United States Department of Labor
Employees' Compensation Appeals Board

FRANK LAURENZI, Appellant	)	
and	)	**Docket No. 05-1251**
	)	**Issued: August 16, 2005**
U.S. POSTAL SERVICE, SOUTHEASTERN PROCESSING & DISTRIBUTION CENTER, Devon, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 18, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 15, 2004, denying his request for reconsideration. The Board does not have jurisdiction to review the April 13, 2004 merit decision as appellant's appeal was filed more than one year after issuance of that decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the December 15, 2004 nonmerit decision.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On April 16, 2002 appellant, then a 34-year-old mail handler, filed a traumatic injury claim alleging that he felt a sharp pain in his right foot and heard a "pop" when he pushed off

with that foot while moving a mail cart. The Office accepted his claim for a right foot sprain and strain and plantar fascial fibromatosis.

On November 20, 2003 appellant filed a claim for a schedule award.

In an August 12, 2003 report, Dr. David Weiss, an orthopedist, diagnosed chronic right foot plantar fasciitis and a talocalcaneal spur. He provided physical findings on examination and determined that appellant had a 32 percent permanent impairment of the lower right extremity[1] which included 17 percent for decreased right ankle plantar flexion and 12 percent for decreased right ankle dorsiflexion, according to Table 17-8 at page 532 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (hereinafter, the A.M.A., *Guides*), and 3 percent for pain according to Figure 18-1 at page 574.

On March 10, 2004 the district medical director stated:

> "Based upon the records using [the] [A.M.A., *Guides*, fifth edition], [page] 532 Table 17-8[,] [G]rade 4[,] ankle plantar flexion [is] 17 percent [and] ankle dorsiflexion [is] 12 percent. Therefore the total is 29 percent upper [sic, lower] ext[remity]. Using the additional 'pain' calculation on [page] 574, Figure 18-1[,] we can add 3 percent with a total [schedule] award of 32 percent [for] *lower extremity* impairment with an MMI [maximum medical improvement] date of [August 12, 2003]." (Emphasis added.)

By decision dated April 13, 2004, the Office granted appellant a schedule award for 65.60 weeks for the period August 12, 2003 to March 20, 2004 for a 32 percent permanent impairment of the right foot. The record reflects that the Office sent a copy of the decision to the correct address of record for appellant's attorney.

By letter dated September 15, 2004, received by the Office on September 20, 2004, appellant requested reconsideration. He argued that the Office should have issued a schedule award for his right lower extremity, rather than his right foot. Appellant also asserted that the April 13, 2004 decision had not been properly issued because his attorney was not provided with a copy of the decision.

By decision dated December 15, 2004, the Office denied appellant's request for reconsideration.

[1] Dr. Weiss indicated a 30 percent impairment. However, he incorrectly added the percentages. The percentages of impairment he found in his examination of appellant equal a total of 32 percent. He also referred to the left lower extremity on the page of his report describing the lower extremity impairment rating. However, it is clear from the rest of his report that he meant to refer to appellant's right lower extremity in describing his impairment rating.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review, may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

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) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.[3] 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.[4]

ANALYSIS

Appellant argued that the Office erred in basing its April 13, 2004 schedule award determination on impairment to his right foot, rather than to his right lower extremity. The record shows that both Dr. Weiss and the district medical director determined that appellant had a 32 percent permanent impairment of the right lower extremity, not the right foot.[5] Where the residuals of an injury to a member of the body specified in the schedule award provisions of the Act extend into the adjoining area of the member also enumerated in the schedule, such as an injury of a hand into the arm, the schedule award should be made on the basis of the percentage loss of use of the larger member.[6] In appellant's case, a 32 percent impairment of the foot equals 65.60 weeks of compensation; a 32 percent impairment of the lower extremity equals 92.16 weeks of compensation. 5 U.S.C. § 8107(c)(2),(4). The Board finds that appellant's argument that the Office erred in granting a schedule award based on foot impairment, rather than lower extremity impairment, constitutes a showing that the Office erroneously applied or interpreted a specific point of law because the April 13, 2004 schedule award was based on foot impairment

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

[4] 20 C.F.R. § 10.608(b).

[5] The Board notes that both physicians based their ratings of appellant's right lower extremity impairment on the same portions of the fifth edition of the A.M.A., *Guides.*

[6] *Tonya D. Bell,* 43 ECAB 845 (1992).

and is not consistent with the medical evidence finding lower extremity impairment. Therefore, the Office abused its discretion in denying appellant's request for reconsideration.

CONCLUSION

The Board further finds that the Office, in its December 15, 2004 decision, abused its discretion in denying appellant's reconsideration request. On remand, the Office should consider appellant's request for reconsideration and, after such further development as it deems necessary, issue an appropriate decision.[7]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2004 is set aside and the case remanded for further action consistent with this decision.

Issued: August 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[7] On appeal, appellant asserts that the Office's April 13, 2004 merit decision was not properly issued because his attorney was not provided with a copy of that decision and the decision should be reissued. However, the Office's April 13, 2004 decision reflects that a copy of that decision was mailed to the correct address of record for appellant's attorney. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175 (1984).