

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ERNEST R. BENGSTON and DEPARTMENT OF JUSTICE,  
EXECUTIVE OFFICE OF ATTORNEYS, Washington, D.C.

*Docket No. 95-2964; Submitted on the Record;  
Issued September 1, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than 10 percent permanent impairment of his right upper extremity for which he received a schedule award; (2) whether appellant has more than three percent permanent impairment of his left lower extremity for which he received a schedule award and (3) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 17, 1995.

This case has previously been before the Board on appeal. In its June 25, 1992 decision, the Board found that appellant had not met his burden of proof in establishing that he sustained a recurrence of total disability on February 1, 1989 causally related to his accepted employment injuries.<sup>1</sup> The Board found that the employing establishment offered appellant a light-duty position, that appellant accepted this position on March 16, 1987 and worked in this position for nearly a year and that appellant did not then establish a change in the nature or extent of his accepted injury or of his job duties. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Following the Board's June 25, 1992 decision, appellant submitted a letter dated October 7, 1994 requesting adjudication of his claim for a loss of wage-earning capacity due to partial disability. Appellant alleged that he was entitled to compensation for loss of wage-earning capacity due to partial disability. He further noted that the Office might consider this a request for reconsideration regarding his recurrence of disability.

By decision dated December 12, 1994, the Office reexamined appellant's claim for recurrence of disability and concluded, "It is recommended that the claim for compensation based on a loss of wage-earning capacity be denied as the claimant has failed to establish that he sustained a recurrence of total disability.

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<sup>1</sup> Docket No. 91-1619.

Appellant requested an oral hearing and by decision dated April 11, 1995 and finalized April 14, 1995, the hearing representative vacated the Office's December 12, 1994 decision as it did not address any new basis for claiming compensation not dealt with by the Board in its June 25, 1992 decision. The hearing representative remanded the case for the Office to consider whether a new claim for compensation benefits has been made for which a formal decision should be issued.<sup>2</sup> As this matter is in an interlocutory posture before the Office, the Board lacks the jurisdiction to review this aspect of the claim on appeal.<sup>3</sup>

The Board finds that appellant has no more than 10 percent permanent impairment of his right upper extremity for which he received a schedule award.

The Office granted appellant a schedule award for 10 percent impairment of his right upper extremity on November 4, 1987. Appellant requested an additional schedule award on March 18, 1993. By decision dated March 4, 1994, the Office denied appellant claim for an additional schedule award. On March 8, 1994 appellant submitted medical evidence. Appellant noted that the medical reports indicated that he did not have additional impairment to his right upper extremity. He formally requested reconsideration on May 27, 1994. By decision dated July 29, 1994, the Office found appellant had no increased impairment to his right upper extremity. Appellant requested reconsideration on August 5, 1994. By decision dated October 3, 1994, the Office noted that the District medical adviser found that appellant had no ratable impairment of his right upper extremity under the current American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>4</sup>

Section 8107 of the Federal Employees' Compensation Act<sup>5</sup> 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 A.M.A., *Guides*<sup>6</sup> as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

In this case, the Office initially granted appellant a schedule award for 10 percent impairment of his right upper extremity. Appellant requested an additional schedule award on March 19, 1993 in support of his request, appellant submitted a form report dated December 21,

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<sup>2</sup> The record indicates that appellant's light-duty position was at the same salary as his date-of-injury position. The Office's regulations provide that an injured employee who is unable to return to the position held at the time of injury or to earn equivalent wage is entitled to compensation computed on loss of wage-earning capacity 20 C.F.R. § 10.303(a).

<sup>3</sup> 20 C.F.R. § 501.2(c).

<sup>4</sup> A.M.A., *Guides* (4th ed. 1993).

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>6</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993).

<sup>7</sup> A. George Lampo, 45 ECAB 441, 443 (1994).

1993 from Dr. John A. Bruno, Jr., a Board-certified orthopedic surgeon, noting appellant had five percent loss of active flexion and extension and seven percent impairment of the arm due to sensory deficit, pain or loss of strength. He concluded that appellant had 10 percent permanent impairment of his right upper extremity.

The District medical adviser reviewed these findings on September 20, 1994 and was unable to correlate Dr. Bruno's report with the A.M.A., *Guides*. He concluded that there was no evidence of impairment of the right upper extremity based on Dr. Bruno's form report.

