United States Department of Labor
Employees' Compensation Appeals Board

BRENT A. BARNES, Appellant	)	
and	)	**Docket No. 04-2025**
	)	**Issued: February 15, 2005**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 12, 2004 appellant filed a timely appeal of the September 18, 2003 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award, and a June 10, 2004 nonmerit decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUES

The issues are: (1) whether appellant is entitled to a schedule award; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The record on appeal includes evidence the Office received after issuing the June 10, 2004 decision denying reconsideration. The Board's review is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On January 23, 2002 appellant, then a 55-year-old electronic integrated systems mechanic, injured his head when he slipped and fell on ice while in the performance of duty. He sustained a laceration to the back of his head and lost consciousness. Appellant was diagnosed with an acute left subdural hematoma. He underwent a left craniotomy on January 25, 2002 for evacuation of the subdural hematoma. A second craniotomy was performed on January 27, 2002 to remove an epidural hematoma. The Office accepted appellant's claim for head trauma, head laceration, acute left subdural hematoma and left craniotomy subdural hematoma.

Appellant's treating physician, Dr. William F. Brandt, a Board-certified physiatrist, released him to return to work on a part-time basis effective April 8, 2002. The Office paid appropriate wage-loss compensation. Appellant retired effective January 3, 2003. The Office subsequently expanded appellant's claim to include vertigo as an accepted condition.

On June 27, 2003 appellant filed a claim for a schedule award. He submitted a January 9, 2003 report from Dr. Brandt, who calculated a 27 percent impairment of the whole person for clinical dementia related to appellant's traumatic brain injury.

By letter dated August 27, 2003, the Office explained that a schedule award could not be paid for an impairment of the whole body and requested that appellant obtain a new medical report from Dr. Brandt that provided an impairment rating in relation to the affected body parts.

In a September 2, 2003 report, Dr. Brandt explained that appellant reached maximum medical improvement on January 23, 2003. He noted that he identified appellant's impairment in his prior report of January 9, 2003.

In a September 18, 2003 decision, the Office denied appellant's claim for a schedule award.

On March 9, 2004 appellant requested reconsideration. He resubmitted several earlier reports from Dr. Brandt and a new report dated December 23, 2003. Dr. Brandt stated that appellant had a substantial impairment due to traumatic brain injury; however, this had not significantly affected his arms or legs. Dr. Brandt further stated that the brain injury affected appellant's cognition, which impacted his ability to perform activities of daily living and to be gainfully employed.

By decision dated June 10, 2004, the Office denied appellant's 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.[2] The Act, however, does not specify the manner by which the

[2] 5 U.S.C. § 8107(a), (c).

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 regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[3] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[4]

No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations.[5] The Act's list of schedule members includes the eye, arm, hand, fingers, leg, foot and toes.[6] The Act also specifically provides for compensation for loss of hearing and loss of vision.[7] Section 8107(c)(22) of the Act vests the Secretary of Labor with the authority to expand the list of schedule members to include "any other important external or internal organ of the body…."[8] In accordance with the authority granted under section 8107(c)(22), the Secretary added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the list of schedule members.[9] Neither the Act nor the regulations authorize payment of a schedule award for loss of cognitive function.[10]

ANALYSIS -- ISSUE 1

Dr. Brandt calculated a 27 percent impairment of the whole person for clinical dementia related to appellant's traumatic brain injury. He relied on Tables 13-5 and 13-6, A.M.A., *Guides* 320-21. A schedule award is not payable for an impairment of the whole person.[11] Furthermore, the brain is not included among the list of schedule members under the Act and regulations.[12] Thus, appellant cannot be compensated for his cognitive deficit under the schedule award provision of the Act. There is no medical evidence that appellant's brain injury has affected any schedule members such as the upper and lower extremities. In a January 9, 2003 report, Dr. Brandt noted a full range of motion in all extremities. His neurological examination revealed no abnormalities with regard to motor strength, reflexes and sensation. Dr. Brandt also stated that appellant had a steady gait. The medical evidence of record fails to establish that appellant

[3] 20 C.F.R. § 10.404 (1999).

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

[5] *Henry B. Floyd, III*, 52 ECAB 220, 222 (2001).

[6] 5 U.S.C. § 8107(c).

[7] *Id.*

[8] 5 U.S.C. § 8107(c)(22).

[9] 20 C.F.R. § 10.404(a) (1999).

[10] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) (1999).

[11] *Phyllis F. Cundiff*, 52 ECAB 439, 440 (2001).

[12] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) (1999).

has permanent impairment of a schedule member. Accordingly, the Office properly denied appellant's claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[13] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.[14] 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.[15]

ANALYSIS -- ISSUE 2

Appellant's March 9, 2004 request for reconsideration 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 his claim based on the first and second above-noted requirements under section 10.606(b)(2).[16] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He resubmitted a number of Dr. Brandt's earlier reports and treatment notes dated December 10, 2002, January 9 and September 2, 2003. This does not constitute relevant and pertinent new evidence.[17] While Dr. Brandt's December 23, 2003 report was not previously of record, the information included in the report is repetitive and merely confirms the prior finding that appellant's traumatic brain injury did not result in a permanent impairment of a schedule member. He specifically indicated that, while appellant had a cognitive impairment, his brain injury did not affect his arms and legs. As Dr. Brandt's most recent report is repetitive of evidence already included in the record, the December 23, 2003 report does not provide a basis for reopening the claim for merit review.[18] Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office and, therefore, he is not entitled to a review of the merits of his claim based on the

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(2) (1999).

[15] 20 C.F.R. § 10.608(b) (1999).

[16] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

[17] Submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[18] *Saundra B. Williams, supra* note 17.

third requirement under section 10.606(b)(2).[19] Because 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), the Office properly denied the March 9, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award. The Board also finds that the Office properly denied appellant's March 9, 2004 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2004 and September 18, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 15, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] 20 C.F.R. § 10.606(b)(2)(iii) (1999).