United States Department of Labor
Employees' Compensation Appeals Board

JEAN F. DANIEL, Appellant	)	
and	)	**Docket No. 04-1243**
	)	**Issued: November 18, 2004**
DEPARTMENT OF DEFENSE,	)	
Washington, DC, Employer	)	

Appearances:
Jean F. Daniel, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 25, 2003, which denied her claim for a schedule award. She also appealed the February 24, 2004 decision which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's claim for a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review of the claim.

FACTUAL HISTORY

On July 17, 1992 appellant, then a 58-year-old administrative officer, filed a traumatic injury claim alleging that on July 16, 1992 she injured her back and left arm when she fell down stairs in the employing establishment parking garage. She worked intermittently thereafter and

retired in April 2000. The Office accepted a lumbar strain, back spasms and contusion of the left arm and paid appropriate compensation.[1]

Appellant submitted several reports from her treating physician, Dr. Jean Panagakos, a Board-certified neurologist, dated September 16, 1997 to December 18, 2000, who noted treating her for chronic low back and radicular pain which was caused by a fall in 1992. A June 19, 1997 lumbar myelogram revealed root compression at L1-2, L2-3 and L3-4 secondary to levoscoliosis and a disc protrusion at L4-5. The physician advised that she was not competent to perform a disability rating for appellant.

On November 18, 1999 appellant filed a claim for a schedule award. She submitted a report from Dr. John A. Bruno, Jr., a Board-certified orthopedist, dated January 24, 2002, who noted findings of scoliosis with a surgical scar and a 40 degree curvature of the thoracolumbar spine. He noted that range of motion of the lumbar spine was 40 degrees of flexion, 0 degrees of extension, 10 degrees of bending left and right, positive straight leg raises on the left, sensory deficits of multiple nerve roots in L4-5 and S1 of the left leg, hypoactive reflexes bilaterally at the knees and ankles, diminished strength of the left leg in the quadriceps, hamstrings and dorsiflexors. He noted that based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] appellant would receive a 35 percent impairment of the whole body on the basis of her back injury with radiculitis, neurologic impairment and segmental instability.

Dr. Bruno's report of January 24, 2002 and the case record were referred to the Office's medical adviser. In a report dated March 15, 2002, he questioned why appellant had not recovered from her accepted conditions. The Office medical adviser advised that she had no residual conditions from the work-related injury of July 1992 that could be supported and documented on an objective medical basis. The physician advised that based on the A.M.A., *Guides*[3] there was no basis for a schedule award related to her accepted conditions.

On April 15, 2002 the Office referred appellant for a second opinion evaluation to Dr. Robert A. Smith, Board-certified in orthopedics. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of her employment duties. In a medical report dated May 2, 2002, Dr. Smith indicated that he reviewed the records provided to him and performed a physical examination. He noted findings upon physical examination of obvious levoscoliosis involving the thoracic and lumbar spines, a large rib hump on the right side, diffuse tenderness on the left lower lumbar area and upper buttock and no spasm, atrophy or trigger points. The physician noted appellant's complaints of hypoesthesia involving the later aspect of the thigh and leg. Dr. Smith indicated that the left lower extremity revealed no deformity, there was no focal atrophy in the thigh or leg on the left, motor strength of the left lower extremity was normal and straight leg raises produced back pain,

[1] The record reveals that appellant filed a claim for compensation for an injury she sustained in 1981, file number 25-207486 and for an injury sustained in 1992, file number 25-0410263. Both of these claims were accepted by the Office.

[2] A.M.A., *Guides* (fourth edition 1993).

[3] A.M.A., *Guides* (fifth edition 2001).

but no radiculopathy. He noted that there was no evidence that appellant's preexisting scoliosis and spondylosis were permanently aggravated by the July 16, 1992 work injury. The physician opined that appellant's neck, left knee and left foot pain were related to age-related degenerative disease and not to the July 16, 1992 work injury. Dr. Smith indicated that there were no objective findings to suggest that appellant had any permanent injury or impairment as a result of the July 16, 1992 fall. He noted no evidence of ongoing nerve injury in the lower left extremity, no muscle atrophy, no asymmetry or pathological reflex and indicated that an electromyography (EMG) study did not reveal any nerve damage. The physician determined that based on the A.M.A., *Guides* appellant sustained a zero percent impairment of the left lower extremity related to the July 16, 1992 injury.

In a decision dated August 6, 2002, the Office denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence rests with the opinion of Dr. Smith, who properly utilized the A.M.A., *Guides* and determined that appellant sustained a zero percent impairment of the left lower extremity due to the July 16, 1992 work-related accident.

In a letter dated August 29, 2002, appellant requested an oral hearing before an Office hearing representative. The hearing was held on April 30, 2003. Appellant submitted a report from Dr. Bruno dated October 3, 2002, who advised that appellant had possessive weakness in the left leg, a huge amount of atrophy in the left quadriceps measuring five centimeters less than the opposite leg, objective findings of reduced sensation of the left thigh, positive straight leg raises on the left, muscle weakness on the left side, altered gait on the left and weakness of the Dorsey flexors in the left foot. Dr. Bruno noted that maximum medical improvement occurred in 1997. The physician noted that according to Table 17-8, page 532 of the A.M.A., *Guides*, appellant had a 12 percent impairment of the left leg and utilizing Table 17-37, page 552 of the A.M.A., *Guides* appellant had a 5 percent impairment from sensory deficits for a 17 percent left lower extremity impairment.

