United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-1831**
	)	**Issued: May 17, 2011**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, FEDERAL PRISON CAMP, Alderson, WV, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2010 appellant filed a timely appeal of a February 25, 2010 Office of Workers' Compensation Programs' merit decision granting a schedule award. He also appealed a May 13, 2010 nonmerit decision. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than one percent impairment of his right lower extremity for which he has received a schedule award; and (2) whether the Office properly denied his request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant asserted that he concurred with his physician that his impairment rating should be greater than one percent.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 7, 2007 appellant, then a 43-year-old cook, filed a traumatic injury claim alleging that he sprained his right ankle while stepping down from the loading dock approximately two feet. The Office accepted his claim for sprain/strain of the right ankle on December 20, 2007. Dr. James T. Chandler, a Board-certified orthopedic surgeon, performed a right calcaneus medial displacement osteotomy, right gastrocnemius recession and right posterior tibial tendon reconstruction with flexor digitorum longus transfer, right medial cuneiform plantar flexion osteotomy and reconstruction of the spring ligament on August 18, 2008. The Office accepted the additional conditions of rupture of other tendons of the foot and ankle on the right and tibialis tendinitis on September 9, 2008.

Dr. Chandler found that appellant had reached maximum medical improvement on May 15, 2009 and found each arch height, with well-healed incisions. He reported excellent ankle and subtalar mobility, but noted that appellant had weakness in a single heel raise and inversion. Dr. Chandler rated appellant based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* and found that appellant had 21 percent impairment of the right lower extremity due to weakness of plantar flexion and inversion.

In a letter dated June 4, 2009, the Office informed appellant that the sixth edition of the A.M.A., *Guides* was required and asked that Dr. Chandler provide the appropriate rating. On June 24, 2009 it asked Dr. Chandler to provide his rating in accordance with the sixth edition of the A.M.A., *Guides*. By decision dated July 28, 2009, the Office denied appellant's request for a schedule award on the grounds that the medical evidence was not sufficient to establish a ratable impairment.

Appellant requested a review of the written record on August 21, 2009. He submitted a report from Dr. Chandler dated August 12, 2009 stating that disruption of the posterior tibial tendon with weakness but no deformity would give 13 percent impairment of the lower extremity. By decision dated November 18, 2009, the Branch of Hearings and Review affirmed the Office's decision finding that Dr. Chandler's report was not sufficient to establish appellant's permanent impairment for schedule award purposes.

Dr. Chandler completed a note on December 18, 2009 and reported that appellant was experiencing pain in his right foot. He stated that appellant had mild *pes planus*, as well as tenderness laterally of the calcaneus osteotomy site, over the screw, at the sinus tarsi and medially in the midfoot. Dr. Chandler did not find swelling. He stated that, according to the sixth edition of the A.M.A., *Guides*, appellant had a work-related injury with a spring ligament rupture and deformity. Dr. Chandler stated that appellant also ruptured his posterior tibial tendon. He concluded that appellant had a class 2 -- moderate problem, with flexibility and loss of specific tendon function based on examination. Dr. Chandler found 21 percent lower extremity impairment based on Table 16-2 on page 501 of the A.M.A., *Guides*.

The Office referred appellant's records to an Office medical consultant, Dr. Craig M. Uejo, a physician Board-certified in occupational medicine, who found that the appropriate

diagnosis for appellant's condition was found in Table 16-2 Foot and Ankle Regional Grid[2] as strain, tendinitis or history of ruptured tendon specifically involving posterior tibial, anterior tibial, Achilles or peroneal tendon. Dr. Uejo noted that the class severity would be based on documentation of motion loss, weakness or deformity. He found that Dr. Chandler did not report any deformity or loss of tendon function or loss of range of motion. Dr. Uejo concluded that appellant had a default score of one percent lower extremity impairment. He further stated:

> "Per Section 16.3a, Adjustment Grid — Functional History,[3] and Table 16-6, Functional History Adjustment — Lower Extremities,[4] the patient is assigned a Grade Modifier 1; the Functional History is consistent with 'mild problems' related to the right ankle/foot. Postoperatively the patient did well; however, it appears he has some residual pain and numbness in the foot.
>
> "Per Section 16.3b, Adjustment Grid — Physical Examination,[5] and Table 16-7, Physical Examination Adjustment — Lower Extremities,[6] the patient is not assigned a Grade Modifier since the examination findings were used to place him within the regional grid.
>
> "Per Section 16.3c, Adjustment Grid — Clinical Studies,[7] and Table 16-8, Clinical Studies Adjustment — Lower Extremities,[8] the patient is assigned a Grade Modifier 1, as the postoperative studies confirm the diagnosis and surgical changes of 'mild pathology' with 'healed osteotomies and acceptable alignment with some impingement toward the sinus tarsi.'
>
> "In summary, the adjustments are: Functional History Grade Modifier 1, Physical Examination n/a, and Clinical Studies 1. Therefore, the net adjustment compared to the Diagnosis Class 1 is 0, which results in a Grade C, which keeps the default impairment of one percent lower extremity impairment."

In decisions dated February 25, 2010, the Office reviewed appellant's claim on the merits and granted him a schedule award for one percent impairment of his right lower extremity.

Appellant requested reconsideration on March 19, 2010 and stated that Dr. Chandler had provided a greater impairment rating based on the A.M.A., *Guides* than awarded by the Office. In a report dated March 19, 2010, Dr. Chandler stated that he fully documented appellant's

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[2] A.M.A., *Guides* 501.

