U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHEILA R. STONE and DEPARTMENT OF THE AIR FORCE, WRIGHT-PATTERSON AIR FORCE BASE, Ohio

Docket No. 96-1767; Submitted on the Record;
Issued April 13, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a 28 percent permanent impairment of the right lower extremity, which would entitle her to an additional schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On the prior appeal of this case,[1] the Board found that although the reported percentage impairments for dorsiflexion, plantar flexion, inversion and eversion corresponded to the ratings set forth in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), appellant's attending orthopedist did not identify the area of involvement or the nerve innervating that area, nor did he refer to the appropriate table in the A.M.A., *Guides* to grade the degree of decreased sensation or pain. The Board also found that it did not appear that the medical adviser based his rating of a five percent impairment due to residual pain on the grading scheme and procedure for determining the impairment due to pain or discomfort, nor did he give a basis for finding a five percent impairment for traumatic arthritis. The Board set aside the Office's July 30, 1992 decision denying modification and remanded the case for necessary clinical findings and an appropriate final decision on appellant's entitlement to schedule award compensation. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On remand, the Office requested that appellant's attending orthopedist, Dr. T.P. Quinn, provide the information needed to determine appellant's impairment due to pain or discomfort. The Office asked Dr. Quinn to identify the area of involvement or the nerve innervating that area and to grade the degree of decreased sensation or pain following the grading scheme and procedure for determining impairment due to pain or discomfort.

Dr. Quinn supplied no additional information.

[1] Docket No. 93-1081 (issued May 19, 1994).

In a decision dated October 11, 1994, the Office denied modification of its October 12, 1989 decision awarding schedule compensation for a 28 percent permanent impairment of the right lower extremity.

In a treatment note dated October 31, 1994, Dr. Quinn reported as follows:

> "The whole question is whether or not [appellant] has any increased disability. I do not feel she does. Apparently, and she brought in some copies for me to look at, she has a 28 [percent] permanent impairment of the right lower extremity and I feel that continues. At this point I do not feel that I am in a position to recommend any increase in disability."

Appellant advised the Office that she was continuing to experience pain and swelling in her ankle and indicated that she would like to apply for an additional schedule award. On August 31, 1995 the Office advised appellant of the specific clinical findings her physician should provide.

In a report dated October 30, 1995, Dr. Quinn stated that appellant's right ankle situation had stabilized; that weakness in the right ankle comes and goes; that if she walks too much or is too active, the ankle may give out; that appellant continues to have pain in the right ankle and occasionally pain in her lower extremity; and that appellant exercises by walking two to three times a week but that occasional numbness makes her stop walking for a period of time. Dr. Quinn stated: "I have not been able to determine a percentage of disability at this point and I feel that probably the ankle will not get better and could eventually get worse as the patient gets older." He also determined that there was some post-traumatic arthritis in the right ankle.

In a report dated December 4, 1995, Dr. Quinn stated that appellant had 10 degrees of dorsiflexion, 35 degrees of plantar flexion, 20 degrees of inversion and between 15 and 20 degrees of eversion. "[Appellant] has a decrease in strength," he stated, "her ankle continues to go out on various occasions. Changes in sensation, and loss of motion, after patient has been [a]sleep awhile or early in the morning -- it takes a while for the ankle joints [sic] to let [appellant] walk steady."

On December 27, 1995 the Office medical adviser reviewed Dr. Quinn's findings and determined that these findings supported a 24 percent permanent impairment of the right lower extremity. Using Tables 42 and 43, page 78, of the fourth edition of the A.M.A., *Guides*, the Office medical adviser noted that 20 degrees dorsiflexion showed a 7 percent impairment; 20 degrees inversion showed a 2 percent impairment; and 35 degrees plantar flexion and 15 degrees of eversion showed no impairment. Loss of range of motion was therefore reported to be nine percent. The medical adviser identified the involved nerves as the medial and lateral plantar nerves, each with a maximum impairment value of 5 percent, according to Table 68, page 89, for a total of 10 percent. Using Table 21, page 151, the medical adviser graded loss of muscle power and motor function at 60 percent and multiplied this value by the maximum impairment value of the involved nerves. This resulted in a total impairment of 6 percent for loss of muscle power and motor function. Using Table 20, page 151, the medical adviser also graded pain and sensory deficit at 60 percent, representing pain or decreased sensation that interferes with activity, and multiplied this value by the maximum impairment value of the

