United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 10-1758**
	)	**Issued: May 16, 2011**
DEPARTMENT OF THE ARMY, U.S. ARMY EUROPE -- SEVENTH ARMY, APO, AE, 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 June 22, 2010 appellant filed a timely appeal from a March 26, 2010 merit decision of the Office of Workers' Compensation Programs denying a schedule award claim and a June 7, 2010 nonmerit 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 the claim.

ISSUES

The issues are: (1) whether appellant has established entitlement to a schedule award for his left lower extremity; and (2) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 19, 2003 appellant, then a 61-year-old quality assurance specialist, was injured while on assignment in Germany when he bumped his left knee while climbing into a military truck. The Office accepted the claim for left knee contusion and aggravation of osteochondritis. Appellant retired on September 3, 2006.

On September 23, 2008 appellant requested a schedule award. In a September 22, 2008 letter, he asserted that his injury had worsened and that he had been fitted with a leg brace. Appellant provided several documents in support of his schedule award claim. These included personnel records pertaining to his retirement and progress notes from the Department of Veterans Affairs.

On November 7, 2008 the Office referred the medical record to an Office medical adviser for an opinion on whether appellant's accepted conditions caused permanent impairment. In a November 10, 2008 report, an Office medical adviser noted the history of injury, appellant's treatment and reviewed the medical record. He indicated that maximum medical improvement was reached on May 23, 2008. The Office medical adviser opined that there were no objective findings of record to support a permanent partial impairment of the left leg based either on lack of range of motion or surgery to the left knee.

In a November 26, 2008 report, Dr. Vladimir A. Alexander, a Board-certified orthopedic surgeon, noted the history of injury, appellant's conservative treatment and his persistent pain in the medial aspect of the left knee and inferior pole of the patella along with clicking and popping of the knee. He noted examination findings and diagnosed left knee internal derangement. Dr. Alexander also ordered a magnetic resonance imaging (MRI) scan. On December 3, 2008 appellant underwent an MRI scan of the left knee that showed a small amount of effusion, degenerative patellar femoral changes and a partial tear of the medial collateral ligament. In a December 9, 2008 report and a left knee impairment worksheet, Dr. Alexander noted the MRI scan and examination findings. These included 120 degrees flexion, full extension, no gross instability or instability to the knee and mild tenderness to palpation over the distal femur. The Lachman, Apley and McMurray tests were negative. Dr. Alexander noted an impression of status post previous trauma, left distal femur. He found appellant to be at maximum medical improvement for his injury, noting that maximum improvement for such injuries were usually reached within 12 to 16 weeks post injury. Dr. Alexander opined that appellant had eight percent permanent impairment of the left leg due to weakness, atrophy, pain or discomfort. He also opined that appellant could work full duty without limitations. On November 26, 2008 Dr. Alexander attributed appellant's impairment to his work injury.

In a January 5, 2009 report, the Office medical adviser reviewed Dr. Alexander's December 9, 2008 reports. He noted that Dr. Alexander did not sufficiently explain the basis for his impairment finding under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Office medical adviser stated that, in the absence of objective findings under the A.M.A., *Guides*, no impairment could be awarded.

The Office determined that a conflict in medical opinion arose between Dr. Alexander and the Office medical adviser with regard to whether appellant had a ratable impairment of the left leg due to the accepted work injury. It referred appellant to Dr. Robert Henderson, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a March 24, 2009 report, Dr. Henderson noted the history of injury along with his review of the medical records. He noted that appellant had symmetric range of motion to the opposite side. Dr. Henderson stated that the work-related contusion had resolved as it was not present in the last MRI scan and maximum medical improvement was reached within 16 weeks of the injury or around May 1, 2004. He explained that the contusion should have lasted 12 to16 weeks and would be a zero percent disability with no restrictions. Dr. Henderson advised that this was supported by objective findings.

By decision dated May 7, 2009, the Office denied appellant's claim for a schedule award and further denied compensation for wage loss or medical treatment. Determinative weight was accorded to Dr. Henderson's opinion as the impartial medical specialist.

On May 21, 2009 the Office received a letter from appellant requesting a review of the written record. Appellant presented statements asserting that his left knee was still injured as a result of the work injury and that he was disabled as a result.

