United States Department of Labor
Employees' Compensation Appeals Board

G.E., Appellant	)	
and	)	**Docket No. 09-1412**
	)	**Issued: February 17, 2010**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal of a February 5, 2009 decision of the Office of Workers' Compensation Programs denying her schedule award claim, and an April 2, 2009 decision denying her request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she is entitled to a schedule award due to her accepted employment injury; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On May 30, 2007 appellant, then a 60-year-old clerk, filed an occupational disease claim alleging that she injured her lower back while performing her employment activities. She first became aware that her employment caused or aggravated her condition on June 5, 2005 and she stopped work on June 9, 2007 and returned to light duty on November 1, 2007. The Office

accepted appellant's claim for thoracic or lumbosacral neuritis or radiculitis. It later accepted displacement of lumbar intervertebral disc without myelopathy and degeneration of lumbar or lumbosacral intervertebral disc and also accepted that February 7, 2006 lumbar spine surgery was employment related.

Appellant submitted several reports dated between November 7, 2005 and February 11, 2008 from Dr. Jack Bryan Williamson, a Board-certified orthopedic surgeon, who noted appellant's complaint of low back pain and bilateral lower extremity pain. In a February 7, 2006 operative report, Dr. Williamson diagnosed lumbar spinal stenosis at L4-5, lateral recess at L5-S1, spondylolisthesis at L4-5 and left L4-5 radicular pattern. He performed a laminectomy, hemilaminectomy, posterior lateral fusion, and an iliac crest bone graft of the left hip. In a November 1, 2007 attending physician's report, Dr. Williamson diagnosed radiculopathy and noted that he had performed a transverse lateral interbody fusion. On February 11, 2008 he indicated that appellant had spondylolisthesis with footdrop that limited her ability to work. Dr. Williamson noted that appellant's February 7, 2006 surgery needed one year for the fusion to heal and grow together. He also noted that appellant was initially seen on November 7, 2005 for back pain and footdrop. Dr. Williamson advised that it was necessary for appellant to be off work for her back, stenosis and footdrop conditions.

Appellant also submitted reports from Dr. James Butler, a Board-certified orthopedic surgeon who noted appellant's complaint of left shoulder pain, trigger finger of the left index finger and carpal tunnel syndrome.

On June 3, 2008 appellant filed a schedule award claim. On July 10, 2008 the Office advised that, to take further action on her schedule award claim, appellant needed to submit medical evidence indicating that she had reached maximum medical and assessing permanent impairment of an affected body member pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). In response, appellant submitted a May 14, 2008 report from Dr. Williamson who noted that appellant still had some low back pain as well as a left shoulder rotator cuff tear. Dr. Williamson indicated that diagnostic evaluation of the lower lumbar spine revealed good alignment of grafts and instrumentation, a solid anterior fusion with no gross motion on flexion-extension. He diagnosed diabetes, status post fusion L4-5 with degenerative changes above and below and right foot bunion. Dr. Williamson recommended conservative treatment and work restrictions. He noted that he would reevaluate appellant "in a couple of years."

On October 31 and December 29, 2008 the Office requested that Dr. Williamson provide an opinion regarding whether appellant had any lower extremity impairment, and if so, to provide an impairment rating according to the A.M.A., *Guides*.

In a September 9, 2008 work capacity evaluation, Dr. Williamson noted appellant's work restrictions and checked a box "yes" indicating that appellant reached maximum medical improvement. On September 22, 2008 he reiterated that appellant had reached maximum medical improvement and advised that she should continue with permanent work restrictions.

In a February 5, 2009 decision, the Office denied appellant's schedule award claim finding insufficient evidence to establish that appellant sustained permanent impairment to a scheduled member due to an accepted work injury.

Appellant requested reconsideration on March 18, 2009. In telephone memoranda dated between February 10 and March 26, 2009, appellant inquired whether Dr. Williamson had submitted medical reports to the record. The Office advised her that it had not received any correspondence from him.

