U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS L. JACKSON and DEPARTMENT OF THE AIR FORCE, AIR FORCE PRINTING SERVICE, KELLY AIR FORCE BASE, San Antonio, TX

Docket No. 00-2685; Submitted on the Record;
Issued November 28, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant has any increase in permanent impairment of his right lower extremity, beyond the 14 percent previously awarded; 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.

The case has been on appeal twice previously.[1] In a December 9, 1987 decision, the Board found that Dr. James W. Simmons, a Board-certified orthopedic surgeon, acting as an impartial specialist in this case, had not discussed whether appellant had a hammer toe deformity of the fourth right toe and had not taken into consideration subjective factors such as decreased sensation and pain in determining the degree of the permanent impairment of the right foot. The Board remanded the case so that Dr. Simmons could clarify his opinion on this point and state whether appellant's impairment was confined to the right foot or extended to the right leg.[2]

In a March 17, 1988 decision, after further development as directed by the Board, the Office issued a schedule award for a 13 percent impairment of the right leg, less the amount paid under previous schedule awards. On appeal in a decision issued August 2, 1988, the Board amended the Office's March 17, 1988 decision to give appellant a schedule award for a 14 percent impairment of the right leg, but otherwise affirmed the decision.[3]

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[1] The Office accepted appellant's claim for a chip fracture of the base of the right first metatarsal and hammer toe deformity of the second and third toes on the right foot.

[2] Docket No. 87-1758, issued December 9, 1987. The history of the case as contained in the prior appeal is incorporated by reference.

[3] Docket No. 88-987, issued August 2, 1988. The history of the case as contained in the prior appeal is incorporated by reference.

On February 25, 2000 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of his right lower extremity and submitted medical evidence in support of his claim. In a decision dated June 19, 2000, the Office denied appellant's claim for an increased schedule award, noting that, while the medical evidence established that he had a 13 percent impairment of the right lower extremity, he had already received an award for a 14 percent impairment of the right lower extremity.

The Board finds that appellant has no increase in permanent impairment of his right lower extremity, beyond the 14 percent previously awarded.

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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 American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In support of his claim, appellant submitted a December 29, 1999 report from his treating physician, Dr. Walter W. Strash, a Board-certified podiatrist, who noted that appellant still had rigid hammertoe deformity of the second and third toes of the right foot and stated that he had referred appellant to the TexasMed clinic for evaluation of disability and impairment. In a report dated January 17, 2000, Dr. Jeff Wasetis, a Board-certified general practitioner, reviewed appellant's medical and employment history and listed his findings on physical examination and testing. Dr. Wasetis diagnosed: contusion of the right foot resulting in hammer toes, second and third, status post arthroplasty of the PIP joints and tenotomy/capsulotomy of the second and third metatarsophalangeal joints; pressure calluses to the balls of both feet, left greater than right; probable onychomychosis of multiple toe nails, unlikely to be work related; contusion to arch of right foot resulting in chip fracture and subsequent arthritis of the first metatarsal joint; plantar flexed second metatarsal head due to previous surgery; and contracture to extensor tendons right second and third toes. Dr. Wasetis stated that, pursuant to Table 45, page 78 of the fourth edition of the A.M.A., *Guides*, he allowed appellant the maximum percentage of three percent for both his second and third toes, for a total of six percent impairment of the right foot due to decreased range of toe motion. Dr. Wasetis explained that, while appellant actually had slightly more than 10 degrees of extension, as the A.M.A., *Guides* do not address appellant's plantar flexed second metatarsal or the contracture to his extensor tendons, he felt it was appropriate to give him the full amount of impairment allowed. Dr. Wasetis further explained that appellant's range of motion impairment could alternatively be evaluated pursuant to Table 61, page 82 of the A.M.A., *Guides*, which discusses ankylosis of the second and third digits in extension, but that application of this section would also yield a rating of a three percent permanent impairment of the right foot for each of the two affected toes, for a total of a six percent impairment of the right foot for

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

restricted motion. Dr. Wasetis noted that in addition to his contracted toes, appellant also had impairment due to the arthritis of the first metatarsal joint, which in turn was due to his employment-related chip fracture. He noted that x-rays taken in his office revealed a one-millimeter gap between appellant's tarsal metatarsal joint with widening at the base of the first metatarsal. Dr. Wasetis explained that, while the portion of the A.M.A., *Guides* pertaining to the evaluation of arthritis did not mention the tarsal metatarsal joint in particular, he felt that this was the equivalent of the listed talar-navicular joint. Dr. Wasetis concluded that, pursuant to Table 62, page 83 of the A.M.A., *Guides*, appellant's one-millimeter gap equated to a 14 percent impairment of the right foot. Finally, pursuant to the Combined Values Chart at page 322 of the A.M.A., *Guides*, Dr. Wasetis combined the 6 percent range of motion impairment with the 14 percent arthritis impairment, to arrive at a 19 percent impairment of the right foot, or a 13 percent impairment of the right lower extremity.

