U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY I. SWEEDEN and DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Dallas, Tex.

Docket No. 97-758; Submitted on the Record;
Issued October 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained more than a three percent permanent impairment of her left leg and a three percent permanent impairment of her right leg for which she received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant has no more than a three percent permanent impairment of her left leg and a three percent permanent impairment of her right leg for which she received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[2] including that she sustained an injury in the performance of duty as alleged and that her disability, if any, was causally related to the employment injury.[3]

Section 8107 of the Act 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.[4] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*

[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107(a).

(4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

In the present case, the Office accepted that on November 15, 1990 appellant sustained an employment-related right hip sprain, left thigh sprain and compression fracture of the left ribs. In a report dated October 4, 1996, an Office medical adviser properly calculated that appellant had a three percent permanent impairment of her left leg and a three percent permanent impairment of her right leg due to sensory loss associated with the S1 nerve roots in each leg.[6] The Office medical adviser based his calculations on the September 18, 1996 physical examination findings of Dr. Joe P. Alberty, a Board-certified orthopedic surgeon, to whom the Office referred appellant. By decision dated October 17, 1996, the Office granted appellant an award of compensation for a three percent permanent impairment of her left leg and a three percent permanent impairment of her right leg.

In his September 18, 1996 report, Dr. Alberty indicated that appellant had a 10 percent permanent impairment. The opinion of Dr. Alberty is of limited probative value regarding appellant's impairment rating in that Dr. Alberty failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[7] The record also contains a November 4, 1991 report in which Dr. Robert H. May, an attending Board-certified orthopedic surgeon, indicated that appellant had a 10 percent permanent impairment of her whole body. However, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person.[8] As the report of the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence and the Office properly granted appellant an award of compensation for a three percent permanent impairment of her left leg and a three percent permanent impairment of her right leg.[9]

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously

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[5] *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[6] *See* A.M.A., *Guides* 48, 130, Tables 11, 83.

[7] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[8] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[9] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[10] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[13]

In support of her reconsideration request, appellant resubmitted a copy of the November 4, 1991 report of Dr. May. The resubmission of this report would not require merit review of appellant's claim in that the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[14]

In the present case, appellant has not established that the Office abused its discretion in its November 15, 1996 decision by denying her request for a review on the merits of its October 17, 1996 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 15 and October 17, 1996 are affirmed.

Dated, Washington, D.C.
October 27, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[11] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[14] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).