U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERTHA J. ROSE and U.S. POSTAL SERVICE,
POST OFFICE, Washington, D.C.

Docket No. 97-1987; Submitted on the Record;
Issued April 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established a permanent impairment causally related to a June 17, 1994 employment injury which would entitle her to a schedule award under 5 U.S.C. § 8107; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review of her claim pursuant to 5 U.S.C. § 8128.

The Board has duly reviewed the record and finds that appellant has not established an employment-related permanent impairment in this case.

On June 17, 1994 appellant, then a 46-year-old postal worker, filed a claim alleging that on that day she injured her back and left knee in the performance of duty while lifting a heavy sack of mail onto a truck. The Office accepted the claim for lumbar strain and left knee strain and authorized the surgical excision of a Baker's cyst. By decision dated August 8, 1996, the Office found that appellant did not have a permanent impairment causally related to her employment injury. Appellant requested an oral hearing before an Office representative, but subsequently withdrew her request and requested reconsideration of the prior decision in the alternative. In a decision dated March 10, 1997, the Office found appellant's request neither raised substantive legal questions nor included new and relevant evidence and, therefore was insufficient to warrant a review of the prior decision.

An employee seeking compensation under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that any disability is causally related to the employment injury.[1] Section 8107 of the Act 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.[2] The Act

[1] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] 5 U.S.C. § 8107(a).

does not specify the manner in which the percentage loss of a member shall be determined. As a matter of administrative practice and to ensure consistent results to all claimants, the Office has adopted and the Board has approved the American Medical Association, (A.M.A.,) *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[3] An employee claiming a schedule award bears the burden of establishing that he sustained a permanent impairment of a member or function, enumerated in section 8107 or its implementing regulations, as a result of his employment injury.[4]

In the present case, the evidence does not establish that appellant sustained a permanent impairment causally related to the employment injury.

In support of her claim, appellant submitted a March 26, 1996 report from her treating physician, Dr. Jorge A. Mondino, an orthopedic surgeon. In his report, Dr. Mondino provided a history and progress report of appellant's condition and concluded that appellant had reached maximum medical improvement. On an enclosed form, provided by the Office for the evaluation of permanent impairment, Dr. Mondino indicated that appellant had flexion of 130 degrees, and extension, valgus and varus measurements of zero degrees. Finally, Dr. Mondino indicated that appellant had a total percentage of permanent impairment to the left lower extremity of 10 percent.

On April 25, 1996 the Office forwarded appellant's medical records to an Office medical adviser for review. In his report dated May 3, 1996, the Office medical adviser concluded that, based on Dr. Mondino's findings as applied to the fourth edition of the A.M.A., *Guides*, flexion to 130 degrees equated to zero impairment, as did the ratings of zero degrees of extension, valgus and varus. Therefore, the Office medical adviser concluded that appellant had zero percent permanent impairment.

By letter dated May 23, 1996, the Office referred appellant to Dr. Robert S. Viener, a Board-certified orthopedic surgeon, for an independent medical examination to resolve the conflict of medical opinion evidence between Dr. Mondino and the Office medical adviser.

In his report dated June 14, 1996, Dr. Viener noted appellant's history of injury and performed a physical examination with x-rays. He found that appellant's left knee had full extension and flexion past 135 degrees, or full range of motion, that clinical examination revealed slight valgus alignment of both knees symmetric, and that her knee appeared normal by radiological examination. Dr. Viener stated that appellant had reached maximum medical improvement and concluded that, having reviewed the fourth edition of the A.M.A., *Guides*, he could find no ratable level of impairment.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] The Board finds that the weight

[3] *Joseph H. Stuart*, 44 ECAB 583 (1993); *George E. Williams*, 44 ECAB 530 (1993).

[4] *See Annette M. Dent*, 44 ECAB 403, 407 (1993).

[5] *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986); *James P.*

of the medical evidence is represented by the thorough report of Dr. Viener, the Board-certified orthopedic surgeon selected to resolve the conflict of opinion, whose findings, when properly applied to the fourth edition of the A.M.A., *Guides,* establish that appellant has no permanent impairment of the right lower extremity and therefore is not entitled to a schedule award.

Accordingly, the Board finds that the medical evidence of record does not establish a permanent impairment to the left knee causally related to the June 17, 1994 employment injury. Appellant has not submitted sufficient evidence to meet her burden of proof and the Office properly denied the claim for a schedule award.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

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

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

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[6]

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.[7] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[9]

In his letter dated February 10, 1997, appellant's counsel only stated that she wished to withdraw her request for an oral hearing in order to request reconsideration of the prior decision, but did not raise any legal questions or indicate that new evidence would be submitted. The record does contain evidence which was received subsequent to the issuance of the Office's

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Roberts, 31 ECAB 1010, 1021 (1980).

[6] 20 C.F.R. § 10.138(b)(1).

[7] *See* 20 C.F.R. § 10.138(b)(2).

[8] *Daniel Deparini*, 44 ECAB 657 (1993).

[9] *Id.*

August 8, 1996 decision, which consists of treatment notes and form reports from Dr. Mondino, and physical therapy progress treatment notes. Dr. Mondino's various reports, however, do not address the particular issue in the instant case, which is whether appellant has any permanent impairment due to her accepted traumatic employment injuries and thus do not constitute a basis for reopening the case.[10] In addition, the reports of appellant's physical therapist are of no probative value as a physical therapist is not a physician under the Act and therefore is not competent to give a medical opinion.[11] The Office, therefore, did not abuse its discretion in refusing to reopen and review appellant's claim on the merits.

The decisions of the Office of Workers' Compensation Programs dated March 10, 1997 and August 8, 1996 are hereby affirmed.

Dated, Washington, D.C.
April 22, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

[10] *See Dominic E. Coppo*, 44 ECAB 484 (1993).

[11] *See* 5 U.S.C. § 8101(2).