

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUDY O. WRIGHT and GENERAL SERVICES ADMINISTRATION,
PUBLIC BUILDING SERVICE, Pittsburgh, PA

*Docket No. 99-1174; Submitted on the Record;
Issued April 30, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to a greater than 62 percent impairment of right lower extremity and a 57 percent permanent impairment for the left lower extremity for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs refusal 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.

On June 25, 1975 appellant, then a 33-year-old mechanic, filed a traumatic injury claim (Form CA-1), alleging that he injured his right leg and back when he slipped and fell on a wet floor.¹ The Office accepted that appellant sustained a lumbosacral strain and paid appropriate compensation.

On January 30, 1976 appellant filed a traumatic injury claim alleging that he injured his left knee when he fell from a ladder.² The Office accepted the claim for internal disarrangement of the left knee joint and paid appropriate compensation. Appellant stopped working for the employing establishment on April 20, 1981.

On April 28, 1981 appellant filed a traumatic injury claim alleging that he injured his knees, back and neck when he fell off a ladder on April 3, 1981.³ The Office accepted the claim for lumbar strain and aggravation of bilateral degenerative knees. Appellant was subsequently placed on the automatic rolls for temporary total disability.

On June 5, 1981 appellant filed a claim for a schedule award.

¹ This was assigned claim number A03-0001439.

² This was assigned claim number A03-0006297.

³ This was assigned claim number A13-0644647.

On March 31, 1989 the Office awarded 38 percent impairment for the right leg and a 30 percent impairment for the left leg. By decision dated December 13, 1989 and finalized on December 14, 1989, the Office hearing representative affirmed the Office's schedule award determination.

By decision dated June 6, 1990, the Office issued appellant an amended schedule award for 62 percent for the right leg and 57 percent for the left leg.

By decision dated April 13, 1995, the Office denied appellant's request for an additional schedule award.

In a decision dated February 1, 1996, a hearing representative affirmed the April 13, 1995 decision denying appellant an increase in his schedule award and rejecting appellant's argument that the Office should have evaluated his knees under the third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* instead of the fourth edition.

In a report dated June 23, 1997, the Office medical adviser concluded that appellant had a 57 percent permanent impairment in both his right and left legs. In reaching this conclusion, he referred to Tables 39 and 40 page 68, pain Table 10 at page 42 and Table 49 at page 76. The Office medical adviser based his calculations for the right knee on 25 degrees of extension, 93 degrees of flexion, severe arthritis 20 percent, pain class 5 which equals 80 percent \times 5 = 4 percent, extension 12 percent, flexion 21 percent, arthritis 20 percent, pain 4 percent, varus 10 degrees = 0 percent. He then added the amounts together to arrive at a total impairment of the right leg of 57 percent. Regarding the left leg, the Office medical adviser noted extension of 12 percent impairment for 25 degrees of extension, 21 percent impairment for 90 degrees of flexion, 20 percent impairment for severe arthritis, 0 percent impairment for a varus of 10 degrees and 4 percent impairment for pain. He then added the amounts together to arrive at a total impairment of the left leg of 57 percent.

By decision dated July 3, 1997,⁴ the Office recalculated appellant's permanent impairment rating of both lower extremities using the third edition of the A.M.A., *Guides* and found that appellant had no increased impairment.

By letter dated July 22, 1998, appellant requested reconsideration of the Office July 3, 1997 decision denying an increase in his impairment rating for lower extremities and enclosed a July 29, 1997 impairment rating by Dr. Douglas W. Jackson, an attending Board-certified orthopedic surgeon, and a December 1, 1997 report by Dr. Neil R. Schultz, a second opinion Board-certified physical medicine and rehabilitation physician, in support of his argument.

In reports dated July 27 and July 29, 1997, Dr. Jackson concluded that appellant had a total 75 percent impairment noted and a total 68 percent impairment noted. In reaching this conclusion, Dr. Jackson noted that appellant had flexion of 75 degrees and extension of 25 degrees in the left knee and a 20 percent impairment for pain and severe arthritis of the left knee. Dr. Jackson recommended a total impairment rating of 75 percent. Regarding the right

⁴ The Board notes that the cover letter accompanying the decision has the date "June 30, 1997" crossed out and "July 3, 1997" written above it.

lower extremity, the physician noted that appellant had flexion of 85 degrees and extension of 15 degrees in the left knee and a 20 percent impairment for pain and severe arthritis of the right knee. Dr. Jackson recommended a total impairment rating of 68 percent.

In a December 1, 1997 report, Dr. Schultz noted flexion of 65 degrees and extension of 25 degrees in the right knee and flexion of 55 degrees and extension of 33 degrees in the left knee.