By decision dated September 25, 2009, an Office hearing representative vacated the May 7, 2009 decision and remanded the case for further development. He found that the case was not in posture of a decision on schedule award and the Office did not afford appellant due process prior to terminating compensation benefits. The hearing representative found that Dr. Henderson was not an impartial medical specialist with regard to whether appellant's work injury had resolved. He further found that Dr. Henderson's opinion did not sufficiently explain his opinion regarding permanent impairment. The hearing representative directed the Office to obtain a supplemental report from Dr. Henderson regarding whether appellant had any permanent impairment of the left leg, pursuant to the A.M.A., *Guides*.

On January 27, 2010 the Office requested a supplemental report from Dr. Henderson regarding whether appellant established any impairment under the sixth edition of the A.M.A., *Guides*. Dr. Henderson was asked to address the accepted conditions and provide a more detailed opinion with regard to permanent impairment due to pain, atrophy, deformity, loss of sensation, loss of strength, marked sensitivity to heat or cold, soft tissue damage or any other relevant subjective factors.

In a March 12, 2010 supplemental report, Dr. Henderson reviewed appellant's history and examination findings. He advised that the only objective finding was pain over the lateral epicondyle and the medial joint over the medial condyle where the prominence was. Dr. Henderson stated that, while the February 2, 2004 MRI scan noted edema, this was a local reaction and had resolution. He advised that the accepted contusion had resolved. Dr. Henderson further opined that appellant had recovered from his knee strain and aggravation of the osteochondritis as of May 1, 2004. He explained that a contusion was something that should resolve within a reasonable amount of time. Dr. Henderson stated that, while subjective complaints over the areas and bony prominence could hurt, any direct blow would have resolved

and any pressure appellant may have from this would have happened independent of the course of the contusion. He stated that appellant should have resolved to his baseline as of May 1, 2004. Dr. Henderson noted no basis for rating impairment due to the work-related injury. He also provided a March 24, 2009 impairment evaluation form in which he noted certain findings and opined that there was no impairment of the left leg due to appellant's knee condition.

On March 24, 2010 a second Office medical adviser reviewed Dr. Henderson's March 12, 2010 report and concurred that there were no objective findings or a basis for an impairment rating under the sixth edition of the A.M.A., *Guides*.

By decision dated March 26, 2010, the Office denied appellant's claim for a schedule award of the left lower extremity based on Dr. Henderson's evaluation.

In an April 15, 2010 letter, appellant disagreed with the Office's March 26, 2010 decision and requested reconsideration. He submitted an April 4, 2010 statement addressing his entitlement to schedule award benefits and referenced information he obtained from the internet. Physical therapy reports and a September 2, 1999 SF-78 were also submitted.

By decision dated June 7, 2010, the Office denied appellant's request for reconsideration without a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act,[2] and its implementing federal regulations,[3] 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 claimants.[4] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[5]

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member.[6] The Board notes that, before applying the A.M.A, *Guides*, the Office must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.[7]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] FECA Bulletin No. 09-03 (issued March 15, 2009); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[6] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[7] *Michael S. Mina*, 57 ECAB 379, 385 (2006).

When there exist opposing medical opinions of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, will be given special weight.[8]

ANALYSIS -- ISSUE 1

The Office accepted the conditions of left knee contusion and aggravation of osteochondritis. On September 23, 2008 appellant filed a claim for a schedule award. The Office found a conflict in medical opinion between Dr. Alexander, who opined that appellant had eight percent permanent impairment of the left lower extremity due to weakness, atrophy, pain or discomfort, and the Office medical adviser, who found that appellant had no ratable impairment under the A.M.A., *Guides.* It properly referred appellant to Dr. Henderson for an impartial evaluation to resolve the conflict.[9]

In a March 12, 2009 report, Dr. Henderson reviewed the medical record and the statement of accepted facts. He found appellant had symmetric range of motion and noted no basis to find permanent impairment of the left leg. In his March 12, 2010 supplemental report,[10] Dr. Henderson stated that the only objective finding was the complaint of pain over the lateral epicondyle and the medial joint over the medial condyle where the prominence was. He found that the accepted contusion and aggravation of osteochondritis resolved by May 1, 2004 such that there was no permanent impairment due to the work-related injury. Dr. Henderson stated that, while the February 2, 2004 MRI scan noted edema, this was a local reaction which had also resolved. He explained that any pain resulting from the direct blow over the areas and bony prominence would have resolved within a reasonable amount of time and any pressure appellant may have would have happened independent of the course of the contusion. On March 24, 2010 an Office medical adviser reviewed Dr. Henderson's March 12, 2010 supplemental report and noted no findings that would warrant an impairment rating under the sixth edition of the A.M.A., *Guides.*

