United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 11-1900**
	)	**Issued: June 25, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 16, 2011 appellant filed a timely appeal from a March 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and a May 4, 2011 nonmerit decision denying a request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 has established that she sustained greater than a 61 percent impairment of the left upper extremity and a 48 percent impairment of the left lower extremity, for which she received schedule awards; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that the accepted reflex sympathetic dystrophy syndrome (RSDS) spread from her left arm and leg to her left ear, with generalized pain, headaches, and a bleeding gastric ulcer caused by years of medication prescribed for RSDS pain symptoms. She alleged that a second opinion physician did not properly assess her condition and would not listen to her describe her symptoms. Appellant submitted general literature from a chiropractic center.

FACTUAL HISTORY

This is appellant's third appeal to the Board in this case. Pursuant to the second appeal, by decision and order issued May 5, 1993,[2] the Board set aside a November 6, 1991 OWCP decision denying appellant's occupational disease claim and a December 2, 1991 nonmerit decision and remanded the case for further development regarding whether appellant sustained a left upper extremity condition due to a February 13, 1990 employment injury. The law and the facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

On remand of the case, OWCP conducted additional medical development. On August 19, 1993 it accepted appellant's claim for RSDS of the left arm and hand. Appellant retired from the employing establishment in September 2000. She received schedule award and medical compensation benefits from 1991 through 2005.

In a September 16, 1994 report, an OWCP medical adviser opined that the medical evidence supported a 23 percent impairment of the left upper extremity due to sensory impairment and weakness in the radial and ulnar nerve distributions according to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*). On December 20, 1994 OWCP granted appellant a schedule award for a 23 percent permanent impairment of the left upper extremity. The period of the award ran from March 4, 1994 to July 19, 1995.

In a January 29, 1996 report, Dr. Walter G. Broadnax, Jr., an attending physician specializing in pain management, diagnosed a neuropathic pain syndrome causally related to the accepted February 13, 1990 electric shock injury. In an August 12, 1997 report, he noted that appellant was left-hand dominant. Dr. Broadnax noted decreased flexion and extension in all joints of the left thumb and the first two fingers of the left hand. He found motor strength at 4/5 in the left upper extremity, hypothermia and paresthesias in the left hand, swelling and decreased motion in the left wrist and decreased motion of the left shoulder. Dr. Broadnax opined that these findings were permanent. He stated that appellant reached maximum medical improvement as of September 7, 1997, later modified to September 7, 1996.

On October 21, 1997 an OWCP medical adviser opined that, according to the fourth edition of the A.M.A., *Guides*, appellant had a 26 percent impairment of the left arm due to decreased motion in all joints of the left thumb and the index and middle fingers of the left hand.

[2] Docket No. 92-638 (issued May 5, 1993).

By decision dated October 30, 1997, OWCP awarded appellant an additional 3 percent impairment of the left upper extremity, in addition to the 23 percent previously awarded. The period of the schedule award ran from August 12 to October 16, 1997.

In a November 24, 1997 letter, appellant requested reconsideration, asserting that Dr. Broadnax made two typographical errors in one of his letters to OWCP. By decision dated December 4, 1997, OWCP denied modification on the grounds that the additional evidence submitted was insufficient to warrant modification.

In February 21 and June 6, 2000 reports, Dr. Broadnax noted a limited motion in all joints of the left wrist, hand, thumb and fingers. In an August 7, 2000 report, an OWCP medical adviser calculated that these losses of motion equaled a 61 percent impairment of the left arm according to the fourth edition of the A.M.A., *Guides*.

By decision dated November 28, 2000, OWCP granted appellant a 35 percent additional schedule award for the left upper extremity, from June 6, 2000 to July 10, 2002, totaling 61 percent.

In March 5 and July 17, 2001 reports, Dr. Broadnax diagnosed RSDS of the left foot and prescribed physical therapy. On October 20, 2001 OWCP obtained a second opinion from Dr. Charles L. Walter, a Board-certified neurologist, who opined that the accepted RSDS of the left upper extremity had spread to her left leg. It then expanded appellant's claim to accept RSDS of the left lower extremity. OWCP granted her a schedule award for a 48 percent permanent impairment of the left leg. The period of the award ran from July 11, 2002 to March 4, 2005.