[3] *Id*. at 516.

[4] *Id.*

[5] *Id*. at 517.

[6] *Id.*

[7] *Id*. at 518.

[8] *Id*. at 519.

impairment as well as the reasons for the impairment rating and that he strongly disagreed with the impairment rating Dr. Uejo provided.

By decision dated May 13, 2010, the Office declined to reopen appellant's claim for consideration of the merits finding that the evidence submitted was duplicative and repetitious.

LEGAL PRECEDENT -- ISSUE 1

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 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*.[11]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12]

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Chandler, provided several impairment ratings of appellant's right lower extremity. Dr. Chandler initially rated appellant under the fifth edition of the A.M.A., *Guides.*[13] When the Office appropriately informed him that appellant's impairment must be evaluated under the sixth edition of the A.M.A., *Guides,* Dr. Chandler completed a note dated August 12, 2009 stating that disruption of the posterior tibial tendon with weakness but no deformity would give 13 percent impairment of the lower extremity. Dr. Chandler did not provide citations to the appropriate provisions of the A.M.A., *Guides* and did not provide or apply the formula for lower extremity evaluations as listed in the A.M.A., *Guides*.

In a note dated December 18, 2009, Dr. Chandler provided findings of pain, mild *pes planus* and diffuses tenderness with no swelling. He stated that he had applied the sixth edition

[9] 5 U.S.C. §§ 8101-8193, 8107.

[10] 20 C.F.R. § 10.404.

[11] For new decisions issued after May 1, 2009, the Office began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[12] A.M.A., *Guides* 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[13] *Id*. at (5th ed. 2001).

of the A.M.A., *Guides*, to appellant's diagnosis of spring ligament rupture and deformity and rupture of the posterior tibial tendon. Dr. Chandler opined that appellant had a class 2 -- moderate problem, with flexibility and loss of specific tendon function based on examination and 21 percent lower extremity impairment based on Table 16-2 on page 501 of the A.M.A., *Guides*. The Board finds that his conclusions do not comport with the sixth edition of the A.M.A., *Guides*. A moderate impairment under this diagnosis does not result in an impairment rating of 21 percent. The impairment ratings vary from 14 to 18 percent and require flexible deformity and loss of specific tendon function.[14] The Board is unable to determine how Dr. Chandler reached the percentage of his impairment rating, as the record does not support that he correctly utilized the sixth edition of the A.M.A., *Guides* in regarding to appellant's right lower extremity impairment.[15] Dr. Chandler did not provide reasoning to support his conclusion or explain his application of the A.M.A., *Guides* to appellant's specific findings.

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[16] Dr. Uejo provided a detailed and comprehensive report which followed the lower extremity formula set out in the A.M.A., *Guides* and explained how he reached the lower extremity impairment rating of one percent. He specifically applied the formula detailed by the A.M.A., *Guides* and explained why he utilized the adjustment factors. The Board finds that this report is entitled to the weight of the medical evidence and establishes that appellant has no more than one percent impairment of his right lower extremity for which he has received a schedule award.

Appellant argued on appeal that Dr. Chandler's rating of 21 percent should be accorded the weight of the medical evidence. As noted, above this rating does not appear to comport with the specific standards of the A.M.A., *Guides* and Dr. Chandler did not provide a detailed correlation of his findings with the specific lower extremity formula of the A.M.A., *Guides*. For these reasons as explained above, Dr. Chandler's report is not sufficient to establish appellant's permanent impairment for schedule award purposes.

LEGAL PRECEDENT -- ISSUE 2

The 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.[17] Section 10.606(b) of the Code of Federal Regulations provide 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 the Office erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by the

[14] *Id*. at 501, Table 16-2.

[15] The Board notes that impairment rating to all other tendons other than the posterior tibial, anterior tibial, Achilles or peroneal tendon ranges between zero and seven percent. *Id*.

[16] *Linda Beale*, 57 ECAB 429 (2006).

[17] 5 U.S.C. §§ 8101-8193, 8128(a).

Office; or includes relevant and pertinent new evidence not previously considered by the Office.[18] 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.[19]

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.[20]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the February 25, 2010 decision on March 19, 2010 arguing that his schedule award should be in line with the impairment rating provided by Dr. Chandler. In support of his reconsideration request, he submitted a report dated March 19, 2010 from Dr. Chandler stating that he disagreed with Dr. Uejo's rating and that he fully documented appellant's impairment rating.

The Board finds that this report is repetitious of medical evidence already in the record. As Dr. Chandler found 21 percent impairment of appellant's right lower extremity, it is evident that he disagreed with Dr. Uejo's rating. Likewise, he clearly felt that his report was sufficient to support appellant's disability rating otherwise he would not have submitted his reports. The March 19, 2010 note does not contain any evidence not previously reviewed by the Office and does not constitute relevant and pertinent new evidence requiring the Office to reopen appellant's claim for consideration of the merits. As appellant failed to comply with the requirements of section 8128(a) and the applicable regulations, the Board finds that the Office properly declined to reopen his claim for consideration of the merits.

CONCLUSION

The Board finds that appellant has no more than one percent impairment of his right lower extremity for which he has received a schedule award. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits.

[18] 20 C.F.R. § 10.606.

[19] *Id.* at § 10.608.

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

ORDER

IT IS HEREBY ORDERED THAT the May 13 and February 25, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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