

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES H. DOROUGH and DEPARTMENT OF THE ARMY,  
ARMY MATERIAL COMMAND, Anniston, Ala.

*Docket No. 97-2736; Submitted on the Record;  
Issued June 15, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Appellant, a 41-year-old heavy mobile equipment mechanic, strained his neck and left shoulder on April 6, 1995 while repairing a construction vehicle. He filed a Form CA-1 claim for traumatic injury on the date of injury, which the Office accepted for a cervical herniated nucleus pulposus by letter dated July 7, 1995.<sup>1</sup>

On October 24, 1995 appellant filed a Form CA-7 claim for a schedule award based on his accepted cervical condition.

By letter dated November 9, 1996, the Office advised appellant that the Act<sup>2</sup> did not provide for a scheduled award based on a back condition. The Office advised appellant to submit a comprehensive report from his physician indicating that his employment-related condition was at maximum medical improvement, and that his permanent impairment was causally related to an extremity due to his work-related cervical condition. The Office stated that the report should describe physical findings upon examination and provide the nature and extent of permanent impairment to the affected extremities pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition). The Office informed appellant that he had 30 days in which to respond, or his claim would be denied.

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<sup>1</sup> The Office also authorized surgery for an anterior cervical discectomy and fusion, which appellant underwent on May 11, 1995.

<sup>2</sup> 5 U.S.C. § 8101.

In support of his claim, appellant submitted January 15 and 16, 1996 reports from Dr. William C. Woodall, III, a specialist in neurosurgery; and several physical therapy reports. In his January 16, 1996 report, Dr. Woodall stated that he had been treating appellant since April 18, 1995 at which time he diagnosed a disc rupture at C6-7 on the left. Dr. Woodall performed anterior cervical fusion which produced improvement of his presurgical neck and left arm pains. Dr. Woodall stated, however, that appellant continued to have some amount of neck stiffness and soreness which had persisted since that point, in addition to pain radiating into the right shoulder and arm. Dr. Woodall advised that a follow-up magnetic resonance imaging (MRI) scan demonstrated mild cervical spondylosis with foraminal stenosis at C4-5 and C5-6 on the right which was consistent with his symptoms.

Regarding an impairment rating, Dr. Woodall stated that appellant had a 10 percent permanent impairment rating to the cervical spine and to the body as a whole as defined by the A.M.A., *Guides*, using Table 73, page 110 and Table 75, page 113. Dr. Woodall stated that appellant reached maximum medical improvement on September 7, 1995.

In a decision dated February 5, 1996 the Office denied appellant's claim for a schedule award for permanent partial impairment based on his accepted employment injury. The Office stated that there was no allowance under the Act for a schedule award for permanent impairment of the spine and no permanent impairment of the extremities due to the work injury of April 6, 1995 was reported by his physician. The Office therefore found that appellant was not entitled to a scheduled award with regard to the instant claim.

By letter dated March 2, 1996, appellant requested a review of the written record.

By decision dated June 6, 1996, the Office affirmed its previous decision.

By letter dated September 7, 1996, appellant's representative requested reconsideration. In support of his claim appellant submitted reports from a physical therapist, a chronological summary of treatment notes, and several progress reports from Dr. Woodall.

By decision dated October 7, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated January 22, 1997, appellant's representative requested reconsideration. In support of his request, appellant submitted three more physical therapy reports; a November 15, 1996 report from Dr. Woodall in which he advised that appellant continued to experience chronic pain; a December 2, 1996 report from Dr. Cornelius B. Thomas, Board-certified in internal medicine, in which he discussed findings on examination; and a December 20, 1996 report from Dr. Horace C. Clayton, a specialist in general practice and general surgery, in which he concluded that appellant is permanently and totally disabled. None of these reports contained an impairment evaluation pursuant to the standards outlined in the A.M.A., *Guides*.

By decision dated March 31, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter dated April 9, 1997, appellant's representative requested reconsideration. Appellant resubmitted the medical evidence he presented prior to the Office's previous decision, but did not submit any new medical evidence with his request.

By decision dated May 29, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The nonmerit decisions before the Board on this appeal are the October 7, 1996, March 31 and May 29, 1997 Office decisions which found that the letters submitted in support of appellant's request for reconsideration were insufficient to warrant review of its prior decisions. Since the October 7, 1996, March 31 and May 29, 1997 Office decisions are the only decisions issued within one year of the date that appellant filed his appeal with the Board, September 2, 1997, these are the only decisions over which the Board has jurisdiction.<sup>3</sup>

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>5</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>6</sup>

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; he has not advanced a point of law or fact not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Although appellant submitted physical therapy reports, treatment notes, progress and reports from Dr. Woodall, Dr. Thomas' December 2, 1996 report, and Dr. Clayton's December 20, 1996 report with his September 7, 1996 and January 22, 1997 requests for reconsideration, none of these reports contained a properly formulated impairment evaluation pursuant to the A.M.A., *Guides*.<sup>7</sup> The Office had previously indicated that no schedule award is payable for permanent loss of, or loss of use of, specified anatomical members

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<sup>3</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> 20 C.F.R. § 10.138(b)(1); see generally 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

<sup>7</sup> The Office also properly found that the physical therapy reports did not constitute medical evidence, as they were not rendered by a physician pursuant to 5 U.S.C. § 8101(2).

or functions or organs of the body not specified in the Act or in the implementing regulations,<sup>8</sup> and that neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.<sup>9</sup> Since appellant failed to submit medical evidence which included an impairment evaluation consistent with these guidelines, the Office had properly determined that appellant was not entitled to such a scheduled award, and that the medical evidence he had submitted with his requests for reconsideration did not contain any new and relevant medical evidence for the Office to review.<sup>10</sup> This is important since the outstanding issue in the case -- whether appellant was entitled to a schedule award based on his accepted cervical condition -- was medical in nature. In addition, all the medical evidence submitted by appellant in his April 9, 1997 request was previously of record and considered by the Office in reaching prior decisions.

Finally, appellant's September 7, 1996, January 22 and April 9, 1997 letters did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended in his requests for reconsideration that he was entitled to a schedule award based on his accepted cervical condition, appellant failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

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<sup>8</sup> *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

<sup>9</sup> The Federal Employees' Compensation Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>10</sup> *George E. Williams*, 44 ECAB 530 (1993).

The decisions of the Office of Workers' Compensation Programs dated October 7, 1996, March 31 and May 29, 1997 are hereby affirmed.

Dated, Washington, D.C.  
June 15, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member