U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD D. JONES and DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, El Toro, Calif.

Docket No. 96-494; Submitted on the Record;
Issued January 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he is entitled to an additional schedule award greater than the 17 percent award that he previously received for his right leg; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128 constituted an abuse of discretion.

On September 10, 1985 appellant, then a 30-year-old sheet metal worker, filed a notice of traumatic injury and claim for compensation alleging that he injured his right knee and ankle on September 9, 1995 in the course of his federal employment. The Office subsequently accepted the claim for a right knee strain and right knee arthroscopy and excision. Pursuant to his February 3, 1986 request, appellant was then granted a schedule award for a 17 percent permanent loss of his right leg.

On May 6, 1991 appellant filed a notice of traumatic injury and claim for compensation, alleging that he injured his right knee on May 2, 1991 in the course of his federal employment. The Office accepted the claim for a right knee strain and the case was eventually referred to Dr. Bruce M. Albert, a Board-certified orthopedic surgeon, to determine appellant's entitlement to a schedule award. Following Dr. Albert's examination, the Office medical adviser applied Dr. Albert's objective findings to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and found that appellant had an 11 percent permanent impairment of his right leg. The Office subsequently granted appellant an 11 percent schedule award for his right leg and appellant received a check for $14,498.51.

A May 31, 1995 internal Office memorandum indicated that appellant was informed that he was not entitled to the 11 percent schedule award, but that he had already cashed the check.

On June 1, 1995 appellant wrote Congressman Ken Calvert indicating that he was confused as to how his knee had improved from the initial 17 percent schedule award to the 11 percent schedule award.

On July 21, 1995 the Office made a preliminary determination that an overpayment in the amount of $14,498.51 occurred because appellant had previously received a schedule award for a 17 percent impairment of the right leg and was therefore not entitled to a schedule award based on an 11 percent impairment of the same leg because such impairment did not represent additional impairment. The Office also made a preliminary determination that appellant was at fault in the overpayment because he was informed by the employing establishment and Congressman Calvert's office that he should hold his check on the basis that he might not be entitled to the schedule award.

In a decision dated July 21, 1995, the Office rejected the claim for a schedule award because the medical evidence of record established that the claimant had no greater impairment as a result of his May 2, 1991 injury than the award paid for the same part of the body as a result of impairment which occurred after the injury of September 9, 1995. In an accompanying memorandum, the Office indicated that the Office medical adviser properly applied the fourth edition of the A.M.A., *Guides* to Dr. Albert's objective findings because that was the edition in effect at the time of the Office's review.

In a letter dated August 11, 1995, appellant indicated that he cashed his schedule award check prior to being told by the employing establishment that it might have been issued in error. Appellant further indicated that he was never told by the Congressman's office not to cash the check. Finally, appellant questioned whether the Office applied the proper A.M.A., *Guides* in calculating his most recent schedule award. Appellant submitted a June 7, 1993 letter from the Office to Dr. Andrew C. Kim, a Board-certified orthopedic surgeon, indicating that schedule awards would be calculated pursuant to the third edition of the A.M.A., *Guides*.

The Office considered appellant's letter a request for reconsideration regarding the 11 percent schedule award.

In a decision dated August 24, 1995, the Office declined to review its prior schedule award decision because the evidence appellant submitted in support of reconsideration was irrelevant and immaterial. In an accompanying memorandum, the Office noted that appellant's arguments regarding fault in the creation of the overpayment were irrelevant to his entitlement to an additional schedule award. Moreover, it found that the Office's June 3, 1993 letter to Dr. Kim instructing him to apply the third edition of the A.M.A., *Guides* was irrelevant to this schedule award in which the fourth edition was properly applicable.

