U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS C. OWEN and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT

Docket No. 02-135; Submitted on the Record;
Issued July 11, 2002

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he has greater than a 28 percent permanent impairment of the right arm, 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 case for further review of the merits.

Appellant, a 26-year-old food aircraft mechanic, fractured his right arm in the performance of duty on July 24, 1984. He filed a claim for benefits on the date of injury, which the Office accepted for a fractured right arm. The Office subsequently expanded its acceptance to include the condition of right-sided carpal tunnel syndrome. The Office paid compensation for appropriate periods.

On January 11, 2001 appellant filed a Form CA-7 claim for a schedule award based on the partial loss of use of his right arm, stemming from his accepted 1984 employment injury. He had previously been granted two schedule awards by the Office, based on his 1984 work injury, in which he received a total of 18 percent permanent impairment.

In a report dated January 8, 2001, Dr. Vermon S. Esplin, a specialist in orthopedic surgery and appellant's treating physician, stated that he had removed pins from appellant's wrist and indicated that he was updating his impairment evaluation. He stated:

> "On examination of [appellant's] hand, the wounds are all well healed. His wrist appears to be in good position. [Appellant's] grip strength on the right dominant side is 130 [pounds] and on the left 135. Repeat evaluation is 110 on the right and 135 on the left. Third evaluation is 130 right and 125 left. Key pinch strength is 17 pounds on the right, 18 on the left. Chuck pinch 11 right and 21 on the left. Tip pinch is 7 [pounds] on the right and 8 on the left. Wrist fusion position is extension 7 degrees and ulnar deviation 8 degrees. Supination and pronation are equal to the contralateral side.

> "Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [the A.M.A., *Guides*], the grip strength and general overall strength appears to be fairly equal with no significant disability calculated according to their criteria. Wrist fusion position shows the wrist fused in extension and slight ulnar deviation which are optimal positions for the wrist fusion. Wrist fusion extension corresponds to 21 percent upper extremity impairment and in an ulnar deviated position 9 percent upper extremity impairment. Using the [C]ombined [V]alues [C]hart this corresponds to a total of 28 percent upper extremity impairment. According to [T]able 16.3, conversion of the upper extremity to whole person impairment corresponds to 17 percent whole person impairment."

In a memorandum/impairment evaluation dated March 29, 2001, an Office medical adviser found, based on Dr. Esplin's January 8, 2001 report, that appellant had a total of 28 percent permanent disability of the right arm pursuant to the A.M.A., *Guides* (fifth edition).

By letter dated March 30, 2001, the Office informed appellant that, based on the additional medical evidence he had submitted, he was entitled to an additional 20 percent impairment award under the schedule.

By decision dated June 19, 2001, the Office granted appellant an additional 10 percent impairment, in addition to the 18 percent already awarded, for a total award of 28 percent permanent impairment of the right arm, for the period from March 1 to October 5, 2001 for a total of 31.20 weeks of compensation.

By letter dated August 1, 2001, appellant's attorney requested reconsideration. The attorney noted that the Office, contrary to the March 30, 2001 letter, had granted appellant an additional 10 percent award in its June 19, 2001 decision, as opposed to the 20 percent indicated in the letter. He requested an explanation as to why appellant received a lesser award in the Office decision than that he was told he would receive in the March 30, 2001 letter. Appellant's attorney resubmitted Dr. Esplin's January 8, 2001 report with his request.

By decision dated August 20, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision. The Office stated that the Office medical adviser, in his March 30, 2001 letter, had mistakenly calculated an additional 20 percent award based on Dr. Esplin's January 8, 2001 report and it advised that this mistake had been corrected in its June 19, 2001 decision. The Office found that this did not constitute a basis for reconsideration, as the actual award of June 19, 2001 was not in error and it found that the duplicate medical evidence appellant submitted with his reconsideration request did not constitute new evidence warranting a merit review.

The Board finds that appellant has no more than a 28 percent permanent impairment for loss of use of the right arm, for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] set 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 than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[2] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[3]

In this case, the Office medical adviser determined that appellant had a 28 percent permanent impairment of his right arm by adopting Dr. Espin's findings that he sustained a loss of wrist fusion extension and a deviated ulnar position. The Office medical adviser then applied these findings to the applicable tables of the A.M.A., *Guides* to arrive at the total percentage of impairment in appellant's right arm.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a 28 percent permanent impairment for loss of use of his right arm, for which he has received a schedule award from the Office and that appellant has failed to provide probative, supportable medical evidence that he has greater than the 28 percent impairment already awarded.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further review of the merits.

Under section 8128(a) of the Act and its implementing regulation, 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law: (1) by advancing a relevant legal argument not previously considered by the Office; or (2) by submitting relevant and pertinent evidence not previously considered by the Office.[4] 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.[5]

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Although the Office erred in its March 30, 2001 letter by miscalculating appellant's additional schedule award and failed to inform appellant in its June 19, 2001 decision that such an error had occurred, this error is harmless, as appellant was

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 5 U.S.C. § 8107(c)(19).

[3] 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

[5] *Howard A. Williams*, 45 ECAB 853 (1994).

not unduly prejudiced by this miscalculation. Thus, the Office's miscalculation does not constitute a reversible error. Dr. Esplin's January 8, 2001 report was previously considered by the Office and is not relevant and pertinent to the issue raised on reconsideration. Appellant's reconsideration request failed to 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. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated August 20 and June 19, 2001 are hereby affirmed.

Dated, Washington, DC
July 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member