U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JIM MORGANTI and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Dallas, Tex.

*Docket No. 97-485; Submitted on the Record;*
*Issued August 11, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a five percent permanent impairment of his left lower extremity for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on May 6, 1996; and (3) whether the Office abused its discretion in denying appellant's request for an oral hearing on July 15, 1996.

The Board has duly reviewed the case on appeal and finds that appellant has no more than a five percent permanent impairment of his left lower extremity for which he received a schedule award.

Appellant filed a claim for traumatic injury on November 1, 1993, alleging that on October 27, 1993 he injured his left knee when he slipped on a patch of water on the employing establishment premises. The Office accepted appellant's claim for meniscus tear of the left knee. The Office authorized left knee arthroscopy chondroplasty, which was performed on June 6, 1995 by Dr. Robert Chapman, an orthopedic surgeon. Subsequently, the Office upgraded its acceptance of appellant's condition to include a chondral fracture of the patella and chondromalacia of the left knee. Appellant filed a claim for a schedule award on August 24, 1995. The Office granted appellant a schedule award for a five percent permanent impairment of the left lower extremity on April 4, 1996. Appellant requested reconsideration on April 30, 1996 and submitted additional evidence in support of his request. In a decision dated May 6, 1996, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant merit review of the prior decision. Appellant requested an oral hearing and by decision dated July 15, 1996 the Office denied appellant's request on the grounds that he had previously requested reconsideration, and therefore was not entitled to an oral hearing as a matter of right.

Section 8107 of the Federal Employees' Compensation Act[1] provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* [2] as a standard for evaluating schedule losses and the Board has concurred in such adoption.[3]

Appellant's attending physician, Dr. Chapman, performed arthroscopic surgery on appellant's left knee on June 6, 1995. Dr. Chapman noted that there was no meniscal tear but that appellant did have a grade III chondral fracture of the patella and a grade III chondral fracture of the intercondylar femoral notch of the left knee. In both instances, the chondral fractures did not extend down to the subchondral bone and were repaired by arthroscopic chondroplasty.

Appellant requested a schedule award and submitted a report from Dr. Chapman in which the physician certified that appellant had reached maximum medical improvement on June 19, 1995, but had a 16 percent permanent impairment of the left knee pursuant to the A.M.A., *Guides*, third edition. By letter dated October 11, 1995, the Office asked Dr. Chapman to reevaluate appellant under the A.M.A., *Guides*, fourth edition, which was properly applicable to appellant's claim and represented a significant departure in methodology from past editions.[4]

In response to the Office's request, appellant subsequently submitted reports dated February 16 and 26, 1996, from physical therapist Kirby D. Horton, to whom appellant had been referred by Dr. Chapman for evaluation under the A.M.A., *Guides*. In these reports, Mr. Horton explained that because appellant's range of motion measurements were essentially normal he had opted to assess appellant's impairment under the alternate section of the A.M.A., *Guides* allowing for diagnosis-based estimates.[5] Using Table 64 on page 85 of the A.M.A., *Guides*, Mr. Horton assigned appellant a 7 percent permanent impairment for patellar fracture, undisplaced, healed, and a 5 percent permanent impairment for intercondylar fracture, undisplaced, healed, for a combined permanent impairment rating of 12 percent.

On March 18, 1996 the Office forwarded the medical records of file, together with a statement of accepted facts and a list of issues to be addressed, to Dr. Ronald H. Blum, an Office medical adviser, for his review.

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[1] 5 U.S.C. §§ 8101-8193, 8107.

[2] A.M.A., *Guides, (*4th ed. 1993).

[3] *A. George Lampo,* 45 ECAB 441, 443 (1994).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.8 (November 1993).

[5] A.M.A., *Guides*, p. 84.

