is a medical issue which must be addressed by relevant medical evidence.²⁰ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Appellant submitted reports from Dr. Thomas dated April 7 to May 19, 2010; however, these reports are not relevant because they were previously of record and previously considered by OWCP.²¹ Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's claim for a schedule award. The Board further finds that OWCP properly denied her request for reconsideration.

¹⁹ See *Jennifer A. Guillary*, 57 ECAB 485 (2006) (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).

²⁰ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²¹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the September 3 and August 19, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 1, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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