involved nerves. This resulted in a total impairment of six percent for pain and sensory deficit. Using Table 62, page 83, the medical adviser reported a 5 percent impairment for arthritis. Combining these various impairments using the Combined Values Chart on page 322, the medical adviser determined that Dr. Quinn's clinical findings supported a 24 percent permanent impairment of the right lower extremity, which the medical adviser noted was appellant's total impairment and did not represent an additional impairment.

In a decision dated January 2, 1996, the Office denied appellant's claim for an additional schedule award on the grounds that the evidence of record failed to demonstrate a higher impairment rating than that already awarded.

On April 10, 1996 appellant advised that she wanted her case to remain open in case she continued to have complications in the future. She wanted to know the real reason she was being denied an additional schedule award and requested reconsideration.

In a decision dated April 17, 1996, the Office denied appellant's request on the grounds that she did not submit relevant evidence not previously considered or present legal contentions not previously considered.

The Board finds that the medical evidence fails to establish that appellant has greater than a 28 percent permanent impairment of the right lower extremity; therefore, she is not entitled to an additional schedule award.

Section 8107 of the Federal Employees' Compensation Act[2] and section 10.304 of the implementing federal regulations[3] authorize the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body. But neither the Act nor the regulations specify how the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as the standard for determining the percentage of impairment, and the Board has concurred in such adoption.[4]

The Office medical adviser properly determined that the range of motion measurements reported by Dr. Quinn showed a 9 percent impairment of the right lower extremity. Tables 42 and 43, page 78, of the A.M.A., *Guides* support this finding. Dr. Quinn's findings under Tables 20 and 21, page 151, support no more than a 6 percent impairment due to loss of muscle strength and motor deficit, and no more than a 6 percent impairment due to pain or decreased sensation. Dr. Quinn's reports do not support the rating of 5 percent for arthritis impairment, however. The medical adviser applied Table 62, page 83, but this table requires that the arthritis impairment be based on roentgenographically determined cartilage intervals. Dr. Quinn's October 30 and December 4, 1995 reports fail to discuss the cartilage interval of appellant's right

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

[4] *See, e.g., Leisa D. Vassar*, 40 ECAB 1287 (1989).

ankle and the Office medical adviser gave no explanation for his rating of five percent. Such a rating would require a cartilage interval of three millimeters in the ankle.

The unsupported rating for arthritis is moot in this case because the combined values of all of the impairments found by the Office medical adviser, including the impairment for arthritis, is no more than 23 percent under the combined values chart on page 322. This fails to support that the permanent impairment of appellant's right lower extremity is greater than the 28 percent for which she has already received compensation. The Board will therefore affirm the Office's January 2, 1996 decision denying an additional schedule award.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Section 10.138(b)(1) 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] 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 criteria, the Office will deny the application for review without reviewing the merits of the claim.[6]

With her April 10, 1996 request for reconsideration, appellant did not attempt to show that the Office erroneously applied or interpreted a point of law. She did not attempt to advance a point of law or a fact not previously considered by the Office. She did not submit relevant and pertinent evidence not previously considered by the Office. She simply questioned the reason she was denied an additional schedule award. Because her request does not meet one of the three criteria for obtaining a merit review of her claim, the Board finds that the Office properly denied her request.

[5] 20 C.F.R. § 10.138(b)(1).

[6] *Id.* § 10.138(b)(2).

The April 17 and January 2, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 13, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member