In his well-rationalized report, Dr. Wasetis stated that he had fully considered all appellant's conditions in arriving at his conclusions. He explained that ankylosis was considered in arriving at the six percent foot impairment, that arthritis was considered under the 14 percent foot impairment and that pain and discomfort were also concluded in the 14 percent impairment for arthritis. In addition, Dr. Wasetis noted that, while appellant also has weakness and atrophy of the right calf, the weakness is covered under the arthritis rating and the A.M.A., *Guides* specifically stated that where impairment is based on loss of ankle and toe motion, it should not be estimated on the basis of muscle atrophy also.[6] Dr. Wasetis further noted that, while appellant did have some loss of normal sensation, it did not correspond with any of the nerves specifically identified in Table 68, page 89 of the A.M.A., *Guides* and he did not feel it was appropriate to award any additional impairment for a nerve injury based on appellant's specific injuries. Finally, Dr. Wasetis noted that appellant's subluxation of the second toe and short third toe, as well as his contractive extensor tendons had been considered in connection with his range of motion impairment rating and that appellant's chip bone fracture had been considered in connection with the arthritis impairment rating.

In a February 16, 2000 memorandum, an Office medical adviser reviewed Dr. Wasetis' findings and, applying the standards outlined in the A.M.A., *Guides*, determined that appellant had a total 19 percent permanent impairment in his right foot. In arriving at this figure, the Office medical adviser utilized the same portions of the A.M.A., *Guides* utilized by Dr. Wasetis and arrived at the same conclusions.

On April 20, 2000 the Office asked the Office medical adviser to revise his conclusions in terms of impairment to the right lower extremity, rather than the right foot. In a report dated April 25, 2000, the Office medical adviser stated that, pursuant to page 75 of the A.M.A., *Guides*, a 19 percent impairment of the right foot equated to a 13 percent impairment of the right lower extremity. This impairment rating is also in accord with that given by Dr. Wasetis.

In the instant case, the Office determined that appellant was not entitled to an increased schedule award for his right lower extremity by adopting the findings of appellant's examining physician, Dr. Wasetis and the Office medical adviser, each of whom arrived at the same precise

[6] A.M.A., *Guides*, page 78.

13 percent right lower extremity impairment rating by gauging the restricted motion of appellant's second and third toes of his right foot, together with the specific numerical impairment caused by arthritis in his right tarsal metatarsal joint, based on the applicable figures and tables of the A.M.A., *Guides.*

The Board specifically notes that, contrary to appellant's arguments, in arriving at his 13 percent impairment rating, Dr. Wasetis specifically discussed each of appellant's many foot abnormalities and explained how they factored into the impairment rating. In addition, he explicitly stated that he based his findings on the fourth edition of the A.M.A., *Guides*. The Board concludes that Dr. Wasetis and the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant, who has already received a schedule award from the Office for a 14 percent permanent impairment of the right lower extremity, has failed to provide probative, supportable medical evidence that he is entitled to an increased award.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for review of the merits of his claim.

Subsequent to the Office's June 19, 2000 decision denying an increased schedule award, by letter dated July 26, 2000, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of his request. In a decision dated August 3, 2000, the Office found that the newly submitted evidence was insufficient to warrant modification of the prior decision.

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 point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[7] Section 10.608 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.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[8] In support of his request for reconsideration, appellant submitted numerous copies of documents previously contained in the record which, therefore, are duplicative. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[9] New to the record, however, is a report dated July 10, 2000 from appellant's treating physician, Dr. Walter W. Strash, a Board-certified podiatrist. In his report, he stated that appellant related continued pain in his right fourth toe and observed that appellant's right fourth

[7] 20 C.F.R. § 10.606(b).

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[9] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

toe was contracted. Dr. Strash diagnosed painful fourth hammertoe right foot and stated that this deformity "may" be related to appellant's March 1970 employment injury. It is not disputed that appellant may have developed additional medical complications as a consequence of his accepted employment-related conditions. However, the only merit decision before the Board deals exclusively with appellant's claim for a schedule award for his right lower extremity. As Dr. Strash's report does not address the particular issue involved in the Office decision before the Board, it does not constitute a basis for reopening the claim.[10] As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The decisions of the Office of Workers' Compensation Programs dated August 3 and June 19, 2000 are hereby affirmed.

Dated, Washington, DC
November 28, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[10] *Richard L. Ballard*, 44 ECAB 146, 150 (1992).