U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN R. CARLSEN and ENVIRONMENTAL PROTECTION AGENCY, GENETICS & CELLULAR TOXICOLOGY, Research Triangle Park, NC

Docket No. 99-1825; Submitted on the Record;
Issued August 7, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than eight percent permanent impairment of her left lower 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 claim for consideration of the merits on April 20, 1999.

The Board has duly reviewed the case on appeal and finds that appellant has no more than eight percent permanent impairment of her left lower extremity.

Appellant, a biological science laboratory technician, filed a claim on January 14, 1997 alleging on that date she fractured her leg in the performance of duty. The Office accepted her claim for a fracture of the left tibia and fibula on February 27, 1997. By decision dated January 27, 1999, the Office determined that appellant's position of modified biological technician represented her wage-earning capacity. The Office granted appellant a schedule award for an eight percent permanent impairment of her left lower extremity on February 8, 1999. She requested reconsideration of this decision on March 1, 1999. By decision dated April 20, 1999, the Office declined to reopen appellant's schedule award for review of the merits.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the American Medical

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R § 10.404.

Association, *Guides to the Evaluation of Permanent Impairment*[3] as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

In this case, appellant's attending physician, Dr. James L. Frank, a Board-certified orthopedic surgeon, stated that appellant reached maximum medical improvement on March 17, 1998. He found that appellant had pain in her leg and decreased sensation along her incision. Dr. Frank found that appellant had 15 percent permanent impairment of the left lower extremity.

The Office referred appellant for a second opinion evaluation with Dr. Paul H. Wright, a Board-certified orthopedic surgeon. In a report dated November 23, 1998, he found that appellant had a normal gait, that her left knee flexion was from 0 to 135 degrees and that she had mild tenderness over the medial aspect. Dr. Wright found that her ankle had dorsiflexion of 5 degrees and plantar flexion of 70 degrees.

The Office medical adviser reviewed the medical evidence and applied the A.M.A., *Guides*. He concluded that appellant had no loss of range of motion in her left knee.[5] The Office medical adviser found that 70 degrees of plantar flexion was not a ratable impairment[6] and that dorsiflexion of 5 degrees was a seven percent impairment.[7] He determined that appellant had impairment due to pain forgotten during activity[8] for 25 percent impairment of the tibial nerve (superficial peroneal) with a impairment rating of 5 percent, which resulted in 1 percent impairment.[9] The Office medical adviser properly determined that appellant had eight percent impairment of her left lower extremity.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on April 20, 1999.

Appellant requested reconsideration of the February 8, 1999 schedule award decision on March 1, 1999. In support of her request for reconsideration, appellant submitted a narrative statement and a report dated February 26, 1999 from Dr. Michael Krasnov, a chiropractor. By decision dated April 20, 1999, the Office declined to reopen appellant's claim for review of the merits.

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented

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

[4] *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[5] A.M.A., *Guides*, 78, Table 41.

[6] A.M.A., *Guides*, 78, Table 42.

[7] *Id.*

[8] A.M.A., *Guides*, 151, Table 20.

[9] A.M.A., *Guides*, 89, Table 68.

evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[10] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In this case, appellant submitted evidence not previously considered by the Office. However, the issue in appellant's case is a medical one, whether she has more than eight percent permanent impairment of her left lower extremity. This issue must be addressed by medical evidence. As appellant is not a physician, her opinion regarding the percentage of her schedule award is not relevant. Furthermore, Dr. Krasnov did not diagnosis a subluxation of the spine as demonstrated by x-ray. Section 8101(2) of the Act[13] provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. As Dr. Krasnov did not provide a diagnosis of subluxation of the spine as demonstrated by x-ray, he is not a physician for the purposes of the Act and his report does not constitute medical evidence. As appellant failed to submit relevant new evidence addressing the issue in her claim, the Office properly declined to reopen her claim for review of the merits.

[10] 20 C.F.R. § 10.608(a).

[11] 20 C.F.R. § 10.606(b)(1) and (2).

[12] 20 C.F.R. § 10.608(b).

[13] 5 U.S.C. §§ 8101-8193, 8101(2).

The April 20 and February 8, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
August 7, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member