U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE V. LOVATO-DURAN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Albuquerque, NM

Docket No. 00-1818; Submitted on the Record;
Issued October 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has a greater than three percent permanent impairment of the left leg, for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a merit review.

This case has previously been on appeal before the Board. In its October 23, 1997 decision,[1] the Board found that the Office improperly determined July 15, 1995 as the date appellant was no longer disabled from performing her usual job. The Board, therefore, remanded the case for further development of the medical evidence regarding the issue of the date appellant's partial disability ceased. The facts and circumstances of the case as set out in the Board's December 6, 1996 decision, are incorporated herein by reference.

On June 17, 1997 appellant filed a recurrence of disability claim, which the Office accepted for the period June 17, 1997 through March 17, 1998.

In a July 2, 1998 report, Dr. Erich P. Marchand, an attending Board-certified neurological surgeon, concluded that appellant had a 12 percent impairment of the lower extremity due to pain and indicated that the S1 nerve root was involved.[2]

Appellant filed a claim for a schedule award on September 2, 1998.

In a March 24, 1999 letter, responding to the Office's request for information, Dr. Marchand noted appellant's date of maximum medical improvement and concluded that appellant had a five percent impairment based on Table 83, page 130 of the American Medical

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[1] Docket No. 96-42.

[2] On January 8, 1998 the Office approved appellant's request to change her treating physician to Dr. Thomas Cohn as Dr. Marchand relocated to Santa Fe, New Mexico.

Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fourth editions. He based his conclusion upon the involvement of the S1 nerve root and that her impairment was based on her pain only since there was "no documented sensory or motor disturbance."

In an April 21, 1999 report, Dr. Marchand provided additional clarification of his impairment rating noting: "[t]he impairment rating I gave on July 2, 1998 was 12 [percent] lower extremity which correlates with 5 [percent] whole person using Table 68, page 89 of A.M.A., *Guides*, 4th edition. I have not changed that impairment rating."

In a December 1, 1999 report, Dr. Bryan J. Duke, a second opinion physician specializing in neurosurgery, noted that appellant had normal range of motion in her lumbar spine, motor examination was "5/5 strength bilaterally throughout all muscle groups," the "deep tendon reflexes were 2+ and symmetric at the knees and ankles bilaterally, no Hoffman's reflex and "sensory examination is decreased to pinprick in the left L5 distribution greater than left S1 and L4 distributions. The entire left foot is decreased in sensation relative to the right foot." Dr. Duke noted that appellant had "impaired sensation in the left lower extremity that seems to conform with the L5 dermatome" and no motor impairment. Utilizing Table 83, page 130 to determine appellant's sensory loss, he indicated that L5 root was involved in the loss, which resulted in a "maximum percent of loss of function due to sensory deficit is 5." Dr. Duke next utilized Table 11, page 48 to determine the grading for sensory deficit or pain which he opined was five.

In a December 9, 1999 report, the Office medical adviser concluded, based upon a review of the December 1, 1999 report by Dr. Duke, that appellant had a three percent impairment of the left leg. In reaching this determination, he noted that "impairment in [left] leg sensory only examination description and per [A.M.A., *Guides*] Table 11 either [No.]3 or [No.]4 (Therefore, upper level [No.]3 or 60[percent]). Thus the max[imum] value of root [equals] 5 and the impairment is 5 [percent] [times] 60 [percent] or: PPI – 3 [percent] [left] [l]eg."

On December 27, 1999 the Office issued appellant a schedule award for a three percent permanent impairment of the left leg.

In a letter dated March 10, 2000, appellant's counsel requested reconsideration arguing that there was a conflict in the medical opinion between appellant's attending physician, who concluded that appellant had a 12 percent impairment of her left leg and the Office medical adviser, who concluded that appellant had a 3 percent impairment of her left leg.

By nonmerit decision dated March 16, 2000, the Office denied appellant's request for review.[3]

The Board finds that appellant has no more than three percent permanent impairment of the left leg, for which she has received a schedule award.

[3] The Board notes that Office erroneously characterized Dr. Duke as being Board-certified in its nonmerit decision denying reconsideration.

Section 8107 of the Federal Employees' Compensation Act[4] 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. 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 justice for all claimants the Office has adopted the A.M.A., *Guides*[5] as a standard for evaluating schedule losses and the Board has concurred in such adoption.[6]

In the present case, in reviewing the calculations of record, the Board concludes that the Office medical adviser properly calculated that appellant had a three percent impairment of the left lower extremity.

The Office medical adviser utilized the description of appellant's impairment provided by Dr. Duke. Utilizing Table 43 of the A.M.A., *Guides*,[6] the Office medical adviser determined that appellant's left leg impairment was sensory only based upon the physical examination description and concluded "per [A.M.A., *Guides*] Table 11 either [No.]3 or [No.]4 (Therefore, upper level [No.]3 or 60[percent]). Thus the max[imum] value of root [equals] 5 and the impairment is 5 [percent] [times] 60 [percent] or: PPI – 3 [percent] [left] [l]eg."

The Board finds that the Office properly relied on the recommendations of the Office medical consultant, as his opinion comported with the A.M.A., *Guides*. Dr. Duke's opinion is insufficient as it determined both a grading and impairment loss, but failed to multiply the results as required by Table 11, page 48 to reach appellant's impairment rating for her lower extremity. While Dr. Marchand advised that he utilized the 4th edition of the A.M.A., *Guides* in determining that appellant had a 12 percent impairment rating, his opinion is of diminished probative value as he referred to using Table 68, page 89 in his April 21, 1999 report and Table 83, page 130 in his March 24, 1999 report. First, the use of Table 68, page 89 to calculate appellant's impairment rating is incorrect as this table is to be used when there is complete motor or sensory loss of the named peripheral nerves. Second, while Dr. Marchand correctly referred to Table 83, page130, pursuant to the A.M.A., *Guides*, the impairment rating determined by referral to Table 83 must be multiplied by a percent from Table 11, page 48 to represent the degree of sensory or motor impairment. In his March 24, 1999 report, Dr. Marchand refers only to an impairment rating based upon Table 83. As it is appellant's burden to submit sufficient evidence to establish her claim,[7] the Board finds that the Office permissibly followed the advice of its medical consultant in granting appellant a schedule award for a three percent permanent impairment of the left lower extremity.

[4] 5 U.S.C. §§ 8101-8193, 8107.

[5] A.M.A., *Guides* 3d ed., rev. (1990).

[6] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[7] *See Annette M. Dent*, 44 ECAB 403 (1993).

The Board further finds that the Office in its March 16, 2000 decision, properly denied appellant's request for consideration on the merits under 5 U.S.C. § 8128(a) on the basis that her/his request for reconsideration did not meet the requirements set forth under section 8128.[8]

Under section 8128(a) of the Act[9] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[10] which provides that a claimant may obtain review of the merits if her/his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office, or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[11]

In the instant case, appellant submitted no new evidence in support of her Mach 10, 2000 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. Appellant argued on appeal that there was a conflict in the medical opinion evidence as Dr. Marchand, the attending physician, concluded appellant had a 12 percent impairment of the left lower extremity while the Office medical adviser concluded that she had a 3 percent impairment of the left lower extremity. Dr. Marchand's opinion has been found to be of diminished probative value due to his incorrect use of the A.M.A., *Guides* and thus, there was no conflict in the medical opinion evidence as alleged by appellant. Accordingly, the Office properly denied appellant's request for review on the merits.

[8] *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b) (1999).

[11] 5 U.S.C. § 10.608(b).

The March 16, 2000 and December 27, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 1, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member