Following a telephone conference with appellant and his wife, the Office issued a decision dated November 17, 1995, in which it determined that waiver of recovery of the overpayment was not warranted. In an accompanying memorandum, the Office determined that appellant was not at fault in the creation of the overpayment. Nevertheless, the Office reviewed appellant's finances and found that because appellant's income was greater than his expenses, waiver was not applicable. The Office, however, noted that appellant retained $10,000.00 of the overpayment and proposed a compromise in which appellant would repay only that amount. On November 29, 1995 the Office formally offered a compromise of the overpayment. The Office offered to accept a payment of $10,000.00 as restitution in full. Appellant accepted the offer on December 5, 1995. Because the Office found that appellant was not at fault in the creation of the

overpayment and the Office and appellant agreed to a compromise of the overpayment, the only issues on appeal involve appellant's entitlement to an additional schedule award.

The Board finds that appellant failed to establish entitlement to a schedule award in addition to the 17 percent award he previously received for his right leg.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations,[2] set forth that schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment is to be determined. For consistent results and to ensure equal justice for all claimant's, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment.[3]

In obtaining medical evidence for schedule award purposes, the Office must obtain an evaluation by an attending physician which includes a detailed description of the impairment including, where applicable, the loss in degrees of 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. The 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 resulting restrictions and limitations.[4] If the attending physician has provided a detailed description of the impairment, but has not properly evaluated the impairment pursuant to the A.M.A., *Guides*, the Office may request that an Office medical adviser review the case record and determine the degree of appellant's impairment utilizing the description provided by the attending physician and the A.M.A., *Guides*.[5]

Following receipt of Dr. Albert's report, the Office requested that its medical adviser apply the A.M.A., *Guides* to the measurements of impairments provided by Dr. Albert. The Office medical adviser thereafter properly evaluated appellant's impairment pursuant to the fourth edition of the A.M.A., *Guides* in a report dated May 2, 1995.[6] The Office medical adviser noted that pursuant to the A.M.A., *Guides*, Dr. Albert's positive anterior Drawers' test on appellant's leg indicated mild anterior cruiciate ligament laxity and would be graded as a 7 percent impairment of the lower extremity pursuant to Table 64, page 85. Moreover, the medical adviser stated that appellant's medial meniscectomy would be graded as a 2 percent impairment of the lower extremity pursuant to Table 64, page 85 and that Dr. Albert's indication of mild occasional knee pain would be graded as a 2 percent impairment pursuant to Table 68,

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *Leisa D. Vassar*, 40 ECAB 1287 (1989).

[4] *Joseph D. Lee*, 42 ECAB 172 (1990).

[5] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[6] Effective November 1, 1993, the fourth edition of the A.M.A., *Guides* is to be used for schedule award calculations; *see* FECA Bulletin No. 94-4, issued November 1, 1993.

page 89. The Office medical adviser then properly combined these values to find that appellant had an 11 percent impairment of the right lower extremity.

As the Office medical adviser properly utilized the description of appellant's impairment provided by Dr. Albert and the fourth edition of the A.M.A., *Guides* to evaluate appellant's impairment, and there is no other medical evidence of record relevant to this issue, the Office properly determined that appellant only demonstrated entitlement to a schedule award of 11 percent for the right lower extremity. Because appellant previously received a schedule award of 17 percent for the right leg, the Office, therefore, properly found that appellant was not entitled to an additional schedule award for this body part.

The Board further finds that the Office's refusal to reopen the case for further consideration on its merits in its August 24, 1995 decision did not constitute an abuse of discretion.

The reopening of a case for reconsideration requires the submission of evidence of a substantive or probative nature.[7] In the instant case, appellant submitted no evidence relevant to the issue of whether he was entitled to a schedule award of greater than 17 percent to his right leg. Appellant only submitted a June 7, 1993 Office letter to Dr. Kim indicating that, at that time, the physician should address appellant's entitlement to a schedule award pursuant to the third edition of the A.M.A., *Guides*. Inasmuch as the Office medical adviser properly applied the fourth edition of the A.M.A., *Guides* in considering appellant's entitlement to a schedule award, this evidence is irrelevant. The Office therefore properly refused to reopen appellant's case for further consideration of the merits of the claim.

[7] *Donald J. Miletta*, 34 ECAB 1822 (1983).

The decisions of the Office of Workers' Compensation Programs dated August 24 and July 21, 1995 are hereby affirmed.

Dated, Washington, D.C.
January 14, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member