United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 10-1557**
	)	**Issued: May 24, 2011**
DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, TINKER AIR FORCE BASE, OK, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 25, 2010 appellant filed a timely appeal from the March 9, 2010 merit decision of the Office of Workers' Compensation Programs denying his schedule award claim and from a March 25, 2010 decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish entitlement to schedule award compensation; and (2) whether the Office properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

In August 2009, the Office accepted that appellant, then a 63-year-old packaging specialist, sustained cervical spondylosis with myelopathy due to his repetitive work duties.[2] On September 8, 2009 appellant filed a claim for a schedule award due to this accepted injury. On September 16, 2009 the Office requested that he submit additional evidence in support of his claim.

Appellant submitted a document containing an impairment rating under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The calculations indicated that he had 20 percent whole person impairment due to limited neck motion. The document, which is unsigned, indicates that an examination was carried out on November 5, 2009.

An Office claims examiner indicated that appellant telephoned him on November 19, 2009 and told him that the location where appellant obtained an impairment rating only performed evaluations under the fifth edition of the A.M.A., *Guides*. He advised appellant that an impairment under the sixth edition of the A.M.A., *Guides* (6th ed. 2009) was needed.

Appellant submitted a single-page document, on letterhead for the Functional Assessment Centers of Oklahoma, which states that he had 19 percent whole person impairment under Table 17-2, Cervical Spine Regional Grid of the sixth edition of the A.M.A., *Guides*. The document, which is unsigned, indicates that an examination was carried out on November 5, 2009.[3]

On December 23, 2009 the claims examiner called appellant in response to an inquiry about his schedule award claim. On the form detailing the call, he stated, "telephone call to the claimant advised him that we have not sent case out for a second opinion."

In a March 9, 2010 decision, the Office found that appellant had not submitted sufficient medical evidence to meet his burden of proof to establish entitlement to schedule award compensation. It found that he had not submitted a probative medical report that provided an impairment rating in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

[2] Appellant had filed an occupational disease claim for this injury in November 2007 and the acceptance of his claim appears to have been based on an August 2009 evaluation by Dr. Brent Hisey, a Board-certified neurosurgeon who served as an Office referral physician. In 1998, he had undergone posterior foraminotomy surgery at C5-6. On January 19, 2004 Dr. Scott C. Robertson, an attending Board-certified neurosurgeon, performed anterior cervical discectomy fusion surgery at C5-6 and C6-7 with instrumentation.

[3] Neither the Act nor implement federal regulations provide for the payment of a schedule award for loss of use of the back or spine. *See Patricia J. Horney*, 56 ECAB 256 (2005). Appellant may receive a schedule award should he establish permanent impairment to either of his upper extremities.

In a March 15, 2010 letter, appellant requested reconsideration of his claim and discussed the evidence he submitted in support of his claim. He detailed his conversations with the claims examiner about obtaining appropriate medical evidence regarding his impairment. Appellant stated:

> "I was further advised by [the claims examiner] that I would be sent out for a 2nd opinion since [the Functional Assessment Centers of Oklahoma] could/would not provide the proper documentation. I have not received documentation or instructions on how to proceed to obtain this 2nd opinion.
>
> "Please provide information on where or how to go about receiving this 2nd opinion so that an informed opinion may be made on my case."

Appellant submitted a March 15, 2010 letter to the Office in which an employing establishment official referenced the claims examiner's discussions with appellant regarding a second opinion referral to evaluate impairment. The employing establishment official stated, "We would like you to send the [injured worker] for a second opinion impairment rating."

In a March 25, 2010 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[4] and its implementing regulations[5] 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 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7] The report of a nonphysician cannot be considered by the Board in adjudicating a medical matter (such as permanent impairment).[8] The Board has held that the determination of the need for a second opinion examination, the type of examination, the choice

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

of locale and the choice of medical examiners are matters within the province and discretion of the Office.[9]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical spondylosis with myelopathy due to his repetitive work duties.[10] Appellant filed a claim for a schedule award due to this accepted injury. The Office denied his claim on the grounds that he had not submitted any medical evidence to establish entitlement to schedule award compensation.

Appellant submitted a document containing impairment rating calculations under the fifth edition of the A.M.A., *Guides*. The calculations indicated that he had 20 percent whole person impairment due to limited neck motion. The document, which is unsigned, indicates that an examination was carried out on November 5, 2009. Appellant also submitted a single-page document, on letterhead for the Functional Assessment Centers of Oklahoma, which states that he had 19 percent whole person impairment under Table 17-2 of the sixth edition of the A.M.A., *Guides*. The document, which is also unsigned, indicates that an examination was carried out on November 5, 2009.

The Board finds that these unsigned documents are of no probative medical value on the issue of possible permanent impairment. There is no indication that they were produced by physicians. Therefore, they do not constitute probative medical evidence.[11] Appellant did not meet his burden of proof to submit medical evidence showing entitlement to schedule award compensation.[12]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[13] 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;

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[9] *See Dana D. Hudson*, 57 ECAB 298 (2006). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.208.6 (September 2000) (an attending physician should make the schedule award determination whenever possible).

[10] *Supra* note 2.

[11] *See supra* note 8. The Board has held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence. *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

[12] On appeal, appellant asserted that a decision was made on his claim before all of the pertinent information was obtained. However, it is his burden to submit evidence establishing entitlement to schedule award compensation and he has not shown that the Office abused its discretion in handling the development of his claim. *See supra* note 8; *D.F.*, Docket No. 09-1463 (issued August 12, 2010) (it is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury).

[13] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application." 5 U.S.C. § 8128(a).

(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.[14] 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.[15] 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.[16] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[17] 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.[18]

ANALYSIS -- ISSUE 2

In connection with his application for reconsideration of the Office's March 9, 2010 denial of his schedule award claim, appellant did not show that the Office erroneously applied or interpreted a specific point of law. He 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. He suggested that his claim was improperly denied because he believed that he would be sent out for a second opinion examination. Appellant did not, however, present support for this argument. As noted, it is his burden to submit medical evidence supporting permanent impairment to a schedule member and he did not show abuse of discretion by the Office in developing his claim.[19] The underlying issue in this case is whether appellant submitted sufficient medical evidence to show his accepted cervical injury caused impairment to either upper extremity. That is a medical issue which must be addressed by relevant medical evidence.[20] Appellant did not submit any new or relevant medical evidence in this case.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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 relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

[14] 20 C.F.R. § 10.606(b)(2).

[15] *Id.* at § 10.607(a).

[16] *Id.* at § 10.608(b).

[17] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[18] *John F. Critz*, 44 ECAB 788, 794 (1993).

[19] Appellant did not explain the relevance of the March 15, 2010 letter from an employing establishment official.

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

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish entitlement to schedule award compensation. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 25 and March 9, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 24, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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