In a report dated December 1, 1998, the Office medical adviser reviewed the reports by Drs. Schultz and Jackson in conjunction with the A.M.A., *Guides* (3rd ed.) to conclude that appellant had a 41 percent impairment of his right lower extremity and a 50 percent impairment of his left lower extremity.⁵ Regarding the left lower extremity, the Office medical adviser found a 23 percent impairment for flexion of 65 degrees and a 4 percent impairment for extension of 15 degrees based upon Table 35 at page 61, a 12 percent impairment for grade 4 pain or weakness of the femoral nerve and a 10 percent impairment for grade 2 pain or weakness of the femoral nerve. The Office medical adviser noted that the 3d edition did not provide an impairment rating for arthritis and found a total 41 percent impairment of the right lower extremity utilizing the combined value table. As to the left lower extremity, the Office medical adviser found a 27 percent impairment for flexion of 75 degrees and a 12 percent impairment for extension of 25 degrees based upon Table 35 at page 61, a 12 percent impairment for grade 4 pain or weakness of the femoral nerve and a 10 percent impairment for grade 2 pain or weakness of the femoral nerve. The Office medical adviser noted that the 3rd edition did not provide an impairment rating for arthritis and found a total 50 percent impairment of the right lower extremity utilizing the combined value table. In calculating appellant's impairment for pain, the Office medical adviser referred to Table 3 at page 104 was 60 percent for a grade 3 pain impairment. The Office medical adviser then referred to Table 7 at page 106 to calculate the pudential nerve loss, which was 20 percent. Next, he multiplied 60 percent by 20 percent to arrive at a 12 percent impairment for pain. The Office medical adviser then referred to Table 4 at page 105 to calculate appellant's impairment for loss of strength, which he determined was 50 percent based upon a grade 2 loss of motion. He then referred to Table 7 at page 107 and multiplied the two results (20 percent x 50 percent) to arrive at a 10 percent impairment for loss of strength. The Office medical adviser then combined the values pursuant to the combined tables to arrive at 41 percent impairment for the right lower extremity and 50 percent impairment for the left lower extremity.

By merit decision dated December 2, 1998, the Office denied appellant's request for modification of his schedule award for his lower extremities.

In a letter dated December 7, 1998, appellant requested reconsideration and referred to Dr. Schultz's report in support of his request.

In a nonmerit decision dated January 15, 1999, the Office found that the evidence submitted was repetitious as it had been previously submitted and considered.

⁵ The Office medical adviser properly applied the third edition revised of the A.M.A., *Guides* as appellant did not claim an additional schedule award based on additional employment exposure or additional injury; see *Roy L. Brandt*, 41 ECAB 569 (1990).

The Board has duly reviewed the evidence of record in this appeal and finds that appellant does not have more than 62 percent impairment of right lower extremity and a 57 percent permanent impairment for the left lower extremity for which he has received a schedule award.

Section 8107 of the Federal Employees' Compensation Act⁶ provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁷ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁸

Dr. Jackson, in his July 27, 1997 report, recommended a total impairment rating of 68 percent for appellant's right lower extremity. In his July 29, 1997 report, he recommended a total impairment rating of 75 percent for appellant's right lower extremity. Dr. Jackson did not demonstrate how he arrived at a total 68 percent for the right lower extremity and a 75 percent for the left lower extremity. It is unclear how Dr. Jackson arrived at a total impairment rating of 75 percent for the left lower extremity and a 68 percent impairment of the right lower extremity. While Dr. Jackson indicated he utilized the third edition of the A.M.A., *Guides* in determining that appellant had a total impairment rating of 75 percent for the left and a total 68 percent impairment for the right, his opinion is of diminished probative value as he did not refer to specific tables.⁹ Dr. Schultz, in his December 1, 1997 report, provided information regarding the degree of appellant's impairment, but provided no opinion utilizing the A.M.A., *Guides* regarding an impairment rating. The Office properly referred the case record to the Office medical adviser inasmuch as neither Dr. Jackson nor Dr. Schultz provided a report in compliance with Office procedures for evaluating schedule award cases.¹⁰

The second Office medical adviser, in his December 1, 1998 report, reviewed the reports by Drs. Jackson and Schultz and calculated 41 percent impairment of the right lower extremity and a 50 percent impairment of the left lower extremity. In reaching his conclusion, the Office medical adviser properly applied the specific tables of the A.M.A., *Guides* in his calculation of the extent of permanent impairment in both lower extremities. As noted above, he utilized the applicable tables of the A.M.A., *Guides* to each loss of motion in both lower extremities and the sensory and motor loss noted in the reports by Drs. Schultz and Jackson. Inasmuch as the Office medical adviser properly applied the third edition of the A.M.A., *Guides* and the impairment

⁶ 5 U.S.C. §§ 8101-8193, 8107.

⁷ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

⁸ *Theresa Goode*, 51 ECAB ____ (Docket No. 99-1831, issued September 12, 2000); *A. George Lampo*, 45 ECAB 441, 443 (1994).

⁹ *See Annette M. Dent*, 44 ECAB 403 (1993).

¹⁰ *Hildred I. Lloyd*, 42 ECAB 944 (1991).

rating was less than 62 for the right lower extremity and less than 57 for the left lower extremity award previously granted by the Office, the medical evidence of record does not support a finding that appellant is entitled to an additional schedule award at this time.

The Board finds that the Office did not abuse its discretion when it refused 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 specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹¹ Section 10.608(b) provides that, when an application for review of the 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.¹²

In his letter requesting reconsideration, appellant did not submit any new evidence and did not argue that the Office erroneously applied or interpreted a point of law. Nor did he advance a relevant legal argument not previously considered by the Office. Appellant merely requested reconsideration of the denial of his claim and reiterated his arguments regarding Dr. Schultz's report. Therefore, the Office properly denied his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 15, 1999 and December 2, 1998 are hereby affirmed.

Dated, Washington, DC
April 30, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

¹¹ 20 C.F.R. § 10.606(b)(2) (1999).

¹² 20 C.F.R. § 10.608(b) (1999).