United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
and	)	**Docket No. 10-1381**
	)	**Issued: February 10, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Aurora, IL, Employer	)	

Appearances:
Brad Harris, 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 April 23, 2010 appellant, through his attorney, filed a timely appeal of an October 28, 2009 decision of the Office of Workers' Compensation Programs denying further merit review. Because over 180 days elapsed between the most recent merit decision, September 17, 2009, to the filing of this appeal, the Board lacks jurisdiction to review the merits of his case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board on appeal. On October 29, 1988 appellant, then a 32-year-old carrier, filed a claim alleging that he experienced low back pain on October 17, 1988 lifting a heavy bag in the performance of duty. The Office accepted his claim for lumbosacral strain and permanent aggravation of degenerative disc disease at L4-5 and

L5-S1. Appellant underwent anterior lumbar interbody fusion at L5. The Office granted him a schedule award for three percent permanent impairment of each of his lower extremities on May 25, 2000. The Board reviewed appellant's claim and concluded that he had no more than three percent impairment of each of his lower extremities for which he had received a schedule award.[1] The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant returned to work in 1998 in a light-duty position. His position changed in 2006. Appellant filed a recurrence of disability on July 27, 2007 alleging on June 28, 2007 he stopped work due to back pain related to his accepted employment injury. By decision dated November 14, 2007, the Office accepted his claim for recurrence of disability beginning June 28, 2007. It entered appellant on the periodic rolls on January 28, 2008. Appellant returned to light-duty work on July 14, 2008.

In a letter dated March 4, 2009, appellant's attorney requested a schedule award and submitted a report dated February 27, 2009 from Dr. Jacob Salomon a Board-certified surgeon, who evaluated appellant's condition using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] and determined that appellant had 57 percent impairment of each of his right lower extremity and 19 percent impairment of his left lower extremity.

Appellant received disability retirement effective April 17, 2009. He elected to receive retirement benefits effective July 4, 2009.

In a letter dated July 15, 2009, the Office explained that the sixth edition of the A.M.A., *Guides*[3] was currently in use and requested a supplemental medical report calculating appellant's permanent impairment based on the appropriate sixth edition of the A.M.A., *Guides*. Appellant's attorney responded on July 15, 2009 and protested the use of the sixth edition of the A.M.A., *Guides* in this case alleging that as the Office delayed in developing his claim his schedule award should be calculated under the fifth edition of the A.M.A., *Guides*. The Office responded on July 21, 2009 again requesting additional medical evidence and noting that his impairment must be calculated under the sixth edition of the A.M.A., *Guides*.

Appellant's attending physician, Dr. Giri T. Gireesan, a Board-certified surgeon, completed a note on July 1, 2009 and provided appellant's range of motion of the neck and lumbosacral spine. He also provided the results of muscle strength evaluations and deep tendon reflexes, which he considered to be normal. Dr. Salomon completed a second report on August 20, 2009 noted that appellant had significant lower back paraspinals muscle spasm and tenderness, radiating pain while attempting to stand on both toes and mild ankle weakness. He reviewed appellant's diagnostic studies and found multilevel lumbosacral radiculopathy and chronic right L5 radiculopathy as well as annular bulging of the L5-S1 disc with foraminal

[1] Docket No. 02-2181 (issued December 6, 2002).

[2] A.M.A., *Guides* (5th ed. 2000).

[3] *Id*. at (6th ed. 2008).

narrowing and degenerative disc disease at L5-S1. Dr. Salomon found functional history of chronic low back pain, abnormal sensation in both lower extremities with decreased pinprick sensation from the right knee down to the right foot and from the left groin to the ankle corresponding to the L5-S1 distribution. He found 16 percent deficit of the right lower extremity and 25 deficit of the left lower extremity after applying the formula of the sixth edition of the A.M.A., *Guides*.

The district medical adviser (DMA) reviewed this report on September 7, 2009 and found that appellant was entitled to an additional three percent impairment of each lower extremity due to impairment of the sural nerve.

