United States Department of Labor
Employees' Compensation Appeals Board

LAWRENCE W. KING, Appellant	)	
and	)	**Docket No. 05-343**
	)	**Issued: June 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Portland, ME, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 23, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision denying his request for reconsideration. Because more than one year has elapsed between the last merit decision dated October 29, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 10, 2004 nonmerit decision.

ISSUE

The issue is 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).

FACTUAL HISTORY

On November 12, 1975 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim which was accepted for a torn right lateral meniscus. The Office developed the case

and on October 20, 1978 issued him a schedule award for 25 percent impairment of his right lower extremity.

On August 29, 2001 appellant requested an additional schedule award, based on the development of arthritis in his right knee. By decision dated December 20, 2001, the Office denied his request for an increased schedule award. On January 16, 2002 appellant requested a review of the written record. By decision dated April 28, 2003, a hearing representative set aside the Office's December 20, 2001 decision and remanded the case for further development.

In a September 23, 2003 report of a second opinion examination, Dr. William Crozier Meade, III, a Board-certified orthopedic surgeon, found that there was no joint space on the lateral side of appellant's right knee and opined that he had a lower extremity impairment of 96 percent. In an October 10, 2003 report, the medical adviser opined that the loss of cartilage in appellant's right knee was consistent with advanced osteoarthritis, which was a result of the accepted work-related injury. Using the 5th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, the medical adviser found that appellant had a 50 percent impairment of his right lower extremity. He further stated that, in order to avoid awarding impairment twice for the same condition, his finding of 50 percent impairment was in lieu of, rather than in addition to, the October 20, 1978 schedule award.

On October 29, 2003 the Office issued appellant a schedule award for an additional 25 percent impairment of his right lower extremity.

By letter dated August 17, 2004, appellant requested reconsideration of the schedule award. The medical argued that the district medical adviser erred in his interpretation of the evidence and application of the A.M.A., *Guide*s by failing to combine the diagnosis-based (meniscectomy) with the arthritis-based method of impairment evaluation, which would have resulted in an additional 50 percent schedule award. He contended that, even though the A.M.A., *Guides* prohibits combination of diagnosis-based estimates, such as meniscectomies, with estimates due to muscle atrophy, muscle weakness, gait and derangement or abnormal motion, they do specifically provide for combination of diagnosis-based impairment evaluations with arthritis-based evaluations.

By decision dated November 10, 2004, the Office denied appellant's request for reconsideration on the grounds that he had not submitted relevant and pertinent evidence not previously considered by the Office or established clear evidence of error to warrant merit review.[1]

[1] The Office's decision referred to former section 10.138(b)(1) of the Code of Federal Regulations which addressed methods by which a claimant may obtain review of the merits of his claim. Although section 10.138(b)(1) has been replaced by 20 C.F.R. § 10.606, the requirements for obtaining a merit review remains substantially unchanged. The Board also notes that, although the Office made passing reference to appellant's failure to show clear evidence of error, based on the language of the decision as well as the regulation cited by the Office, the appropriate standard of review for a timely request for reconsideration was used.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[2] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4]

The schedule award provision of the Act[5] and its implementing regulation[6] sets 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. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[7] 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*[8] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[9]

ANALYSIS

On October 29, 2003 the Office issued appellant a schedule award for an additional 25 percent impairment of his lower right extremity. On August 17, 2004 well within the one year time limitation, he requested reconsideration of the schedule award. Therefore, the Board must determine whether appellant met the requirements under 8128(a) of the Act for a timely request.

The Board finds that the Office improperly refused to reopen appellant's case for merit review. He did not submit relevant and pertinent new evidence not previously considered by the Office. However, appellant demonstrated that the office erroneously applied the A.M.A.,

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[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.608(b). *See Annette Louise*, 54 ECAB ___ Docket No. 03-445 (issued August 26, 2003).

[4] 20 C.F.R. § 10.607(a).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Linda R. Sherman*, 56 ECAB ___ Docket No. 04-1510 (issued October 14, 2004); *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986).

[8] A.M.A., *Guides* (5th ed.) (2001).

[9] 20 C.F.R. § 10.404.

Guides, which provided the legal basis for the denial of his claim and, therefore, is entitled to merit review under section 8128(a). In support of his reconsideration request, appellant argued that the district medical adviser erred in his interpretation of the evidence and application of the A.M.A., *Guide*s by failing to combine the diagnosis-based (meniscectomy) with the arthritis-based method of impairment evaluation, which would have resulted in an additional 50 percent schedule award, rather than an additional 25 percent award. He contended that even though the A.M.A., *Guides* prohibits combination of diagnosis-based estimates, such as meniscectomies, with estimates due to muscle atrophy, muscle weakness, gait and derangement or abnormal motion, they do specifically provide for combination of diagnosis-based impairment evaluations with arthritis-based evaluations. The Board finds that appellant has presented a relevant legal argument not previously considered by the Office and has shown that the Office erroneously applied the A.M.A., *Guides*.

The combining of different methods of assessing permanent impairment must be made in light of the principles of assessment set forth in the A.M.A., *Guides* and in particular the cross-usage chart at Table 17-2.[10] This chart recognizes that certain methods of assessment cannot be combined because the methods are not mutually exclusive. Table 17-2 clearly indicates that an impairment for muscle atrophy cannot be combined with either an arthritis impairment or a diagnosis-based impairment. The only combination permitted among the three evaluation methods identified in this case are the diagnosis-based estimate, which includes meniscectomy and the arthritis impairment. In other words, the impairment under Table 17-33 for meniscectomy may be combined with the arthritis impairment under Table 17-31, but no other combination is permitted under the cross-usage chart.

Appellant received a schedule award for 25 percent impairment of his right lower extremity as a result of his meniscectomy, which calls for a diagnosis-based estimate pursuant to Table 17-1 of the A.M.A., *Guides*. In its October 29, 2003 decision, the Office expanded appellant's claim to include osteoarthritis, which requires an anatomic-based method of evaluation according to Table 17-1.[11] The Office adopted the opinion of the medical adviser, who determined that the 50 percent impairment due to osteoarthritis under Table 17-31 could not be combined with the original 25 percent impairment for appellant's meniscectomy.

The Office's Procedure Manual directs the district medical adviser to verify the appropriateness of combining evaluation factors by referring to Table 17-2 of the A.M.A., *Guides*,[12] which clearly reflects that impairment ratings for arthritis may be combined with diagnosis-based estimates. The Board finds that, in concluding that impairment ratings for appellant's arthritis and his meniscectomy could not be combined, the Office erroneously applied the A.M.A., *Guides*. Accordingly, appellant has presented a relevant legal argument not previously considered and the case must be remanded to the Office for a review of the merits of the case.

[10] A.M.A., *Guides*, at 526, Table 17-2.

[11] *See id.* at 525.

[12] *Id*. at 526. *See* Federal (FECA) Procedure Manual, Part 2 -- Medical, *Schedule Awards*, Chapter 3.0700, Exhibit 4, use of fifth edition (2003) of A.M.A., *Guides* (issued June 2003).

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a), in that appellant has presented a relevant legal argument not previously considered by the Office and has shown that the Office erroneously applied the A.M.A., *Guides*.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2004 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for action consistent with this decision of the Board.

Issued: June 7, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member