U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE FULTON and DEPARTMENT OF THE NAVY, NAVY MILITARY SEALIFT COMMAND, Virginia Beach, VA

Docket No. 02-1532; Submitted on the Record;
Issued November 12, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for a permanent impairment of his brain; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On August 7, 1998 appellant, then a 54-year-old able seaman, filed a claim alleging that on August 5, 1998 he sustained a traumatic injury to his left knee, left elbow, right wrist, right hip and head in the performance of duty. The Office accepted appellant's claim for post-concussion syndrome. Appellant stopped work on August 6, 1998 and did not return.

On April 23, 2001 appellant filed a claim for a schedule award. By letter dated April 25, 2001, the Office requested that Dr. Edward. M. Gilbreth, a Board-certified internist and appellant's attending physician, provide an opinion regarding whether appellant had a permanent impairment due to his post-concussion syndrome according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

In a report dated June 15, 2001, Dr. Charles S. Jervey, a Board-certified neurologist and appellant's attending physician, found that, according to the A.M.A., *Guides* appellant had a four percent permanent impairment due to post-concussion syndrome. Dr. Jervey noted, however, that appellant's attorney had advised him that the Office "does not recognize impairment rating for brain or spine injuries. Therefore, I do not know if this information will be helpful in his case."

By decision dated July 13, 2001, the Office denied appellant's claim on the grounds that the Federal Employee's Compensation Act[1] did not allow a schedule award for an impairment of the brain.

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[1] 5 U.S.C. § 8107 *et seq.*

In numerous letters dated July through December 2001, appellant's representative requested that the Office issue a decision regarding whether appellant's claim should be expanded to include acceptance of additional injuries sustained on August 5, 1998. In a response dated January 14, 2001, the Office stated that, while appellant listed injuries to his left knee, left elbow, right wrist and right hip on his claim form, his physician only provided rationalized medical evidence that his concussion was causally related to his employment injury.

By letter dated February 11, 2001, appellant through his representative, requested reconsideration of his claim.

In a decision dated May 8, 2002, the Office found that appellant did not submit relevant evidence or present a new legal contention in support of his request for reconsideration and thus denied review of the prior decision.

The Board finds that appellant is not entitled to a schedule award for a permanent impairment of the brain.

The schedule award provisions of the Act, section 8107[2] and its implementing regulation,[3] 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. In addition to the bodily members and functions listed in section 8107(c) of the Act, Congress delegated authority to the Secretary of Labor to add other important external or internal organs of the body to the compensation schedule.[4] A schedule award is not payable for the loss or loss of use of any part or function of the body not specifically enumerated in the Act or the Office's regulation that added certain organs to the compensation schedule.[5] Not only is the brain not specifically enumerated in the Act or the regulations, but under section 8101(19) of the Act, Congress provided that "for purposes of this subchapter," the term organ "excludes the brain, heart and back." Appellant, therefore, is not entitled to a schedule award for a permanent impairment of the brain.

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

Section 10.606 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[6] Section 10.608 provides that when an application for review of the

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *See* 5 U.S.C. § 8107(c)(22).

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

[6] 20 C.F.R. § 10.606(b)(2).

merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[7]

In support of his request for reconsideration, appellant contended that the Office erred in failing to determine whether his brain impairment caused a ratable impairment of an extremity. However, it is appellant's burden to submit medical evidence in support of his claim. The record contains no medical opinion finding that appellant has a permanent impairment of a scheduled member due to his post-concussion syndrome. Appellant's allegation, therefore, does not have sufficient legal basis to require a merit review of his claim for a schedule award.

Appellant further contended that he has additional injuries causally related to his August 5, 1998 employment injury. However, the determination of whether appellant has further employment-related injuries is medical in nature and can only be resolved by the submission of medical evidence. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[8]

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[9] Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.

[7] 20 C.F.R. § 10.608(b).

[8] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

The May 8, 2002 and July 13, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 12, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member