U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH L. TURNER and DEPARTMENT OF THE NAVY, U.S. NAVAL ACADEMY, Annapolis, MD

Docket No. 99-715; Submitted on the Record;
Issued September 27, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained an injury covered by the schedule award provisions of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request to reopen his case for a merit review.

On August 13, 1984 appellant, then a 41-year-old laborer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he pulled a muscle in his back while lifting a bulletin board on August 9, 1984. Appellant stopped work on August 9, 1984 and returned to work on August 13, 1984. The Office accepted the claim for back strain[1] and paid appropriate compensation.[2]

On April 16, 1987 appellant filed a notice of traumatic injury claim alleging that he sustained an injury to his neck and back while lifting an 80-pound box on April 1, 1987. The Office accepted the claim for low back strain and paid appropriate compensation.[3]

On June 20, 1991 appellant filed a claim for a recurrence of disability due to his injuries of August 9, 1984, August 11, 1986 and April 1, 1987. By letter dated December 13, 1991, the Office advised the appellant that he needed to submit additional medical evidence including factual "bridging" evidence to support his recurrence of disability claim.

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[1] The record also indicates that the Office accepted a back strain for an injury sustained on August 11, 1986. Appellant injured his neck and back when a truckload of chairs fell on him. In a statement of accepted facts dated April 30, 1997, the Office noted that it had accepted cervical and lumbar strains from the April 5, 1993 employment injury.

[2] This was assigned claim number A25-0256431.

[3] This was assigned claim number A25-0304786.

The Office accepted that on March 17, 1992 appellant sustained a lumbar strain when he lifted bricks off the back of a pickup truck. Appellant returned to work on March 9, 1992 and was paid appropriate compensation.[4]

On April 5, 1993 appellant filed a traumatic injury claim for an injury sustained to his back and neck while lifting a wheel barrow into a pickup truck. Appellant returned to work on April 27, 1993. The Office accepted the claim for acute back sprain and paid appropriate compensation.[5]

In a report dated April 19, 1993, Dr. Constantine A. Misoul, an attending physician specializing in orthopedic surgery, noted that his medical records indicate that appellant's neck began hurting him after his April 5, 1993 employment injury. Dr. Misoul further noted that appellant had a prior accepted employment-related neck and low back injury in 1986 and that appellant's current diagnosis was a cervical radiculopathy.

In a disability slip, a claim for continuing compensation (Form CA-8) and attending physician's supplementary report (Form CA-20a), all dated September 7, 1993, Dr. Misoul requested that appellant be excused from work from September 7 to 21, 1993 due to his cervical and lumbar strains/sprains and bilateral cervical radiculopathy which were related to his April 5, 1993 employment injury.

The record contains progress notes and medical reports from April 23, 1993 through November 20, 1995, by Dr. Misoul who noted treatment for cervical and lumbar strains with April 5, 1993 as the date of injury.

In an October 1, 1993 report, Dr. Misoul diagnosed bilateral cervical radiculopathies and released appellant to light-duty work as of September 21, 1993. He noted that the diagnostic tests of the lumbar spine had been performed to determine whether appellant had any disc pathology or evidence of any lumbar radiculopathies.

In reports dated October 14, 1993 and June 10, 1994, Dr. Misoul noted that appellant continued to have neck and low back difficulties due to his employment injury. He reported that appellant continued "to have bouts of difficulty with stiffness and pain in his neck with numbness and tingling radiating into both of his arms" and that appellant's "low back still aches with pain radiating to his right thigh."

Dr. David L. Kreisberg, a Board-certified orthopedic surgeon, in an August 12, 1996 report to Dr. Misoul, noted that appellant had increased complaints of symptoms in his cervical spine. Appellant complained of "pain and stiffness involving his neck and occasionally there is bilateral numbness and tingling."

[4] This was assigned claim number A25-0401262.

[5] This was assigned claim number A25-0424564. According to the nonfatal summary sheet, the Office accepted the claim for acute sprains of the cervical and lumbar spine.

Dr. Misoul, in an August 27, 1996 report, noted that appellant had been in a motor vehicle accident on that date and that appellant complained of pains and aches to his neck and lower back and pain radiating into his shoulders and backs of his thighs.

By letter dated February 5, 1997, the Office requested appellant's treating physician to provide a permanent impairment rating for appellant using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition).

On February 21, 1997 appellant's treating physician[6] opined that appellant had a 5 percent impairment in each upper extremity for a total of 10 percent permanent impairment, which he attributed to loss of function from pain, discomfort, sensory deficit and decreased strength.

In a report dated May 2, 1997, an Office medical adviser reviewed the February 21, 1997 impairment rating of Dr. Misoul and found there was no basis for an impairment rating of the upper extremities as there was no diminished muscle function, no neurologic impairment and no structural abnormalities.

By decision dated May 23, 1997, the Office denied appellant's request for a schedule award on the basis that appellant's physician provided no basis for his rating.

On May 8, 1998 appellant requested reconsideration of the May 23, 1997 decision denying his request for a schedule award and submitted a February 12, 1998 report by Dr. Misoul and an electromyogram (EMG) and nerve conduction studies dated January 29, 1998 by Dr. Marcel A. Reischer, an attending physician specializing in physical medicine and rehabilitation.

Dr. Reischer, based upon nerve conduction and EMG studies, concluded that appellant had chronic bilateral C7 and chronic left C6 radiculopathies. The physician indicated that there were "abnormalities noted in the distribution of the long thoracic nerve" and that he could not "definitely exclude a coexistent partial long thoracic nerve lesion."