In a report dated March 28, 1996, the Office medical adviser properly applied the fourth edition of the A.M.A., *Guides* to Dr. Chapman's June 6, 1995 description of appellant's knee condition. He found that Dr. Chapman's arthroscopic findings of chondral fractures of the patella and intercondylar groove of the femur, with no osseous fractures noted and with neither region demonstrating full thickness loss of articular cartilage, matched the description of traumatic chondromalacia. Using Table 62, page 83 of the A.M.A., *Guides*, particularly the footnote thereto, together with the arthroscopic description of the patellofemoral joint, the Office medical adviser found that appellant had a 5 percent permanent impairment of the left lower extremity. The Office medical adviser also noted that as there was no evidence in the record that appellant used an ambulation aid for walking, no impairment rating was recommended for gait derangement.[6]

In the present case, Mr. Horton, a physical therapist to whom appellant was referred by Dr. Chapman, appellant's attending physician, stated in his February 16, 1996 report that appellant had a 12 percent permanent impairment of the left lower extremity due to fractures of the patella and intercondylar groove. Mr. Horton, however, is not a physician and there is no indication in the record that Dr. Chapman reviewed and approved this disability rating.[7] In addition, Table 64, page 85 of the A.M.A., *Guides* utilized by Mr. Horton does not appear to pertain to chondral fractures, but rather to osseous fractures, which were not noted by Dr. Chapman.

The Board has held that when a medical report gives an estimate of permanent impairment but is not based on a proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser if he or she has properly used the A.M.A., *Guides*.[8] The Board concludes that in the present case the Office medical adviser properly applied the A.M.A., *Guides* to the description of the impairment provided by Dr. Chapman. There is no other competent evidence of record that appellant has greater than a five percent permanent loss of use of his left lower extremity for which he has received a schedule award.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for merit review on May 6, 1996.

Under section 8128(a) of the Act,[9] 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

[6] A.M.A., *Guides*, p.75.

[7] 5 U.S.C. § 8101(2) states: "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see Barbara J. Williams*, 40 ECAB 649 (1988). (The Board found that a physical therapist was not a physician as defined under the Act and was not competent to render a medical opinion.)

[8] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[9] 5 U.S.C. § 8128(a).

set forth in section 10.138(b)(1) of the implementing federal regulations,[10] which provides that a claimant may obtain review of the merits of the claim by:

"(i) Showing that the Office erroneously applied or interpreted a point of law; or

"(ii) Advancing a point of law or a fact not previously considered by the Office; or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[11]

In support of his reconsideration request, appellant submitted copies of the February 16 and 26, 1996 reports from physical therapist Mr. Horton. Each of these reports, however, was previously submitted to the Office and was reviewed by the Office prior to its April 4, 1996 decision. These documents were, therefore, repetitious and did not offer any relevant information not already before the Office at the time of its April 4, 1996 decision. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[12]

In addition, the points raised by appellant in his letter, that he has been prescribed medication for continual pain as well as a knee brace for extended periods of walking, do not substantiate any error in fact or law in the prior Office decision. Finally, the Office properly declined to refer appellant for a second opinion, as requested, as appellant failed to present any new medical evidence which would warrant further medical development by the Office.[13]

As appellant failed to submit any new relevant and pertinent evidence not previously reviewed by the Office, and failed to raise any error of fact or law in the prior decision, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

Finally, the Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

By decision dated July 15, 1996, the Office denied appellant's hearing request. The Office stated that appellant was not entitled to a hearing as a matter of right since he had

[10] 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

[13] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

previously requested reconsideration. The Office exercised its discretion to conduct a limited review of the case and indicated that appellant's request was also denied on the basis that the issue of causal relationship could be addressed through a reconsideration application.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[14]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[15] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[16] when the request is made after the 30-day period for requesting a hearing,[17] and when the request is for a second hearing on the same issue.[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[19]

In the present case, appellant's hearing request was made after he had requested reconsideration in connection with his claim and, thus, the Office was correct in stating in its July 15, 1996 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its July 15, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that he had sustained more than a five percent permanent impairment of the left lower extremity. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[20] In the present case, the evidence of record does not indicate that the Office

[14] 5 U.S.C. § 8124(b)(1).

[15] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[16] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[17] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[18] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[19] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[20] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

The July 15, May 6 and April 4, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member