

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

V.W., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, New York, NY, Employer**

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**Docket No. 09-2026
Issued: February 16, 2010**

Appearances:
Willie Jones, for the appellant
No appearance, for the Director

Oral Argument December 3, 2009

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2009 appellant, through her representative, filed a timely appeal from a June 3, 2009 merit decision of the Office of Workers' Compensation Programs denying her schedule award claim and a July 16, 2009 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, 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; and (2) whether the Office properly denied her request for further review of the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On December 22, 1999 appellant, then a 45-year-old secretary, filed a claim alleging that she sustained a traumatic injury to her neck and the right side of her arm, back and leg on that

date while shooting at a firing range. The Office accepted the claim, assigned file number xxxxxx399, for neck strain and lumbosacral strain.¹

On May 1, 2009 the Office requested that appellant submit an impairment evaluation from her attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). It provided her 30 days to submit the requested impairment evaluation.

By decision dated June 3, 2009, the Office denied appellant's claim for a schedule award. It noted that she had not submitted an impairment evaluation in support of her claim.

In a letter dated June 5, 2009, submitted in reference to subsidiary file number xxxxxx428, Dr. Michael Katz, a Board-certified orthopedic surgeon, informed the Office that he was waiting to receive the sixth edition of the A.M.A., *Guides* before evaluating the extent of appellant's permanent impairment.

On June 25, 2009 appellant requested reconsideration. She noted that her attending physician, Dr. Katz, had requested clarification from the Office regarding how to complete the schedule award evaluation forms. In a decision dated July 16, 2009, the Office denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening the case for further merit review.

On appeal appellant argues that the Office erred in denying her claim because on June 5, 2009, Dr. Katz, her attending physician, had requested additional time to perform his impairment evaluation under the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing federal regulations,³ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

¹ In a decision dated August 11, 2005, the Board set aside January 27 and April 29, 2003 decisions issued under file number xxxxxx428 and December 18, 2002 and April 7, 2003 decisions issued under file number xxxxxx887. The Board noted that appellant had sustained prior work injuries on May 6 and December 22, 1999, assigned file numbers xxxxxx428 and xxxxxx399. The Board remanded the case for the consolidation of all her prior claims relevant to the same body part. Docket Nos. 03-1741 & 03-1874. On January 4, 2006 the Office informed appellant that claims xxxxxx399, xxxxxx428 and xxxxxx887 had been consolidated under file number xxxxxx428.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

claimants.⁴ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁶ 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 so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁷

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for neck strain and lumbosacral strain. Appellant requested a schedule award; however, the Office denied her schedule award claim after finding that she did not establish that she sustained a permanent impairment resulting from her work injury.

Appellant has not submitted sufficient evidence to establish that, as a result of her employment injury, she sustained any permanent impairment to a scheduled member such that she would be entitled to a schedule award. On May 1, 2009 the Office informed her of the type of evidence necessary to establish her schedule award claim and specifically requested that she submit an impairment evaluation from her attending physician in accordance with the sixth edition of the A.M.A., *Guides*. Appellant did not submit an impairment evaluation. It is her burden of proof to establish that she sustained a permanent impairment of a scheduled member as a result of an employment injury.⁸ The medical evidence must include a description of any physical impairment in sufficient detail so that the claims examiner and others reviewing the file would be able to clearly visualize the impairment with its resulting restrictions and limitations.⁹ Appellant did not submit such evidence and thus the Office properly denied her schedule award claim.

On appeal appellant argues that, on June 5, 2009, Dr. Katz requested additional time to perform his impairment evaluation under the sixth edition of the A.M.A., *Guides*. She contends that the Office should not have denied the claim as her physician requested additional information. The Office, however, did not receive Dr. Katz's June 5, 2009 letter until June 8,

⁴ *Id.* at § 10.404(a).

⁵ FECA Bulletin No. 09-03 (issued March 15, 2008).

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

⁸ *See Tammy L. Meehan*, *supra* note 6.

⁹ *See A.L.*, 60 ECAB ____ (Docket No. 08-1730, issued March 16, 2009).

2009, subsequent to its June 3, 2009 decision denying her schedule award. Further, as discussed, it is appellant's burden to establish medical evidence showing a permanent impairment.¹⁰

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹¹ 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) submit relevant and pertinent new evidence not previously considered by the Office.¹² 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.¹³ 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.¹⁴

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁵ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁷

ANALYSIS -- ISSUE 2

In its June 3, 2009 decision, the Office determined that appellant had not established a permanent impairment of a scheduled member such that she would be entitled to a schedule award. It found that she had not submitted an impairment evaluation as requested.

In her request for reconsideration, appellant contended that her attending physician, Dr. Katz, had requested clarification from the Office regarding how to perform an impairment evaluation. Her argument, however, is not relevant to the pertinent issue of whether the medical evidence establishes that she has a permanent impairment of a scheduled member. The issue in this case is medical in nature and can only be resolved through the submission of probative

¹⁰ See *Tammy L. Meehan*, *supra* note 6.

¹¹ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

¹² 20 C.F.R. § 10.606(b)(2).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b).

¹⁵ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹⁶ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁷ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

medical evidence from a physician.¹⁸ Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹⁹

In a letter dated June 5, 2009, provided under file number xxxxxx428, Dr. Katz informed the Office that he was awaiting receipt of the sixth edition of the A.M.A., *Guides* before conducting his impairment evaluation. His letter, while informative, is not pertinent to the issue of whether appellant has established a permanent impairment of a scheduled member such that she is entitled to a schedule award; consequently, it is insufficient to warrant reopening her case for further review of the merits.²⁰

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office or submitted new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.²¹

CONCLUSION

The Board finds that appellant has not established that she is entitled to a schedule award. The Board further finds that the Office properly denied her request for further review of the merits of her claim under section 8128.

¹⁸ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁹ *Freddie Mosley*, 54 ECAB 255 (2002).

²⁰ *See Patricia G. Aiken*, 57 ECAB 441 (2006); *Johnnie B. Causey*, 57 ECAB 359 (2006).

²¹ Appellant submitted new medical evidence subsequent to the Office's July 16, 2009 decision, included in file number xxxxxx428. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c). Appellant can resubmit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 16 and June 3, 2009 are affirmed.

Issued: February 16, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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