On June 13, 2010 appellant claimed an additional schedule award. In an accompanying letter, she asserted that the accepted RSDS had spread to her left ear and that she could no longer straighten her left ring finger. Appellant submitted a September 4, 2009 report from Dr. David A. Cheesman, an attending osteopath and family practitioner, noting full motion of all joints in the upper and lower extremities, decreased grip strength in the left hand and decreased dorsiflexion of the left foot with "no voluntary toe movement." Dr. Cheesman assessed a history of RSDS in the left upper and lower extremities.

In a September 14, 2010 letter, OWCP advised appellant of the type of additional evidence needed to establish her claim for an augmented schedule award, including an impairment evaluation from her attending physician utilizing the sixth edition of the A.M.A., *Guides*.

Appellant submitted charts notes dated from June 2, 2010 through February 22, 2011 from Dr. Duby Avila, an attending Board-certified physiatrist, noting a stable pattern of pain and paresthesias in the left arm, left leg and left ear, weakness in the left hand and foot and permanent flexion of the index and fourth fingers of her left hand. Dr. Avila prescribed codeine sulfate and aspirin.

On January 7, 2011 OWCP obtained a second opinion from Dr. Bernard F. Germain, a Board-certified internist and rheumatologist, who reviewed the medical record and a statement of accepted facts OWCP provided for his use. Dr. Germain related appellant's account of

worsening pain and weakness in the left hand, flexion of the fourth finger of the left hand, pain at or below the left temporomandibular joint, pain in the left lower leg and an inability to spread the toes of her left foot.[3] He obtained a left hand x-ray showing minimal osteoarthritis. Dr. Gemain noted that, while there was "minimal physical evidence" supporting appellant's complaints, she was cooperative, credible and did "not exaggerate during the physical examination." Dr. Germain opined that there was no evidence of worsening beyond the percentage of impairment previously awarded.

In a March 17, 2011 report, an OWCP medical adviser opined that the medical record, including Dr. Germain's report, did not support any additional impairment of the left upper or lower extremities.

By decision dated March 22, 2011, OWCP denied appellant's claim for an additional schedule award. It found that Dr. Germain's clinical findings, as reviewed by OWCP's medical adviser, did not demonstrate an additional percentage of impairment above the 61 percent previously awarded for the left upper extremity and 48 percent for the left lower extremity.

In an April 26, 2011 letter, appellant requested reconsideration. She asserted that the accepted RSDS had spread to her left ear, left temporomandibular joint, left upper back, right arm and right leg. Appellant also contended that the medication Dr. Avila prescribed for RSDS caused a bleeding gastric ulcer and anemia, precipitating an eight-day hospitalization in March 2011. She submitted additional medical evidence.

In a June 24, 2010 report, Dr. Bradley R. Reese, a Board-certified surgeon, diagnosed temporomandibular joint syndrome. In reports from March 28 to June 29, 2011, Dr. Avila found the left upper and lower extremities unchanged and noted symptoms in the right arm and leg. Appellant also submitted March 2011 hospital reports diagnosing a bleeding gastric ulcer with severe anemia.

By decision dated May 4, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant to her claim for an increased schedule award. It found that the medical evidence submitted on reconsideration either did not address the left upper and lower extremities or address any increased impairment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body.[4] FECA, 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 mater which rests in the sound discretion of OWCP. 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 A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has

[3] Dr. Germain also reviewed a January 10, 2011 letter appellant submitted after the examination, describing the severity of her pain symptoms.

[4] 5 U.S.C. § 8107.

concurred in such adoption.[5] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.[6]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[7] Under the sixth edition, the evaluator identifies 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).[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained RSDS of the left upper and lower extremities due to a February 13, 1990 occupational injury. Appellant received schedule awards totaling a 61 percent impairment of the left upper extremity due to sensory impairment and a 48 percent impairment of the left lower extremity due to sensory impairment and restricted motion.

