U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUISE WAKER and DEPARTMENT OF THE ARMY, COMMUNITIES COMMAND HEADQUARTERS, Fort Monmouth, NJ

Docket No. 02-544; Submitted on the Record;
Issued July 19, 2002

DECISION and ORDER

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

The issues are: (1) whether appellant has any permanent partial impairment of her right upper and lower extremities; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim filed on February 1, 1984 was accepted for sprains of the right hip and knee with residual synovitis and osteoarthritis of the right knee after appellant, then a 41-year-old procurement clerk, slipped and fell on ice in the parking lot.

Appellant requested a schedule award and submitted the July 11, 1989 report of Dr. Ronald Goldberg, an osteopathic practitioner, who found a 10 percent permanent impairment of appellant's right upper extremity and a 16 percent permanent impairment of her right lower extremity. On July 25, 2001 the Office referred appellant to Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, for a second opinion evaluation.[1]

Based on his August 6, 2001 report, the Office denied appellant's claim for a schedule award. Appellant requested reconsideration, which the Office denied on November 29, 2001.

The Board finds that appellant has failed to meet her burden of proof to establish her entitlement to a schedule award.

Section 8107 of the Federal Employees' Compensation Act[2] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[3] The Act, however, does not specify the manner by which the

[1] The record reflects a 10-year hiatus between appellant's claim for a schedule award and the Office's referral for a second opinion evaluation. The gap is unexplained.

[2] 5 U.S.C. §§ 8101-8109.

[3] 5 U.S.C. § 8107.

percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[4] The Act's implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.[5]

In this case, Dr. Goldberg examined appellant on May 15, 1989 and reported range of motion findings for her right hand and hip, resulting in 10 and 16 percent impairments of the right upper and lower extremities, respectively. However, Dr. Goldberg did not specify which edition of the A.M.A., *Guides* he used to calculate his impairment findings. Further, he attributed disc herniation at L4-S1 and carpal tunnel syndrome to the effects of the 1984 fall, but failed to explain how these conditions were causally related. Because of these deficiencies and the lengthy delay in adjudicating appellant's claim, the Office referred appellant to Dr. Strouse.

In his August 6, 2001 report, he applied the fifth edition of the A.M.A., *Guides*[6] and reviewed diagnostic testing conducted in June and July 1998, which revealed degenerative disc disease and herniation at L4-5 with nerve impingement. Noting that a magnetic resonance imaging (MRI) scan in 1998 was normal, Dr. Strouse assigned no permanent impairment of her right hip, based on Table 17-9, page 537. He found no impairment of her right hand or wrist, based on Figure 16-23, page 463, Figure 16-28, page 467, and Figure 16-31, page 469.

Using DRE Lumbar Category 2 on page 385, Dr. Strouse found a six percent impairment of the whole person based on appellant's lumbar spinal injury. He stated that the date of maximal medical improvement was August 6, 2001 and that he could not determine if appellant had reached maximal medical improvement prior to his examination on that date.

The Board finds that Dr. Strouse's report establishes that appellant has no permanent impairment resulting from her work-related injuries in 1984. His clinical findings upon physical examination revealed full range of motion of knees, ankles and feet, with no muscle atrophy, sensory loss, or reflex or vascular abnormalities in the lower extremities. As the Office noted in its October 15, 2001 decision, the Act does not provide a schedule award for the back.[7] Therefore, appellant has failed to establish her entitlement to a schedule award.

The Board also finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

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[4] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[5] 20 C.F.R. § 10.404 (1999).

[6] The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date.

[7] *See Thomas J. Engelhart*, 50 ECAB 319, 320 n. 9 (1999) (section 8101(19) specifically excludes the back from the definition of organ eligible for a schedule award).

Section 8128(a) of the Act[8] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[9]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[10] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[12]

With her request for reconsideration, appellant submitted no new medical evidence. Therefore, she has not met the subsection (iii) requirement. Appellant argued that the 1984 fall caused "more than abrasions to the right knee and right hand" and that she has pain and swelling in her right knee, and pain, weakness and a permanent red scar in her right hand. Appellant is correct that the Office accepted sprains and residual synovitis. But medical evidence is required to establish entitlement to a schedule award, and appellant submitted no such evidence.

Appellant has failed to show that the Office erred in interpreting the law and regulations governing schedule awards under the Act. Nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[10] 20 C.F.R. § 10.608(a) (1999).

[11] 20 C.F.R. § 10.606(b)(1)-(2).

[12] 20 C.F.R. § 10.608(b).

The November 29 and October 15, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member