U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNA M. FENNIMORE and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

Docket No. 98-433; Submitted on the Record;
Issued August 9, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has greater than a 16 percent permanent impairment of her right upper extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On April 8, 1992 appellant, then a 35-year-old clerk, filed a claim alleging that she sustained tendinitis of her right shoulder cuff as a result of her job. Appellant's claim was accepted by the Office for right shoulder tendinitis, partial tear right rotator cuff and impingement syndrome right shoulder. She did not lose time from work until November 16, 1992, when she underwent arthroscopy with debridement of the rotator cuff and subacromial decompression of the right shoulder. Appellant returned to full duty on February 18, 1993.

In an April 7, 1993 report, Dr. Robert P. Falconiero, appellant's treating physician and an osteopath, released appellant from his care stating that she was able to do all of her previous duties with the exception of overhead and above the shoulder reaching.

In an October 7, 1993 report, Dr. David Weiss, an osteopath, examined appellant at the request of her attorney. Dr. Weiss determined that appellant had a 35 percent total right upper extremity impairment which consisted of a 10 percent loss of motor strength and a 25 percent supraspinatus muscle weakness.

In a November 2, 1994 report, Dr. Falconiero opined that appellant could return to work at regular duties. Although appellant complained of pain radiating into her forearms bilaterally, he found that the examination revealed a full range of motion of both shoulders without pain. Dr. Falconiero stated that if her bilateral arm pains continued to be a problem, then an electromyogram (EMG) would be the next step along with an evaluation of her cervical spine.

In a letter dated February 1, 1994, the Office advised appellant that a detailed medical report and a medical evaluation sheet from her attending physician was needed to support her claim for a schedule award. Appellant was provided 30 days within which to provide the requested information.

In a letter dated August 29, 1994, Dr. Weiss stated that his report of October 7, 1993 was prepared according to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

On February 3, 1995 an Office medical adviser reviewed the record and found that a schedule award could not be calculated due to missing information. The Office medical adviser noted that the date appellant reached maximum medical improvement was not in file. The Office medical adviser further stated that Dr. Falconiero implied that appellant did not have a permanent partial impairment while Dr. Weiss noted that appellant had a permanent partial impairment.

In a letter dated April 6, 1995, the Office referred appellant to Dr. Frederick George, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated April 26, 1995, Dr. George noted the history of injury, reviewed appellant's medical records and conducted an examination of appellant's right shoulder. He found the range of motion of the right shoulder to be within normal limits, no evidence of crepitation, good hand grip strength and the neurological examination to be within normal limits. Dr. George diagnosed residuals of tendinitis and subacromial decompression of the right shoulder and felt that appellant had achieved maximum benefits of medical treatment. Pursuant to the third edition of the A.M.A., *Guides*, Dr. George determined that appellant had a 10 percent loss of the right upper extremity due to pain, discomfort and muscle weakness.

On August 9, 1995 an Office medical adviser noted that Dr. George used the third edition of the A.M.A., *Guides* while the Office was presently using the fourth edition. The Office medical adviser noted that further information was needed to know how Dr. George arrived at his 10 percent loss calculation.

By letter dated March 29, 1996, the Office sent Dr. George a copy of the fourth edition of the A.M.A., *Guides,* and requested which pages, tables and figures he used to arrive at his 10 percent loss calculation. In an April 9, 1996 letter, Dr. George stated that appellant had weakness of strength of the rotator cuff musculature. Table 12, page 49, indicated a Grade IV of active movement against gravity with some resistance which was graded from 1 to 25. Appellant was given a 15 percent motor deficit. Appellant also had involvement of the C5, C6 nerve roots which innervated the supraspinatus and infraspinatus musculature. Dr. George rated this according to Table 13, page 51, as a 30 percent deficit for C5 and a 35 percent deficit for C6. The combined total of 65 percent plus the 15 percent motor deficit gave a combined value of 75 percent which equated to a 10 percent upper extremity impairment.

On April 22, 1996 an Office medical adviser applied the standards of the A.M.A., *Guides* (fourth edition) to Dr. George's March 29, 1996 report and concluded that appellant had a 16 percent impairment of her right upper extremity. He noted that the date of maximum medical improvement was April 9, 1996. In his calculations, the Office medical adviser noted that

weakness of the rotator cuff Grade 4 was equal to a 25 percent classification. He identified a C5 motor deficit was equal to a 30 percent impairment and a C6 motor deficit was equal to a 35 percent impairment to give a total maximum of 65 percent. Multiplying the 25 percent grade with the 65 percent maximum impairment for deficit of the spinal nerves, the Office medical adviser found that appellant had a 16 percent impairment of the right upper extremity.

By decision dated April 25, 1996, the Office issued a schedule award for appellant's 16 percent impairment to her right upper extremity entitling her to 49.92 weeks of compensation from April 9, 1996 to March 24, 1997.

Appellant requested a hearing before an Office hearing representative. Her representative contended that Dr. Weiss' opinion should be used in calculating the schedule award as it was based upon the third edition of the A.M.A., *Guides*, which was in effect when appellant reached maximum medical improvement in April 1993.

