

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR C. ASHER and DEPARTMENT OF THE NAVY,
NAVAL AIR DEPOT, NAVAL AIR STATION, Jacksonville, FL

*Docket No. 99-1846; Submitted on the Record;
Issued August 23, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a 20 percent permanent impairment of his right arm and a 10 percent permanent impairment of his left arm for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen the record pursuant to appellant's request for reconsideration under section 8128(a) of the Federal Employees' Compensation Act constituted an abuse of discretion.

On March 24, 1994 appellant, then a 40-year-old sheet metal mechanic, filed a claim for occupational disease alleging that carpal tunnel syndrome, both hands, was caused by factors of his federal employment.

On April 19, 1994 the Office accepted appellant's claim for bilateral carpal tunnel syndrome.

In a medical report dated September 27, 1995, Dr. Dennis D. Dewey, appellant's treating physician and Board-certified in neurology, stated that he had performed a carpal tunnel release procedure in 1994 and that appellant remained symptomatic with bilateral carpal tunnel syndrome as revealed by a repeat nerve conduction study.

On February 5 and May 8, 1996 the Office requested that Dr. Dewey provide an impairment evaluation on appellant.

On September 23, 1996 the Office medical adviser reviewed appellant's medical record and stated that based on his bilateral mild median nerve compression in both wrists and the American Medical Association (A.M.A.) *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Table 16, page 57, appellant had a 10 percent permanent impairment "for each upper extremity."

By decision dated September 25, 1996, the Office awarded appellant a schedule award for a 10 percent loss of use of the right arm and a 10 percent loss of use of the left arm, to equal 62.40 weeks of compensation, payable for the period August 22, 1995 to October 31, 1996.

On May 28, 1997 appellant requested reconsideration and submitted a March 28, 1996 report from Dr. Dewey, who stated that appellant had a 25 percent permanent impairment of the upper extremity, noting that both hands were affected. He noted September 27, 1995 as the date of appellant's maximum medical improvement. In a medical report dated June 27, 1997, the Office medical adviser stated that, pursuant to the A.M.A., *Guides* (4th ed., 1993) Table 16 at page 57, rated appellant with a 20 percent permanent impairment of the right upper extremity stating: "There has been carpal tunnel release on the right wrist on March 14, 1994." Dr. Dewey noted that, appellant had a 10 percent permanent impairment for his left upper extremity and noted August 23, 1996 as the date of maximum medical improvement. He also noted that, appellant's treating physician in his March 28, 1996 report improperly relied on the third edition of the A.M.A., *Guides* to support his 25 percent impairment rating.

By decision dated July 16, 1997, the Office modified its September 25, 1996 decision and awarded appellant an additional 10 percent impairment rating for loss of use of the right upper extremity to equal 31.20 weeks of compensation, payable for the period November 1, 1996 to June 7, 1997.

In an undated letter, received by the Office on October 29, 1997, appellant requested reconsideration of the Office July 16, 1997 decision. By nonmerit decision dated that day, the Office denied appellant's request for review of the July 16, 1997 decision on the grounds that he failed to raise substantive legal questions or to introduce new and relevant evidence. In an undated letter received by the Office on December 31, 1997, appellant requested written review of the record. On February 17, 1998 the Office denied appellant's request for written review of the record on the grounds that he had previously filed a request for reconsideration.

On March 9, 1998 appellant requested reconsideration and submitted nerve conduction studies dated November 12, 1997, August 30, 1995 and November 23, 1994 as well as a medical report dated March 26, 1998 and a disability impairment form report dated December 3, 1997 from Dr. Dewey.

In a medical report dated March 27, 1998, the Office medical adviser noted:

"The claim was evaluated and approved at 20 percent impairment of right upper extremity and 10 percent impairment of the left upper extremity. This impairment rating was obtained by using Table 16, page 57, A.M.A., *Guides* (4th ed. 1993) ... due to entrapment neuropathy. The nerve studies of November 23, 1994 revealed 'bilateral median nerve conduction at the wrist levels mild in severity.' The report from Dr. Dewey (dated) November 12, 1997 (states) 'mild prolongation of sensory latencies medial on left and bilateral ulna.' On both the November 1994 and November 1997 (tests) the neurologist diagnosed ... impairment at both times as mild. Consequently, no further impairment has occurred. Further compensation not warranted."