In an April 2, 2009 decision, the Office denied appellant's reconsideration request without a merit review finding that she did not raise any substantive legal questions or submit any new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations 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. The Act, 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 matter which rests in the sound discretion of the Office. 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* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[2]

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member.[3] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[4] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.[5]

[1] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

[2] *See* 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007).

[3] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[4] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[5] *J.P.*, 60 ECAB __ (Docket No. 08-832, issued November 13, 2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbosacral radiculitis, lumbar intervertebral disc displacement and disc degeneration. However, the back is not listed as a scheduled member under the Act.[6] While an injury to the spine or back may cause impairment in an extremity, the Board finds that the medical evidence is insufficient to establish that appellant's accepted back condition caused any permanent impairment to a scheduled member of the body.[7]

None of the medical reports of record contains an opinion supporting that appellant's accepted conditions caused any permanent impairment to a scheduled member of the body. Likewise, there are no medical reports of record that offer an opinion on permanent impairment of a scheduled member of the body as derived under the standards of the A.M.A., *Guides*. For example, although Dr. Williamson found that appellant had reached maximum medical improvement, he did not opine that her accepted conditions caused any permanent impairment in the lower extremities.

Similarly, Dr. Butler did not provide any opinion regarding whether appellant's accepted conditions caused a permanent impairment of a scheduled member of the body. He also did not otherwise describe appellant's medical condition in sufficient detail to allow for an impairment determination.[8] Therefore, these reports are an insufficient basis on which to find any permanent impairment of a scheduled body member that is causally related to appellant's accepted back condition. The Board notes that the Office advised appellant of the type of medical evidence needed to establish her schedule award claim on July 10, 2008 and it also advised Dr. Williamson and appellant of the type of medical evidence needed to establish lower extremity impairment on October 31 and December 29, 2008. However, responsive evidence was not received from a physician.

For these reasons, the medical evidence does not support that appellant is entitled to a schedule award due to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must:

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[6] *See* 5 U.S.C. § 8101(19); *see also George E. Williams*, 44 ECAB 530 (1993) (finding that as neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award).

[7] *See J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008) (the schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of such impairment originates in the spine).

[8] *See A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009) (an impairment description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b)(2) (August 2002).

(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.[9] Section 10.608(b) of Office regulations provide 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

Appellant's request for reconsideration consists of an appeal request form with a checkmark next to "reconsideration." She did not explain any reasons why she thought the Office's decision was incorrect. Appellant does not satisfy any of the three criteria required to reopen a case for merit review. Her request does not attempt to show that the Office erroneously applied the law because she did not identify a point of law that was erroneously applied or interpreted. Appellant's request form also did not advance any new relevant legal arguments not previously considered by the Office. In addition, she did not submit any new medical evidence addressing whether she sustained a permanent impairment to a scheduled body member. This is particularly important as the underlying issue -- whether appellant is entitled to a schedule award due to an accepted employment injury -- is medical in nature. Although Office telephone memoranda indicate that appellant discussed whether her treating physician had submitted medical reports, no such evidence was submitted to the Office prior to issuance of the Office's April 2, 2009 decision. As a result, no relevant and pertinent new evidence supports appellant's request for reconsideration.

For these reasons, the Office properly denied appellant's reconsideration request without merit review.

On appeal, appellant asserts that her treating physician did not submit her impairment rating to the Office in a timely manner. However, as noted, no medical evidence relevant to the schedule award issue was submitted in support of appellant's reconsideration request.[11]

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award due to her accepted employment injury. The Board also finds that the Office properly denied appellant's request for reconsideration without a merit review.

[9] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[10] *Id.* at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

[11] Following the Office's April 2, 2009 decision and on appeal, appellant submitted new evidence. However, the Board may not review this evidence on appeal as it may only review the evidence that was in the record at the time the Office issued its final decision. 20 C.F.R. § 501.2(c). New evidence may be submitted along with a request for reconsideration before the Office.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated April 2 and February 5, 2009 are affirmed.

Issued: February 17, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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