In a decision dated March 6, 1997, an Office hearing representative affirmed the Office's decision of April 25, 1996. The Office hearing representative noted that the weight of the medical evidence was represented by Dr. George's report as he was an impartial medical examiner. He found that as Dr. George provided his actual measurements of appellant's examination, the Office medical examiner could use those measurements to establish the appropriate percent impairment in accordance to the A.M.A., *Guides*. The Office hearing representative further found that the fourth edition of the A.M.A., *Guides* was the appropriate edition in which to evaluate appellant's impairment as the date of computation by the district Office determines which edition of the A.M.A., *Guides* to use, not the date of examination by the physician.[1]

Appellant requested reconsideration and resubmitted the January 24, 1997 supplemental report of Dr. Weiss. Appellant's attorney argued that the third edition of the A.M.A., *Guides* should apply since appellant reached maximum medical improvement in April 1993, when she was first evaluated for permanent injury purposes.

By decision dated August 13, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that appellant has no more than a 16 percent permanent impairment of her right upper extremity, for which she has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act [2] and its implementing regulation [3] set forth the number of weeks of compensation to be paid for

[1] The Office hearing representative noted that appellant submitted a January 24, 1997 supplemental report from Dr. Weiss which correlated to the third edition of the A.M.A., *Guides*. The Office hearing representative found that this evidence was not competent to support a greater award as the fourth edition of the A.M.A., *Guides* was the appropriate edition.

[2] 5 U.S.C. § 8107.

permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[4] However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[5]

In the instant case, the Office medical adviser determined that appellant had a 16 percent permanent impairment of her right upper extremity by applying the standards of the A.M.A., *Guides* (fourth edition) to Dr. George's findings, an Office referral physician. The Board notes that although the Office referred appellant to Dr. George as an impartial medical specialist, a conflict in medical opinion was not created between Drs. Falconiero and Weiss, as both physicians are physicians of the appellant.[6] Accordingly, Dr. George is considered a second opinion physician.[7] The Board finds, however, that the April 26, 1995 and April 9, 1996 reports of Dr. George outweigh the reports of Dr. Weiss. Dr. George submitted a thorough medical opinion based upon a complete and accurate factual and medical history as provided by the Office. He performed a complete examination, reviewed the record and advised how he calculated a 10 percent upper extremity impairment under the A.M.A., *Guides*. While Dr. Weiss performed a complete examination, his report is not as thorough or as detailed as Dr. George's report. Additionally, Dr. Weiss fails to provide an explanation of how he calculated his 35 percent right upper extremity impairment rating under the A.M.A., *Guides*. Thus, Dr. Weiss' impairment rating is of diminished probative value.

As the medical opinion of Dr. George represents the weight of the medical evidence, his clinical data can be readily extrapolated and evaluated within the tables and guidelines as presented. The Office medical adviser properly applied the fourth edition of the *Guides* to the report of Dr. George to give appellant a 25 percent motor deficit for weakness of the rotator cuff, Grade 4. Multiplying the 25 percent with the 65 percent maximum impairment derived for the C5 and C6 motor spinal nerve impairment, the Office medical adviser calculated a 16 percent impairment of the right upper extremity. The Office properly based appellant's schedule award

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[3] 20 C.F.R. § 10.304.

[4] 5 U.S.C. § 8107(c)(19).

[5] *Thomas D. Gunthier,* 34 ECAB 1060 (1983). In the present case, the fourth edition of the A.M.A., *Guides* provides the appropriate standards for evaluating appellant's right upper extremity impairment in that the Office's decision pertaining to appellant's right upper extremity was issued by the Office after November 1, 1993, the effective date of the fourth edition of the A.M.A., *Guides; see* FECA Bulletin No. 94-4 (issued November 1, 1993).

[6] Section 8123 of the Act provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

[7] *Jack R. Smith,* 41 ECAB 691 (1990).

on the calculation of its medical adviser since he used the A.M.A., *Guides* to the findings of Dr. George to determine that appellant had a 16 percent impairment of her right upper extremity.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[8] 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 reviewing the merits of the claim.[9] 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.[10]

In the present case, appellant's attorney has not shown that the Office erroneously applied or interpreted a point of law, and has not advanced a point of law or fact not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. While a 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.[11] In this case, the issue is procedural in nature as the Office relied upon the Office medical adviser's utilization of the percentages of impairment and tables derived from Dr. George's examination of appellant to calculate the degree of impairment based on the fourth edition of the A.M.A., *Guides*. As the Office hearing representative footnoted that "The date of computation by the [d]istrict Office, not the date of examination by the physician, determines which edition to use," and properly cited the correct authority, appellant's argument and resubmission of the January 24, 1997 report of Dr. Weiss which calculates impairment based on the third edition of the A.M.A., *Guides*, has no reasonable color of validity. Therefore, appellant's contentions do not have a reasonable color of validity and are insufficient to require the Office to reopen the claim for a merit review. Appellant failed to submit any evidence in support of her request for reconsideration to support a finding that she was entitled to an award greater than the 16 percent impairment already awarded. Therefore, the Office properly refused to reopen appellant's claim for a review on the merits.

[8] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[11] *Constance G. Mills*, 40 ECAB 317 (1988); *Mary J.W. Gormary*, 15 ECAB 107 (1963); *Maria Sievers*, 13 ECAB 380 (1962).

The decisions of the Office of Workers' Compensation Programs dated August 13 and March 6, 1997 are affirmed.

Dated, Washington, D.C.
August 9, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member