U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY COLE and U.S. POSTAL SERVICE,
POST OFFICE, Cedar Bluff, VA

Docket No. 00-1457; Submitted on the Record;
Issued January 24, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for his left lower extremity; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On January 29, 1993 appellant, then a 42-year-old window/distribution clerk, filed a notice of traumatic injury claiming that on January 23, 1993 he injured his low back while lifting a cash drawer. The Office accepted appellant's condition for herniated discs at L4-5 and L5-S1 and corrective surgeries. Appellant received a schedule award for a 55 percent loss of use of his right lower extremity and was paid appropriate compensation.

Appellant also requested a schedule award for his left lower extremity. In support of his request, he submitted several reports from his attending physician, Dr. William A. McIlwain, a Board-certified orthopedic surgeon, rating the function of appellant's upper and lower extremities at 50 percent due to pain and loss of strength. Dr. McIlwain did not provide any physical rang of motion findings for his ratings nor did he explain where the figures came from or how they were computed. He also submitted a report rating the functions of appellant's lower extremities at 54 percent.

Appellant submitted reports from Dr. McIlwain dated November 9 and 23, 1998, in which he stated:

> "You [appellant] have a combination of reasons why your back pertains to your legs as much as you have developed consistent hamstring tightness that cannot be relieved, that you have difficulty getting your legs straight in any other than a standing position because of this hamstring tightness. This appears to be directly from the legs rather than from the neurological deficit since that neurological deficit is improved…."

He also stated:

> "Reference the request on [appellant], his back injury has definitely had an effect on his back, legs and his bladder. … He has more weakness and pain in his legs that derived from his back. Although the loss to his legs is not a direct loss to the legs from a structural problem that they have incurred, the loss of strength and stamina has been a direct result of his back injury."

The Office requested that the district medical adviser review the medical evidence of record and determine the percentage of impairment of appellant's left lower extremity according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) 4th ed.[1]

By letter dated December 18, 1998, the district medical adviser found that the medical evidence of record was insufficient to determine any impairment related to appellant's lower extremities.

By letter dated December 30, 1998, the Office authorized an examination by a second physician to determine the specific measurements of the degrees of appellant's impairment according to the A.M.A., *Guides*.[2]

The Office received a report from Dr. William E. Kennedy, a Board-certified orthopedic surgeon, dated January 13, 1999. Dr. Kennedy examined appellant on January 13, 1999 and the medical evidence of record and diagnosed appellant with degenerative disc disease at levels L4-5, degenerative stenosis at L4 and status fusion at L4-5. He stated, however: "There was no suggestion of any neurovascular deficits in the lower extremities. The lower extremity deep tendon reflexes were bilaterally equal and normal." Dr. Kennedy determined that appellant had a 24 percent impairment to the whole person and from there determined that appellant had a 30 percent permanent impairment to each lower extremity. He used tables measuring range of motion for the spine and back to arrive at these figures.

Dr. Kennedy also stated:

> "I can state with reasonable medical certainty that [appellant's] low back injury has caused the above loss of physical function to the lower extremities even though there was no evidence of neurological deficits in the lower extremities."

The Office forwarded a statement of accepted facts and Dr. Kennedy's January 13, 1999 report to the district medical adviser for review. By memorandum dated February 19, 1999, the district medical adviser stated that no lower extremity impairment may be awarded on the basis of back pain, back muscle spasms or decreased back range of motion.

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[1] A.M.A., *Guides*, 4th ed. (1993).

[2] *Id*.

By decision dated March 6, 1999, the Office denied appellant's claim for a schedule award finding that he failed to establish a permanent impairment of the left lower extremity due to his accepted employment injury.

An oral hearing was held on June 14, 1999. At the hearing appellant submitted additional medical reports, which consisted of a follow-up report from Dr. Kennedy dated April 13, 1999 and a note from Dr. McIlwain dated June 8, 1999. In his April 13, 1999 report, Dr. Kennedy opined that appellant qualified for an additional three percent permanent physical impairment to each lower extremity. Dr. McIlwain again opined that the injury to appellant's back resulted in a functional impairment to his lower extremity but did not provide any physical findings to support his statement. He also stated that he agreed with Dr. Kennedy's new assessment of 33 percent to each lower extremity.

The district medical adviser reviewed the additional medical information and by report dated August 13, 1999, found that there was no objective medical reasoning to support a schedule award for either lower extremity.

By decision dated August 26, 1999, the hearing representative affirmed the Office's March 1999 decision denying appellant a schedule award for the left lower extremity.

By letter dated October 25, 1999, appellant requested reconsideration and submitted additional medical reports, including a November 20, 1999 report from Dr. Kennedy and two reports from Dr. McIlwain dated October 5, 1999.

By decision dated March 6, 2000, the Office denied appellant's request for reconsideration.

The Board finds that appellant is not entitled to a schedule award for his left lower extremity as a result of an employment-related accepted back condition.

The schedule award provisions of the Federal Employees' Compensation Act[3] and its implementing federal regulations[4] set forth the number of weeks of compensation to be paid for permanent loss of the member, functions and organs of the body listed in the schedule. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[5] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,[6] no claimant is entitled to such an award.[7] However, amendments to the Act in 1960 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

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.404.