Dr. Henderson provided examination findings and provided a well-rationalized opinion that there were no continuing symptoms of appellant's accepted conditions on which permanent impairment could be based. Although he noted pain over the medial joint over the medial condyle, he opined that any pain due to the accepted injury had resolved and that any pressure appellant currently felt in his knee would occur independent of his work injury.

The Board finds that Dr. Henderson's opinion is sufficiently well rationalized and based upon a proper factual and medical background such that it is entitled to special weight and

[8] *R.C.*, 58 ECAB 238 (2006); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

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

[10] As Dr. Henderson's initial March 24, 2009 report provided insufficient reasoning on permanent impairment, the Office properly requested a supplemental report regarding permanent impairment. *See Raymond A. Fondots*, 53 ECAB 637, 641 (2002) (when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in the original report).

establishes no basis for permanent impairment of the left leg causally related to appellant's accepted conditions. The Board finds that the Office properly denied appellant's claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.[11] Section 10.608 of the Office's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, the Office will deny the application for review without reopening the case for a review on the merits.[12]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the merits of his schedule award claim in April 2010. His statements and beliefs about his entitlement to schedule award benefits do not address a legal argument or advance a point of law and therefore fail to meet the first and second standards of the Office's regulations. Appellant merely stated his belief that he is entitled to schedule award benefits. However, the issue of whether he has permanent impairment of his left leg causally related to his accepted conditions is a medical issue. While appellant referenced various articles from the internet in support of his belief that he was entitled to schedule award benefits, the Board has held that such articles are of general application and not determinative regarding whether specific conditions are causally related to the particular employment factors in a claim.[13] The relevant issue in this claim, whether he has established entitlement to a schedule award for permanent impairment to his left lower extremity, is a medical question and must be resolved by the submission of relevant medical evidence.[14]

Appellant did not submit any medical evidence addressing the extent, if any, of his permanent impairment. He submitted physical therapy reports and a September 2, 1999 SF-78 form. However, these documents are irrelevant as they do not address the relevant medical issue of permanent impairment causally related to the accepted conditions. Moreover, reports from physical therapists do not constitute competent medical evidence as physical therapists are not considered physicians under the Act.[15] Therefore, this evidence does not comprise a basis for

[11] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[12] *Id*. at § 10.608.

[13] *See C.B.*, Docket No. 08-2268 (issued May 22, 2009) (where the Board held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship, as they are of general application and are not determinative of whether the specific condition claimed was causally related to the particular employment injury involved).

[14] *Id.*

[15] 5 U.S.C. § 8101(2). *See also David P. Sawchuk*, 57 ECAB 316 (2006); *Paul Foster*, 56 ECAB 208 (2004).

reopening the case.[16] The remainder of the evidence submitted are duplicative of evidence previously of record. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[17] Thus, appellant has failed to meet the third standard of the Office's regulations and the Office was not required to reopen his claim for further consideration of the merits.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

On appeal, appellant contends that he is entitled to an award as he continues to have pain in his left knee and his activities of daily life are affected. As noted, the evidence of record does not support impairment causally related to the accepted conditions. The Board has held that factors such as limitations on daily activities are not considered in the calculation of a schedule award.[18] While appellant argued that Dr. Alexander supported impairment, he was a physician on one side of a medical conflict that was resolved by Dr. Henderson. Accordingly, appellant has not established that he sustained permanent impairment of the left leg causally related his accepted conditions.

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award for permanent impairment to his left lower extremity. The Board further finds that the Office properly denied his request for reconsideration without further review of the merits of the claim.

[16] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

[17] *Denis M. Dupor*, 51 ECAB 482 (2000).

[18] *E.L.*, 59 ECAB 405 (2008).

ORDER

IT IS HEREBY ORDERED THAT the June 7 and March 26, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 16, 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