In a decision dated September 25, 2003, the hearing representative affirmed the Office decision dated August 6, 2002. The hearing representative noted that Dr. Bruno did not address the causal relationship of the accepted injury of July 16, 1992 and appellant's lower back and left leg problems.

In a letter dated October 21, 2003, appellant requested reconsideration of the September 25, 2003 decision. She submitted a report from Dr. Bruno dated October 21, 2003, who opined that the injury of July 16, 1992 was the cause of her lower back and left leg problems. He reiterated the objective findings set forth in his report of March 31, 2003.

In a decision dated February 24, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[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 regulation as the appropriate standard for evaluating schedule losses.

ANALYSIS -- ISSUE 1

In April 2002, the Office referred appellant for a second opinion evaluation to Dr. Smith. In his report dated May 2, 2002, Dr. Smith noted that appellant's physical examination revealed obvious levoscoliosis involving the thoracic and lumbar spines, a large rib hump on the right side, diffuse tenderness on the left lower lumbar area and upper buttock and no spasm, atrophy or trigger points. The physician noted that the left lower extremity revealed no deformity, no focal atrophy in the thigh or leg on the left, normal motor strength of the left lower extremity and straight leg raises produced back pain, but no radiculopathy. Dr. Smith opined that there was no evidence that appellant's preexisting scoliosis and spondylosis were permanently aggravated by the July 16, 1992 work injury and noted that her neck, left knee and left foot pain were related to age-related degenerative disease and not to the 1992 work injury. He indicated that there were no objective findings to suggest that appellant had any permanent injury impairment or residuals from the July 16, 1992 injury. The physician noted no evidence of ongoing nerve injury in the lower left extremity, no muscle atrophy, no asymmetry or pathological reflex noted and, therefore, based on the A.M.A., *Guides* appellant sustained a zero percent impairment of the left lower extremity related to the July 16, 1992 injury.

The Board finds that, under the circumstances of this case, the opinion of Dr. Smith is sufficiently well-rationalized and based upon a proper factual background such that it is the weight of the evidence and established that appellant did not sustain a work-related permanent impairment of the lower extremities. Dr. Smith indicated that her impairment did not appear to be attributable to the accepted conditions of lumbar strain, back spasms and contusion of the left arm, but did appear to be due to age-related degenerative disease and her preexisting scoliosis.

The Board has carefully reviewed Dr. Bruno's reports dated January 24, October 3, 2002 and March 31, 2003, which determined that appellant was entitled to a 35 percent impairment of the whole body on the basis of her back injury with radiculitis and notes that Dr. Bruno did not adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*.[6] Specifically, the Board notes that no schedule award is payable for a

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See Tonya R. Bell,* 43 ECAB 845, 849 (1992).

member, function or organ of the body not specified in the Act or in the implementing regulation.[7] As neither the Act nor its regulation provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole, no claimant is entitled to such a schedule award.[8] The Board notes that section 8101(19) specifically excludes the back from the definition of "organ."[9]

In his report dated January 24, 2002, Dr. Bruno noted findings upon physical examination for the back, but as noted above, neither the Act nor its regulation provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[10]

Other report's from Dr. Bruno dated October 3, 2002 and March 31, 2003 noted findings of "possessive weakness" in the left leg, noted "huge amount" of atrophy in the left quadriceps and opined that appellant sustained a 12 percent permanent impairment of the left leg.[11] However, the physician failed to provide a rationalized opinion explaining how the diagnosed condition of the left leg was causally related to the accepted conditions of lumbar strain, back spasms and contusions of the left arm.[12] The Office did not accept a left leg condition as a result of her work injury and there is no medical rationalized evidence to support such a conclusion.[13]

The Board finds that Dr. Smith's opinion constitutes the weight of the medical evidence and establishes that appellant did not sustain a permanent impairment of the lower extremities causally related to her accepted work-related injury of lumbar strain, back spasms and contusion of the left arm. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no permanent impairment of the lower extremities causally related to her accepted condition.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[14] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,[15] which provides that a

[7] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[8] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[9] 5 U.S.C. § 8101(19).

[10] *Id.*

[11] A.M.A., *Guides* 532, 552, Table 17-8, Table 17-37.

[12] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[13] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.606(b).

claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by the Office; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[16]

ANALYSIS -- ISSUE 2

Appellant submitted a new medical report from Dr. Bruno dated October 21, 2003. He reiterated the objective findings set forth in his report of March 31, 2003, but also opined that the injury of July 16, 1992 was the cause of appellant's lower back and left leg problems. The hearing representative in the Office decision dated September 25, 2003, in part, denied appellant's claim because Dr. Bruno did not address causal relationship. This particular medical evidence is new and relevant as Dr. Bruno specifically addresses causal relationship of appellant's current condition to the original work-related injury by noting it was directly related to the original work-related injury of July 16, 1992. This evidence was not previously considered by the Office in rendering a decision. While this evidence may be of limited probative value, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[17]

As the Office failed to review this new evidence, which is relevant to the issue in this case, it improperly denied appellant's request for further merit review. The February 24, 2004 decision will be set aside and the case remanded for consideration of all of the medical evidence contained in the record.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award and that the Office properly denied her request for reconsideration. The Board finds with respect to the Office's February 24, 2004 decision denying reconsideration, that the Office improperly

[16] 20 C.F.R. § 10.608(b).

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

refused to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2003 is affirmed. The Office's decision dated February 24, 2004 is set aside and the case is remanded for further action in accordance with this decision of the Board.

Issued: November 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member