U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEWIS W. COOVER, and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, New Cumberland, PA

Docket No. 99-2180; Submitted on the Record;
Issued December 5, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 19 percent impairment for loss of use of his left leg for which he received a schedule award, and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review.

On August 11, 1994 appellant,[1] then a 42-year-old packer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on August 1, 1994, while lifting a box, he sustained an injury to his lower back. The claim was originally accepted for lower back strain and later was also accepted for lumbosacral strain and central disc herniation. Appellant had a lumbar laminectomy with disc excision L5-S1 left on January 12, 1995.

On January 21, 1998 appellant filed a claim for a schedule award.

In a medical report dated April 6, 1998, Dr. C.P. Binning, a Board-certified neurologist, stated that if appellant were to improve as a result of the surgery, it should have occurred within one year and that therefore, he became disabled one year after his surgery, *i.e.*, January 1996. He further opined:

> "I would say that [appellant's] L5-S1 roots are affected. The degree of permanent impairment due to loss of function will be 50 to 60 percent.
>
> "[He] continues to have titubation of his head and truncal ataxia and abnormal movements of the head and neck. [Appellant] drags his left leg while walking. He walks with a limp. [Appellant] uses a cane for walking.

[1] Appellant is also known as Linda M. Coover.

"The left quadriceps muscle had strength 4-/5. This will be the medial Research Council Scale. The left foot evertors were 4-/5. The dorsiflexion of the left was 4-/5.

"The left ankle is sluggish. The plantar flexion was 4-/5, hamstring muscles had 4/5. The sensory deficit was present in the outer aspect of the left leg from the level of the knee down and outer aspect of the left foot. On the right side, the distal muscles, that is dorsiflexion, plantar flexion of the foot had normal strength, 5/5. The right ankle jerk was normal. The quadriceps had 4+/5.

"[Appellant] could not put weight on the left leg and he, as I mentioned above, walking with a limp and needed a stick to walk.

"He also has shaking of the left arm. The left leg, however, had normal strength in all the muscles 5/5. The reflexes were normal. The ankle jerk was normal on the right side, barely elictable on the left and knee jerks were intact bilaterally."

Dr. Binning concluded his report by answering the specific questions propounded by the Office. He noted that the affected region was the L5-S1, that the degree of permanent impairment of the lower extremity due to loss of function from sensory deficit, pain or discomfort is 60 percent and that the degree of permanent impairment of the lower extremity due to loss of function from decreased strength is 50 percent.

The Office medical adviser utilized Dr. Binning's report and applied it to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995). The Office medical adviser determined that appellant had a 19 percent impairment of the left leg.

By decision dated May 19, 1998, the Office awarded appellant a schedule award based on a 19 percent impairment to the left leg.

By letter dated March 3, 1999, appellant requested reconsideration based on the 60 percent impairment allegedly found by Dr. Binning.

By decision dated April 9, 1999, the Office denied appellant's application for review for the reason that the evidence presented was repetitious and insufficient to warrant a merit review of the case.

The Board finds that the Office properly determined that appellant had a 19 percent impairment to his left leg.

The schedule award provision of the Federal Employees' Compensation Act[2] sets forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less that 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, neither

[2] 5 U.S.C. § 8101 *et. seq.*

[3] 5 U.S.C. § 8107(c)(19).

the Act nor its regulations specify the manner which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides*, have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[4]

In the instant case, Dr. Binning gave a detailed report regarding appellant's condition. However, he did not apply the A.M.A., *Guides*. Accordingly, the Office medical adviser properly reviewed Dr. Binning's report, applied the A.M.A., *Guides* and determined that appellant had a 19 percent impairment of the left leg.