In a February 12, 1998 report, Dr. Misoul, diagnosed cervical radiculopathies in both upper extremities based upon the abnormal EMG and nerve conduction studies. Dr. Misoul further opined:

> "There is now muscle change in the actual musculature supplied by these nerve which would explain his weakness and numbness in his upper extremities. I, [conclude], therefore, that according to A.M.A., [*Guides*] that he has a five (5%) percent permanent partial disability to each upper extremity for sensory deficit and discomfort, as well as five (5%) percent to each upper extremity, due to loss of function from decreased strength, resulting in a ten (10%) percent permanent partial disability to each upper extremity. This is EMG documented."

[6] The signature is illegible. It appears that the signature is that of Dr. Marcel A. Misoul.

By report dated July 20, 1998, the Office medical adviser noted that the Office had accepted a sprain of the neck and back and stated that there was no permanent partial impairment for soft tissue injuries and that the abnormal EMG and other findings provided by Drs. Misoul and Reischer were not established as related to appellant's accepted employment injuries.

By merit decision dated July 22, 1998, the Office denied modification of the May 23, 1997 decision on the basis that the evidence submitted failed to establish appellant's impairment was due to his accepted April 5, 1993 employment injury.

By letter dated August 13, 1998, appellant requested reconsideration of the denial of his request for a schedule award. Appellant noted that his injury in 1993 was "a reinjury and not a new injury" and that he has been receiving treatment and medication for the 1986 injury.

By decision dated September 9, 1998, the Office denied appellant's request for reconsideration on the basis that appellant had failed to include new and relevant evidence or raise a substantive legal issues.

The Board finds that appellant has failed to meet his burden of proof in establishing his entitlement to a schedule award.

The schedule award provisions of the Act[7] set forth the number of weeks of compensation to be paid for permanent loss of use of the members listed in the schedule. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determinations is a matter which rests in the sound discretion of the Office. However, as a matter of administrative practice and to insure consistent results to all claimants, the Office has adopted and the Board has approved of the A.M.A., *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[8]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[9] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back[10] or an impairment of the whole person,[11] no claimant is entitled to such an award.[12]

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a

[7] *See generally* 5 U.S.C. §§ 8101-8193.

[8] *Jimmy B. Newell*, 39 ECAB 181 (1987).

[9] *George E. Williams*, 44 ECAB 530, 533 (1993); *William Edwin Muir*, 27 ECAB 579, 581 (1976).

[10] *See* 5 U.S.C. § 8107(c); *George E. Williams*, *supra* note 9.

[11] *See Gordon G. McNeill*, 43 ECAB 140, 145 (1990); *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

[12] *E.g.*, *Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[13]

Appellant's attending physicians submitted reports that make general reference to the A.M.A., *Guides*, but provided little reasoning or evidence of proper application of the relevant tables of the A.M.A., *Guides*. In a February 21, 1997 report, Dr. Misoul opined that appellant had a five percent impairment of each upper extremity which he attributed to loss of function from pain, discomfort, sensory deficit and decreased strength. In a report dated February 12, 1998, Dr. Misoul reiterated that appellant had a five percent impairment of each upper extremity due to sensory deficit and discomfort and loss of function from decreased strength. Dr. Misoul did not explain how such percentages were calculated under the specific sections or tables of the A.M.A., *Guides*. Other medical reports submitted by appellant either do not reference the A.M.A., *Guides* or do not provide an opinion on permanent impairment of a schedule member.

The Office referred both reports to the Office medical adviser for review.[14] In a report dated May 2, 1997, he concluded that there was no basis for an impairment rating of the upper extremities as there was no established decrease of muscle function, no neurologic impairment and no structural abnormalities. After reviewing the February 12, 1998 report, by Dr. Misoul and EMG and nerve conduction studies by Dr. Reischer, the Office medical adviser opined that there was no permanent partial impairment due to the accepted soft tissue injuries and opined that the abnormal EMG and other findings provided by Drs. Misoul and Reischer were not causally related to appellant's accepted employment injuries.[15]

The Board finds that the record does not contain any probative medical evidence containing an accurate reference to all the appropriate tables and a reasoned opinion establishing that appellant has sustained a permanent impairment of the upper extremities due to his accepted employment injury under the A.M.A., *Guides*. Accordingly, the Board finds that the Office properly determined that appellant was not entitled to a schedule award in this case.

Next, the Board finds that the Office did not abuse its discretion by denying appellant's request to reopen his case for a merit review.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.[16]

[13] *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

[14] *See Paul R. Evans, Jr.*, 44 ECAB 646 (1993). The Office may follow the advice of its medical adviser where the attending physician does not indicate how the impairment is based on an application of the A.M.A., *Guides*.

[15] The Board notes that appellant's claim was accepted for lumbar and cervical sprains. For conditions not accepted by the Office, appellant retains the burden of proof to establish that any such conditions were caused or aggravated by his employment. *See Annette M. Dent*, 44 ECAB 403, 407 (1993).

[16] 20 C.F.R. § 10.138(b)(2).

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim.[17] Evidence that does not address the particular issue involved also does not constitute a basis for reopening the case.[18]

Appellant, in his August 13, 1998 reconsideration request, did not submit any new evidence or a specific argument regarding his claim. The Board finds that the Office did not abuse its discretion in denying appellant's request for a merit review of his case inasmuch as he failed to submit new evidence, show that the Office erroneously applied or interpreted a point of law, or advance a point of law or fact not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 9 and July 22, 1998 are affirmed.

Dated, Washington, DC
September 27, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[17] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[18] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).