

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE E. BROYLES and U.S. POSTAL SERVICE,
POST OFFICE, Oklahoma City, OK

*Docket No. 00-1975; Submitted on the Record;
Issued April 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he has a greater than two percent permanent impairment of the left lower extremity, for which he has received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On December 6, 1997 appellant, then a 41-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that he injured his left knee while delivering mail.¹ The Office accepted the claim for left knee strain by letter dated December 18, 1997. Appellant returned to full-time limited duty on April 6, 1998.

Appellant filed a schedule award claim on November 12, 1998.

By letter dated November 24, 1998, the Office requested Dr. Glenn L. Smith, an attending physician, to provide an assessment of appellant's permanent impairment using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) and advised him that it was not to be based upon the whole person.

On January 26, 1999 the Office referred appellant to Dr. Phillip McCown, a second opinion Board-certified orthopedic surgeon, to provide an impairment rating as no reply had been received from Dr. Smith.

In a report dated March 10, 1999, Dr. McCown concluded appellant had a four percent impairment in the left lower extremity utilizing Table 64 at page 85.

¹ This was assigned claim number A16-038080. The record contains a claim filed for an injury sustained on May 10, 1999 which the Office accepted for right acruciate ligament (ACL) tear and repair and assigned claim number A16-0334432.

The Office medical adviser reviewed Dr. McCown's report and concluded that appellant had a two percent impairment in the left lower extremity due to appellant's partial lateral meniscectomy. The Office medical adviser indicated that he was unable to determine how Dr. McCown arrived at four percent using Table 64 at page 85 and requested the Office to refer back to another Office medical adviser if he did agree with the two percent permanent impairment rating.

By decision dated April 1, 1999, the Office issued appellant a schedule award for a two percent permanent impairment of the left lower extremity.

On April 14, 1999 appellant requested an oral hearing, which was held on September 21, 1999.

Appellant subsequently submitted a February 9, 1999 report by Dr. Smith in which he opined that appellant had 17 percent disability to the whole person. In reaching this conclusion, Dr. Smith attributed a four percent impairment due to flexion contracture using Table 41 at page 78, a 5 percent impairment due to extension weakness using Table 41 at page 78, a 5 percent disability due to flexion weakness using Table 39 at page 77, a 3 percent impairment for decreased cartilage interval using Table 62 at page 83.

In a December 7, 1999 decision, the Office hearing representative affirmed the Office's determination that appellant had no more than a two percent impairment of the left lower extremity.

In a February 1, 2000 letter, appellant requested reconsideration alleging that Dr. McCown was incompetent to assess his degree of disability and attached reports regarding other claimants seen by Dr. McCown for disability ratings in support of his argument.

On May 1, 2000 the Office denied appellant's request for a merit review on the basis that appellant did not raise any new legal issues nor submit any relevant and new medical evidence.

The Board finds that appellant has no more than a two percent impairment in his left lower extremity, for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act² 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.³ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal

² 5 U.S.C. §§ 8101-8193, 8107.

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

justice for all claimants the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁴

The Office, in this case, based its assessment of the impairment of appellant's left lower extremity on the Office medical adviser's March 23, 1998 medical report. In this report, the Office medical adviser, based upon the report of Dr. McCown dated March 10, 1999 and the A.M.A., *Guides*, stated that appellant had reached maximum medical improvement on March 10, 1999. Regarding the lower extremities, the Office medical adviser stated that, based on Table 64, page 85 of the fourth edition of the A.M.A., *Guides*, appellant had a two percent impairment of the left lower extremity due to his partial lateral meniscectomy. The Board has reviewed the Office medical adviser's calculations of the lower extremities and finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had no more than a two percent impairment of the left lower extremity for which he has received a schedule award.

In a report dated February 9, 1999, Dr. Smith stated his opinion that appellant had a 17 percent permanent impairment of the whole person for due flexion contracture based upon Table 41 at page 78, a 5 percent impairment due to extension weakness based Table 41, page 78, a 5 percent disability due to flexion weakness based upon Table 39, page 77, a 3 percent impairment for decreased cartilage interval based upon Table 64, page 85 of the A.M.A., *Guides*. However, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person. The Board therefore finds that Dr. Smith's opinion lacked probative value, as he failed to calculate his impairment rating pursuant to the fourth edition of the A.M.A., *Guides*, under the protocols set forth above.

The Board finds that the refusal of the Office, in its May 1, 2000 decision, to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) 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.⁶

In his February 1, 2000 letter requesting reconsideration, appellant did not submit any relevant and pertinent new evidence not previously considered by the Office and did not argue that the Office erroneously applied or interpreted a specific point of law. Nor did he advance a point of law not previously considered by the Office. Appellant merely stated his opinion

⁴ *Theresa Goode*, 51 ECAB ____ (Docket No. 99-1831, issued September 12, 2000); *A. George Lampo*, 45 ECAB 441, 443 (1994).

⁵ 20 C.F.R. § 10.606(b)(2) (1999)

⁶ 20 C.F.R. § 10.608(b) (1999).

Dr. McCown was not competent to offer an opinion regarding his disability and submitted a medical report on another person by Dr. McCown in support of his argument. Therefore, the Office properly denied his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 7 and May 1, 2000 are hereby affirmed.

Dated, Washington, DC
April 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member