On June 23, 2010 appellant claimed an increased schedule award, asserting a worsening in the restricted motion of her left hand. In support of her claim, she submitted a September 4, 2009 report from Dr. Cheesman, an attending osteopathic physician and family practitioner, noting full motion of all joints in the left upper extremity including the hand and loss of movement in the toes of the left foot. Appellant also provided chart notes dated from June 2, 2010 through February 22, 2011 from Dr. Avila, an attending Board-certified physiatrist, noting permanent flexion of the left index and ring fingers.

As Dr. Cheesman and Dr. Avila differ significantly in their observations of appellant's left hand and neither physician offered range of motion measurements, OWCP referred appellant to Dr. Germain, a Board-certified internist and rheumatologist, for a second opinion examination. Dr. Germain provided detailed clinical findings demonstrating that the accepted RSDS of the left arm and leg had not worsened beyond the percentages of impairment previously awarded. OWCP concurred with Dr. Germain's findings, as reviewed by an OWCP medical adviser on March 17, 2011. It denied appellant's claim for an increased schedule award by decision dated March 22, 2011.

The Board finds that the medical record does not support a worsening of the accepted condition beyond the percentages of impairment previously awarded. Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical

[5] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- *Medical*, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[7] A.M.A., *Guides* (6th ed., 2008), page 3, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[8] A.M.A., *Guides* 494-531 (6th ed., 2008).

evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

On appeal, appellant asserts that the accepted RSDS spread from her left arm and leg to her left ear, with generalized pain, headaches and a bleeding gastric ulcer caused by years of medication prescribed for RSDS pain symptoms. As stated above, the medical evidence submitted does not support a greater percentage of permanent impairment than that previously awarded. Appellant also alleged that Dr. Germain did not properly assess her condition and would not listen to her describe her symptoms. However, the Board finds that there is no indication of impropriety in Dr. Germain's report, which also described appellant's recitation of her symptoms in detail. Accompanying her appeal request, appellant submitted general literature from a chiropractic center. However, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final merit decision in the case.[9]

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[10] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[11] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[13] She need only submit relevant, pertinent evidence not previously considered by OWCP.[14] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[15]

[9] 20 C.F.R. § 501.2(c).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id*. at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

[13] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[14] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[15] *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

OWCP issued a March 22, 2011 decision denying appellant's claim for an increased schedule award. Appellant requested reconsideration on April 26, 2011. She asserted that the accepted RSDS of the left upper and lower extremities had spread to her left ear, right arm and right leg. Appellant also contended that prescribed pain medication used to treat the accepted RSDS caused a bleeding gastric ulcer.[16] In a May 4, 2011 decision, OWCP denied reconsideration as the evidence submitted was cumulative and repetitious.

In support of her request for reconsideration, appellant submitted medical reports from Dr. Avila finding the left upper and lower extremities unchanged and noting symptoms in the right arm and leg. Insofar as Dr. Avila found the accepted condition unchanged, his opinion is cumulative of his reports previously of record, and therefore insufficient to warrant a merit review of the prior decision.[17] Regarding Dr. Avila's findings concerning the right upper and lower extremity, these remarks are irrelevant to appellant's schedule award claim for increased impairment of the left upper and lower extremities.[18] Similarly, the medical reports regarding the gastric ulcer and anemia are not relevant to the schedule award claim and do not constitute a basis for reopening the case for a merit review.[19]

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 appellant has not established that she sustained more than a 61 percent impairment of the left upper extremity and a 48 percent impairment of the left lower extremity, for which she received previous schedule awards. The Board further finds that OWCP properly denied appellant's request for reconsideration.

[16] The Board notes that appellant's contentions about the gastric ulcer implicate a consequential injury. However, there is no formal claim of record for a gastric ulcer consequential to the accepted RSDS. There is no Notice of Occupational Disease (Form CA-2) of record claiming a gastric ulcer causally related to pain medication used to treat the accepted RSDS.

[17] *A.R.*, Docket No. 11-1358 (issued January 3, 2012). *See L.H.*, 59 ECAB 253 (2007).

[18] *A.R.*, *supra* note 17.

[19] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 4 and March 22, 2011 are affirmed.

Issued: June 25, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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