The Office medical adviser noted that, pursuant to Dr. Binning's report, the affected nerve roots were L5 and S1. Pursuant to the A.M.A., *Guides*,[5] if the L5 is the nerve root impaired, there is a maximum of 5 percent loss of function due to sensory deficit or pain and a maximum of 37 percent loss of function due to strength deficit. If the S1 nerve root is impaired, then there is a maximum of 5 percent loss of function due to sensory deficit or pain and a maximum of 20 percent loss of function due to strength deficit. The A.M.A., *Guides* then instruct the evaluator to apply to Tables 11 and 12 of the A.M.A., *Guides* to Grade the extent of impairment.[6] In order to determine the impairment of the leg due to loss of power and motor deficits, the Office medical adviser found that appellant had a classification grade 4 impairment based on Dr. Binning's finding that appellant had a strength of 4-/5 on the Medial Research Council Scale, which according to the A.M.A., *Guides*, allows a 1 to 25 percent motor deficit.[7] With regard to appellant's sensory deficit, the Office medical adviser noted that Dr. Binning found that appellant had a 60 percent degree of permanent impairment of the lower extremity due to loss of function from sensory deficit, pain or discomfort. Applying this figure to Table 11, he noted that a 60 percent sensory deficit would be a grade three classification.[8] The A.M.A., *Guides* instruct the evaluator to multiply the sensory or motor impairment percent for the impaired nerve root, found in Table 83, by the percent from Table 11 or Table 12 that represents the degree of sensory or motor impairment. Accordingly, the Office medical adviser multiplied the above figures and determined that appellant had a loss of muscle strength of nine percent for the impairment of the L5 and five percent for the impairment of the S1 nerve roots. With regard to sensory loss, the Office medical adviser determined that appellant had a three percent sensory loss of the L5 and a three percent sensory loss of the S1. Utilizing the Combined Values Chart of the A.M.A., *Guides*,[9] the Office medical adviser correctly determined that appellant sustained a 19 percent impairment of the left leg. As noted, Dr. Binning's report did not explain his application of the A.M.A., *Guides*. For this reason, Dr. Binning's report was

[4] *John M. Gonzales, Jr.*, 48 ECAB 357, 361 (1997); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[5] A.M.A., *Guides*, 130, Table 83.

[6] A.M.A., *Guides* 130.

[7] A.M.A., *Guides*, 49, Table 12.

[8] A.M.A., *Guides*, 48, Table 11.

[9] A.M.A., *Guides* 322.

utilized by the Office medical adviser in making the schedule award determination.[10] Accordingly, the Office properly found that, based on the application of the A.M.A., *Guides* the Office medical adviser properly found that appellant had a 19 percent impairment to the lower left extremity.

The Board further finds that the refusal of the Office to reopen appellant's claim for reconsideration did not constitute an abuse of discretion.

Under Section 8128(a) of the Act,[11] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing regulations,[12] which provides that a claimant may obtain review of the merits of the claim by setting forth arguments and containing evidence that either:

> "(i) Shows that the OWCP erroneously applied or interpreted a specific point of law;
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> (ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

Section 10.607(a) provides that any application for review of the merits will be considered to be timely filled if made within one year of the date of the Office's decision. Section 10.608 provides that where the request is timely but fails to meet at least one of the criteria of 410.606(b)(2), the Office will deny the application for consideration without reopening a case for a review on the merits. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[13]

In the instant case, appellant requested reconsideration based on Dr. Binning's estimate of a 60 percent impairment. However, this does not constitute new evidence or legal argument. As discussed above, Dr. Binning's opinion was utilized in making the determination of a 19 percent impairment to the left lower extremity. Accordingly, as there was no new medical evidence or legal argument submitted in support of the request for reconsideration, a merit review of the case was properly denied.

[10] It is well established that when the treating physician fails to provide an estimate of impairment conforming with the protocols of the A.M.A., *Guides*, the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician. *See John L. McClanic*, 48 ECAB 552 (1997).

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(2).

[13] *James A. England*, 47 ECAB 115 (1995).

The decisions of the Office of Workers' Compensation Programs dated April 9, 1999 and May 19, 1998 are affirmed.

Dated, Washington, DC
December 5, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member