[5] *Thomas E. Stubbs*, 40 ECAB 647 (1989).

[6] *Gary L. Loser*, 38 ECAB 673 (1987).

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

originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.[8] The Act does not specify the manner in which the percentage of loss of a member shall be determined and the method for making such a determination rests in the sound discretion of the Office.[9] The Office has adopted and the Board has approved, the use of the A.M.A., *Guides*.[10]

The record contains several medical reports relating appellant's lower extremities to his accepted back condition, but only Dr. Kennedy's January 13, 1999 report applies examination findings to the A.M.A., *Guides*.

The Board finds that the Office correctly found a lack of basis for a schedule award. Dr. Kennedy, in his January 13, 1999 report, found a 30 percent rating for each lower extremity, but did so only after computing a 24 percent whole body impairment. The 24 percent whole body rating was reached using Tables 75, 81 and 82, which are whole person impairment percents due to specific spine disorders and range of motion for the lumbosacral region. As noted a schedule award is not payable for a member, function or organ of the body not specified in the Act or in the regulations.[11] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,[12] no claimant is entitled to such an award.[13] In this case, Dr. Kennedy based his 30 percent impairment findings using tables used to calculate impairments for the back and spine and did not provide separate impairment ratings for the lower extremities. Since he extrapolated the 30 percent impairment ratings from a whole body rating using range of motion findings for the lumbosacral spine and did not provide separate ratings for the lower extremities, Dr. Kennedy's ratings are insufficient to calculate a schedule award. In addition, Dr. Kennedy provided contradictory information regarding neurovascular deficits in appellant's lower extremities. He first stated in his January 13, 1999 report that "there was no suggestion of any neurovascular deficits in the lower extremities" and then subsequently referred to bilateral sensory symptoms in appellant's L5 nerve root. Dr. Kennedy's opinion is of little probative value since it is contradictory and he did not submit any physical evidence to support his findings.

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

[9] *See Richard W. Robinson*, 39 ECAB 484 (1988).

[10] *Supra* note 1.

[11] *Supra* note 3.

[12] *Supra* note 4.

[13] *Supra* note 5.

Dr. Kennedy's ratings were based on an evaluation of the lumbosacral spine, which is not ratable under the Act, and he did not provide findings supporting his estimate of impairment in appellant's lower extremities. Appellant did not submit sufficient medical evidence to meet his burden of proof to obtain a schedule award.

The Board also finds that the refusal of the Office in its March 6, 2000 decision, to reopen appellant's case for further consideration of the merits of his claim 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,[14] 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 a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[15]

The evidence submitted by appellant with his October 25, 1999 request for reconsideration consisted of the November 20, 1999 follow-up report from Dr. Kennedy and the reports from Dr. McIlwain dated June 8, 1999 and two reports dated October 5, 1999. Dr. McIlwain's June 8, 1999 report is duplicate evidence already contained in the record and does not constitute a basis for reopening a case.[16]

Dr. McIlwain's letter dated October 5, 1999, is written to appellant and attempts to explain his whole-person rating from his January 13, 1999 report. He states:

> "The diagnosis that leads to a rating is the primary diagnosis, in your case the lumbar spine injury. The legs are a product of that and, therefore, that is how you come to have a rather large whole person rating…."

Dr. McIlwain continues by discussing appellant's leg pain and how it stems from his back injury. He notes that "any inability to further build your muscles stems directly from the inability of the residual pain in your back…." Dr. McIlwain acknowledge in his report that appellant's primary diagnosis stems from his back injury. In Dr. McIlwain second report dated October 5, 1999, he simply states that he has, for his whole career, rated the back separately from the extremities, as "the back is the injury and the extremities are the result of the injury." Dr. McIlwain statement is irrelevant to the issue at hand and also is not a basis for reopening a case.

[14] 5 U.S.C. §§ 8101-8193.

[15] 20 C.F.R. § 10.606.

[16] *Paul Kovash*, 49 ECAB 350 (1998).

In his November 20, 1999 report, Dr. Kennedy states that he reviewed his previous reports and the hearing representative's decision and attempts to explain his contradictory statements regarding appellant's lower extremities. Dr. Kennedy states that "there is no way to be objective by physical examination with regard to sensory disturbances except to map out the patient's description of those disturbances." He continues:

> "The absence of evidence of neurological deficit referenced in my report of January 13, 1999 had to do with motor function, central nervous system (brain and spinal cord) signs and reflexes, not sensory function."

Here, Dr. Kennedy is only attempting to explain his previous contradictory statements and does not provide any new evidence or objective findings relating to neurological impairment in appellant's lower extremities. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and does not constitute a basis for reopening a case.[17] Since appellant did not submit any new or relevant medical evidence with his request, he has not established a basis for reopening his case.

Appellant has not established that the Office abused its discretion in its March 6, 2000 decision, by denying his request for review on the merits because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

Accordingly, the March 6, 2000 and August 26, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 24, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[17] *Id*.