By decision dated September 17, 2009, the Office granted appellant a schedule award for an additional six percent impairment of each of his lower extremities.

Appellant requested reconsideration on October 13, 2009 by indicating with a checkmark that he wished to pursue his appeal right of reconsideration. Counsel submitted a letter on the same date and stated, "The [DMA] did not correctly apply the sixth edition of the A.M.A., *Guides* to the rating impairments in accordance with Dr. Saloman's report dated August 20, 2009." He also stated that appellant was entitled to a rating under the fifth edition of the A.M.A., *Guides* as he had timely submitted a request for schedule award and supportive medical evidence and that the Office delayed in reaching a decision.

By decision dated October 28, 2009, the Office denied appellant's request for reconsideration on the grounds that his request for reconsideration did not raise substantive legal questions or include new and relevant evidence and was therefore insufficient to warrant review of the merits of his claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides in section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[4] Section 10.606(b) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that it erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office; or includes relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608 of the Office's regulations provides that when a request for reconsideration is timely, but does meet at least one of these three requirements, it will deny the application for review without reopening the case for a review on the merits.[6]

[4] 5 U.S.C. §§ 8101-8193, 8128(a).

[5] 20 C.F.R. § 10.606.

[6] *Id.* at § 10.608.

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. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. 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.[7]

ANALYSIS

The Office issued a merit decision granting appellant schedule awards for six percent impairment of each of his lower extremities on September 17, 2009. Appellant and his counsel requested reconsideration of this decision on October 13, 2009. He did not submit any new evidence and his attorney argued that the fifth edition of the A.M.A., *Guides* should apply to his schedule award calculations and that the DMA improperly calculated his permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. The Office declined to reopen appellant's claim for consideration of the merits on October 28, 2009. As appellant did not file an appeal with the Board until April 23, 2010, the Board may not consider the merits of his claim.[8]

As appellant submitted no new evidence, the issue before the Board is whether the Office properly declined to reopen his claim on the grounds that he failed to submit arguments that show that the Office erroneously applied or interpreted a specific point of law or that he failed to advance a relevant legal argument not previously considered by the Office.

Counsel did not submit any new arguments that the Office erroneously applied or interpreted a specific point of law. He reargued his previous contention that the fifth edition of the A.M.A., *Guides* should be applied to appellant's request for a schedule award.

The schedule award provision of the Act[9] and its implementing regulations[10] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be

[7] *M.E.*, 58 ECAB 694 (2007).

[8] 20 C.F.R. § 501.3(f). Any notice of appeal must be filed within 180 days form the date of issuance of a decision of the Office.

[9] 5 U.S.C. §§ 8101-8193, 8107.

[10] 20 C.F.R. § 10.404.

based on the sixth edition.[11] As the Office's procedure manual required the Office to apply the sixth edition of the A.M.A., *Guides*, to all decisions issued after May 1, 2009, this repetitious argument does not require the Office to reopen appellant's claim for consideration of the merits.

In regard to counsel's statement that the DMA failed to properly apply the sixth edition of the A.M.A., *Guides*, this assertion does not rise to the level of relevant new argument as counsel did not assert any specific or even general deficits with the DMA's opinion. His statement confirms appellant's disagreement with the amount of his schedule award which was established by the request for reconsideration. Counsel did not offer, discuss or address any specific point of contention with the DMA's application of the A.M.A., *Guides*. By merely indicating that he preferred the rating of his physician and again suggesting that the Office should instead rely on Dr. Salomon's application of the A.M.A., *Guides* to determine appellant's permanent impairment, this allegation does not add any new or relevant argument to appellant's claim.

CONCLUSION

The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on the grounds that his request for reconsideration did not set forth arguments or evidence and 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 include relevant and pertinent new evidence not previously considered by the Office.

[11] *Id*. at § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2011
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