

**United States Department of Labor
Employees' Compensation Appeals Board**

DREAMA L. BEVERLY, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
CHILlicothe VETERANS HOSPITAL,
Chillicothe, OH, Employer**

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**Docket No. 04-659
Issued: June 4, 2004**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 12, 2004 appellant filed a timely appeal of the December 19, 2003 decision of the Office of Workers' Compensation Programs, which denied appellant's request for reconsideration. Appellant also timely appealed the Office's March 28, 2003 decision granting her an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the schedule award.

ISSUE

The issues are: (1) whether appellant has greater than an 11 percent permanent impairment of her left lower extremity, for which she received a schedule award; and (2) whether the Office abused its discretion by denying appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant sustained an injury in the performance of duty on March 4, 1999 which the Office accepted for aggravation of left inguinal hernia site, sprain of left pelvis and surgical repair of the site.¹ On January 15, 2002 the Office awarded appellant a schedule award for a four percent permanent impairment of her left lower extremity. By decision dated December 10, 2002, the Board affirmed the Office's January 15, 2002 schedule award decision.²

On December 25, 2002 appellant requested reconsideration of the January 15, 2002 Office decision, granting her a schedule award. She submitted an October 14, 2002 report from Dr. Charles J. Kistler, Jr., an osteopath Board-certified in family practice, who reported that appellant had a 25 percent whole body impairment as a result of her employment injury.³

The Office sought clarification from Dr. Kistler regarding appellant's impairment due to pelvic strain and in a supplemental report dated February 7, 2003, he explained that according to the diagnosis-based estimates at Chapter 17, section 17.2j of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001), appellant's ischial injury of the pelvis represented a 3 percent lower extremity impairment and as much as a 7 percent whole body impairment under Table 17-33.

The Office referred the record to its medical adviser and in a March 5, 2003 report; he determined that appellant had an 11.2 percent permanent impairment of her left lower extremity.

By decision dated March 28, 2003, the Office vacated its prior decision dated January 15, 2002 and granted appellant a schedule award for an additional 7 percent permanent impairment of her left lower extremity, for a total schedule award of 11 percent.

In letters dated April 22, June 5, August 1, October 7 and November 24, 2003, appellant's counsel inquired about the status of the December 25, 2002 request for reconsideration.⁴ By letter dated December 15, 2003, the Office explained that the March 28, 2003 decision had been sent to counsel's former business address. The Office enclosed a copy

¹ Appellant underwent surgery on March 31, 1999.

² Docket No. 02-1903. The Board's December 10, 2002 decision is incorporated herein by reference.

³ Dr. Kistler noted complaints of lower abdominal pain on the left side and left pelvic area pain at that time and described the results of his physical examination. Dr. Kistler noted that the pelvic area showed pain on the left side, the lumbar spine showed diminished range of motion with forward bending to 35 degrees, back bending to 10 degrees, right-sided bending to 20 degrees and left side bending to 15 degrees, right rotation to 20 degrees and left rotation to 15 degrees. He noted that the Fabere's test was positive on the left side, negative on the right, the LeSegue's straight leg raising test was positive on the left at 20 degrees and negative on the right, that deep tendon reflexes were diminished to +1 in the patellar and Achilles areas bilaterally and was +2 on the right and that appellant continued to have pain, numbness and tingling over the area of the hernia repair. Dr. Kistler diagnosed aggravation of the left inguinal hernia and sprain of the left pelvis, with surgery performed on March 31, 1999. He opined that appellant's conditions were the result of her work-related accident.

⁴ The record indicates that mail forwarded to Mr. Shapiro was returned as undeliverable. Thus, appellant's counsel was apparently unaware that the Office had issued a decision on March 28, 2003.

of the decision. Additionally, the Office considered counsel's November 24, 2003 correspondence as a request for reconsideration of the March 28, 2003 decision. In a decision dated December 19, 2003, the Office denied the request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁵ The Act, however, does not specify the manner, by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁷

ANALYSIS -- ISSUE 1

In this case, the Board initially affirmed the Office's determination that appellant had a four percent permanent impairment of her left lower extremity based upon ilioinguinal nerve impairment.⁸ Thereafter, appellant submitted Dr. Kistler's October 14, 2002 report that identified additional impairment due to appellant's left pelvis sprain. As the Office medical adviser could not clearly ascertain how Dr. Kistler calculated five percent impairment for left pelvis sprain, the Office properly sought clarification. In his supplemental report dated February 7, 2003, he explained that appellant's ischial injury of the pelvis represented a three percent lower extremity impairment and as much as a seven percent whole body impairment under Table 17-33 of the A.M.A., *Guides* (5th ed. 2001). However, the physician mistakenly reversed the impairment ratings under Table 17-33. Ischial bursitis represents three percent whole body impairment and a seven percent lower extremity impairment. The Office medical adviser corrected Dr. Kistler's miscalculation when he reviewed the medical record on March 5, 2003 and he properly noted that, in addition to the previously awarded four percent impairment for nerve deficit, appellant was entitled to seven percent lower extremity impairment for ischial bursitis. Appellant was, therefore, granted a schedule award for an additional 7 percent for her left lower extremity loss of use, for a total of an 11 percent permanent impairment of her left lower extremity. The Office medical adviser's calculations in conjunction with Dr. Kistler October 14, 2002 physical findings represent the weight of the medical evidence. Accordingly, appellant has failed to establish that she has greater than an 11 percent permanent impairment of the left lower extremity.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ FECA Bulletin No. 01-05 (January 29, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁸ The Board noted in its prior decision that this impairment was based on paresthesias and dysesthesias and ilioinguinal neuritis of 60 percent of the ilioinguinal nerve, which the Office medical adviser equated as comparable to the lateral femoral cutaneous nerve.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁹ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

The November 24, 2003 correspondence merely inquired about the status of a prior request for reconsideration, which appellant's counsel was unaware had already been addressed by the March 28, 2003 decision. The November 24, 2003 correspondence neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, counsel did not submit any additional evidence with the November 24, 2003 correspondence. Therefore, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying reconsideration.

⁹ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁰ 20 C.F.R. § 10.608(b) (1999).

CONCLUSION

Appellant failed to establish that she has greater than an 11 percent permanent impairment of her left lower extremity. Additionally, the Office properly determined that the November 24, 2003 correspondence received from appellant's counsel was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the December 19 and March 28, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member