U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. WHITE and U.S. POSTAL SERVICE,
MINUET STATION, Charlotte, NC

Docket No. 01-2281; Submitted on the Record;
Issued June 6, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether appellant has more than a one percent permanent impairment of each upper extremity, for which he 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.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that he sustained more than a one percent permanent impairment of each upper extremity for which he received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3] The schedule award provision of the 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.

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[3] *See Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment."[6] This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[7]

On December 4, 1999 appellant, then a 51-year-old letter carrier, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome in the performance of duty due to repetitive use of the hands. On January 28, 2000 the Office accepted his claim for bilateral carpal tunnel syndrome. Appellant underwent surgery for his bilateral carpal tunnel syndrome on November 30 and December 14, 1999 and on June 15, 2000 appellant filed a claim for a schedule award.

In a decision dated May 29, 2001, the Office granted appellant a schedule award for 6.24 weeks based on a combined 2 percent permanent impairment of the right and left upper extremities. Appellant requested reconsideration and in a decision dated August 14, 2001, the Office declined to reopen appellant's claim for merit review.

By letters dated December 28, 2000 and January 18, 2001, the Office asked appellant's treating physician, Dr. William G. McCarthy, Jr., to evaluate appellant for the purpose of determining the extent of his permanent impairment. The Office specifically asked Dr. McCarthy to apply the standards set forth in the A.M.A., *Guides* and to discuss the date of maximum medical improvement and the degree of impairment due to decreased strength, sensory loss, pain and discomfort. In a one-sentence report dated January 10, 2001, he responded that appellant has a 10 percent impairment of each upper extremity. Dr. McCarthy did not explain how he arrived at this figure, or reference the A.M.A., *Guides*.

On February 15, 2001 the Office referred appellant, together with a statement of accepted facts, a list of questions to be resolved and the relevant medical evidence of record for an examination by Dr. E. Neal Powell, Jr., a Board-certified orthopedic surgeon and second opinion physician. In a narrative report dated March 19, 2001, Dr. Powell stated that appellant had reached maximum medical improvement by February 12, 2001 and that he had no restriction of motion of either upper extremity and his wrist and fingers showed normal movement. He noted that appellant had no atrophy but did have some objective decreased grip strength on the right

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (March 1995); *see John H. Smith*, 41 ECAB 444, 448 (1990).

[7] *Alvin C. Lewis*, 36 ECAB 595-96 (1985).

and some decreased sensation in the median distribution bilaterally. In addition, Dr. Powell noted that appellant complained of some mild pain in the wrist and again some slight numbness in the fingers, particularly worse with use. He concluded that pursuant to the A.M.A., *Guides* (5th ed.), appellant's residual median nerve dysfunction equated to a 10 percent upper extremity impairment bilaterally.

In a memorandum dated April 12, 2001, an Office medical adviser applied Dr. Powell's findings on physical examination to the appropriate sections of the A.M.A., *Guides* (5th ed.) noting that pursuant to Table 16-10, page 482, Grade 4 distorted superficial tactile sensibility, with or without minimal abnormal sensation or pain, that is forgotten during activity, equated to a 25 percent sensory deficit severity of the C8 medial nerve branch. Multiplying the 25 percent sensory deficit severity by the 5 percent maximum allowable percentage for sensory deficit of the C8 nerve branch, as set forth in Table 16-13, page 489, equated to a 1 percent permanent impairment of each upper extremity.

By letter dated April 26, 2001, the Office asked Dr. Powell to clarify his conclusion that appellant had a 10 percent impairment of each upper extremity, in light of the findings and conclusions of the Office medical adviser. In a report dated May 9, 2001, he stated that he had reviewed appellant's chart again in conjunction with the Office medical adviser's calculations under the A.M.A., *Guides* and that he agreed that the Office medical adviser's more specific formula and classification more accurately described appellant's functional impairment. Dr. Powell concluded that, therefore, he concurred with the Office medical adviser's conclusion that appellant has a one percent permanent impairment of each upper extremity.

The Office medical adviser correctly applied the fifth edition of the A.M.A., *Guides* to Dr. Powell's physical findings on examination of appellant in reaching his determination that appellant sustained a one percent permanent impairment of each upper extremity due to sensory deficit. Dr. Powell agreed with the Office medical adviser's determination. While appellant's treating physician concluded that appellant had a 10 percent permanent impairment of each upper extremity, despite 2 requests by the Office, he did not include the requisite detailed description of the impairment necessary to allow the claims examiner and others reviewing the file to be able to clearly visualize the impairment with its restrictions and limitations.[8]

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

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.[9] Section 10.608 provides that when an application for review of the

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (March 1995); *see John H. Smith*, *supra* note 6; *Alvin C. Lewis*, *supra* note 7.

[9] 20 C.F.R. § 10.606(b).

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.[10] In support of his request for reconsideration, appellant submitted a letter from his congressman, who noted that appellant disagreed with the degree of disability assigned to his claim and would like his claim to be reexamined. Appellant did not make any additional arguments or submit any additional evidence. 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 August 14 and May 29, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 6, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

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