In a supplemental medical report, the Office medical adviser noted that “the neurodiagnostic studies of both upper extremities revealed only ‘mild’ involvement and according to the A.M.A., *Guides*, both (extremities) should have been rated as 10 percent permanent impairment.” He then noted that the 20 percent permanent impairment for the right upper extremity “was in error, the rating should have remained at 10 percent.”

In a decision dated June 9, 1998, the Office denied modification of the July 16, 1997 decision. In an attached memorandum, the Office noted that appellant’s treating physician did not indicate that he correlated his findings with the A.M.A., *Guides* in arriving at his estimate of impairment and that, therefore, the weight of the medical evidence rested with the Office medical adviser who relied on the A.M.A., *Guides* to establish his rating.

On July 9, 1998 appellant requested reconsideration, stating that he had “new developments in both upper extremities,” and attached a copy of Dr. Dewey’s March 26, 1998 report. On October 25, 1998 appellant again requested reconsideration. By nonmerit decision dated January 20, 1999, the Office denied appellant’s request for review of the July 16, 1997 decision on the grounds that the evidence submitted in support of his request was previously reviewed and, therefore, was insufficient to warrant merit review.

The Board finds that appellant is entitled to no more than 20 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity for which he received a schedule award.

The Act’s schedule award provisions set forth the number of weeks of compensation that are to be paid for permanent loss of use of the members of the body that are listed in the schedule. The Act does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter, which rests in the sound discretion of the Office. However, as a matter of administrative practice, the Board has stated: “For consistent results and to ensure equal justice under the law to all claimants, good administrative practice, necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.”

The Office has adopted and the Board has approved the A.M.A., *Guides* as the uniform standard applicable to all claimants.¹

If appellant’s physician does not use the A.M.A., *Guides* to calculate the degree of permanent impairment, it is proper for an Office medical adviser to review the case record and to apply the A.M.A., *Guides* to the examination findings reported by the treating physician.² In the present case, Dr. Dewey opined that appellant had a 25 percent permanent impairment of the upper extremity, both hands. However, Dr. Dewey did not explain how he had calculated appellant’s degree of impairment pursuant to the A.M.A., *Guides*. An impairment to the upper extremity caused by entrapment neuropathy can be evaluated by measuring the sensory and motor deficits, or by use of Table 16 of the A.M.A., *Guides*, which provides a diagnosis based

¹ *Lena P. Huntley*, 46 ECAB 643 (1995).

² *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

impairment value for impairment due to entrapment neuropathy. The Office medical adviser was the only physician of record who calculated appellant's impairment pursuant to the A.M.A., *Guides*. The Office medical adviser properly noted that Table 16 of the A.M.A., *Guides* provided a permanent impairment value for mild median nerve entrapment neuropathy at the wrist of 10 percent. The Office medical adviser properly calculated appellant's right upper extremity impairment pursuant to the A.M.A., *Guides* and there is no medical evidence of record that appellant has more than a 20 percent permanent impairment of the right upper extremity or 10 percent permanent impairment of the left upper extremity.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must:

- (1) Show that the Office erroneously applied or interpreted a specific point of law;
- (2) Advance relevant legal argument not previously considered by the Office; or
- (3) Submit relevant and pertinent new evidence not previously considered by the Office.⁴

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his/her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶

By letter dated October 25, 1998, appellant requested reconsideration of the Office's June 9, 1998 decision, denying modification of its July 16, 1997 decision, which awarded appellant an additional 10 percent impairment to the right upper extremity. In support of the request, appellant submitted a March 26, 1998 medical report from Dr. Dewey, which had been previously submitted and considered by the Office. The Board has found that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ Consequently, appellant has not presented relevant and pertinent

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. §§ 10.606(b).

⁵ 20 C.F.R. § 10.607.

⁶ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁷ *Jerome Ginsberg*, 32 ECAB 31 (1980).

evidence not previously considered by the Office, sufficient to require that the Office reopen his case for a reconsideration of its merits.

In the present case, appellant has not established that the Office abused its discretion in its January 20, 1999 decision, by denying his request for a review on the merits of its July 16, 1997 decision, under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by the Office and failed to submit relevant and pertinent new evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from known facts.⁸ Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 20, 1999 and June 9, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 23, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁸ *Rebel L. Cantrell*, 44 ECAB 660 (1993); *Billy G. Reeder*, 44 ECAB 578 (1993); *Patsy R. Tatum*, 44 ECAB 490 (1993); *Wilson L. Clow*, 44 ECAB 157 (1992); *Daniel J. Perea*, 42 ECAB 214 (1990).