Appellant has not submitted sufficient medical evidence to establish that he sustained an additional impairment of his right upper extremity. The District medical adviser reviewed Dr. Bruno's report and concluded that there were insufficient findings to formulate an impairment rating in accordance with the A.M.A., *Guides*. Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, 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 descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewed the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>8</sup> As appellant has failed to submit the necessary medical evidence describing his right upper extremity condition in the detailed terms required by the A.M.A., *Guides*, he has failed to establish that he has more than 10 percent permanent impairment of his right upper extremity.

The Board further finds that appellant has no more than three percent permanent impairment of his left lower extremity for which he received a schedule award.

In a letter dated March 18, 1993, appellant stated that he had not received a schedule award for permanent impairment to his left lower extremity. Appellant filed a claim for a schedule award on September 5, 1993. By decision dated March 4, 1994, the Office denied appellant's claim finding he had submitted no medical evidence. Appellant requested reconsideration on May 27, 1994 and by decision dated July 21, 1994, the Office granted appellant a schedule award for three percent permanent impairment of his left lower extremity. Appellant requested reconsideration on August 5, 1994. By decision dated October 3, 1994, the Office concluded that appellant had no more than three percent permanent impairment of his right upper extremity.

In support of his claim for a schedule award, appellant submitted a form report dated December 21, 1993 from Dr. Bruno. Dr. Bruno found that appellant had 15 degrees of dorsiflexion, and 25 degrees of plantar flexion. He found inversion and eversion were both 20 degrees and concluded that appellant had 10 percent permanent impairment of the left lower extremity.

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<sup>8</sup> Robert B. Rozelle, 44 ECAB 616, 618 (1993).

The District medical adviser reviewed Dr. Bruno's report and applied the A.M.A., *Guides*. He properly found that 25 degrees of plantar flexion, and 15 degrees of extension<sup>9</sup> were not ratable impairments. The District medical adviser found that 20 degrees of inversion was a 3 percent impairment of the foot<sup>10</sup> and that eversion of 20 degrees was not a ratable impairment.<sup>11</sup> As these were the only impairment ratings listed by Dr. Bruno, the Office properly granted appellant three percent permanent impairment of his left foot.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

In a request for reconsideration dated May 24, 1995, appellant alleged that the District medical adviser improperly used the fourth edition of the A.M.A., *Guides* in evaluating his permanent impairment. By decision dated August 17, 1995, the Office found that the evidence submitted in support of the reconsideration request was immaterial and not sufficient to warrant merit review.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>12</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.<sup>13</sup>

In this case, appellant submitted a new legal argument in support of his request for reconsideration. Appellant alleged that the Office's improperly utilized the current edition of the A.M.A., *Guides* in evaluating his claim for additional permanent impairment of his right upper extremity. Appellant also alleged that in evaluating the permanent impairment of his left lower extremity, the Office should have applied the edition of the A.M.A., *Guides* in effect at the time he reached maximum medical improvement rather than the current edition. In support of his argument, appellant provided citation to Board precedent.

Appellant has submitted new legal argument not previously considered by the Office, however, this argument lacks reasonable color of validity. Board precedent is clear that the Office should apply the current edition of the A.M.A., *Guides* in evaluating a claim for an additional schedule award.<sup>14</sup> The Board has also established that decisions regarding initial

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<sup>9</sup> A.M.A., *Guides*, 78, Table 42.

<sup>10</sup> This is two percent impairment of the left lower extremity. *Id.* 78, Table 43.

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.138(b)(1).

<sup>13</sup> 20 C.F.R. § 10.138(b)(2).

<sup>14</sup> *James R. Bradford*, 48 ECAB \_\_\_\_ (Docket No. 94-2313, issued January 23, 1997).

claims for schedule awards issued after November 1, 1993 should be evaluated using the fourth edition of the A.M.A., *Guides*.<sup>15</sup>

The decisions of the Office of Workers' Compensation Programs dated August 17, 1995 and October 3, 1994 are hereby affirmed.

Dated, Washington, D.C.  
September 1, 1998

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>15</sup> *Richard F. Kastan*, 48 ECAB \_\_\_\_ (Docket No. 95-2272, issued August 22, 1997).