

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of AUDREY M. APPLEWHITE and DEPARTMENT OF THE AIR FORCE,  
KEESLER AIR FORCE BASE, MS

*Docket No. 98-143; Submitted on the Record;  
Issued December 10, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a five percent permanent impairment of each of her lower extremities for which she received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on June 12 and September 11, 1997; and (3) whether appellant established disability due to her accepted employment injuries from August 25 to October 5, 1987.

The Board has duly reviewed the case on appeal and finds that appellant has no more than a five percent permanent impairment of her lower extremities for which she received a schedule award.

Appellant filed a claim on August 25, 1987 alleging that she injured her knees and ankles in the performance of duty. The Office accepted appellant's claim for contusion both knees, bilateral ankle strain and aggravation of degenerative joint disease in her knees on November 25, 1996. She filed a claim requesting a schedule award on September 24, 1996 and by decision dated May 5, 1997, the Office granted her a schedule award for a five percent permanent impairment of each of her lower extremities. Appellant requested reconsideration on June 2 and July 22, 1997 and the Office declined to reopen appellant's claim for consideration of the merits by decisions dated June 12 and September 11, 1997, respectively.<sup>1</sup>

Section 8107 of the Federal Employees' Compensation Act<sup>2</sup> provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the

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<sup>1</sup> Following the Office's September 11, 1997 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8107.

claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. 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*<sup>3</sup> as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>4</sup>

In this case, appellant's attending physician referred her to Dr. M.F. Longnecker, a Board-certified orthopedic surgeon, for an orthopedic consultation. He completed a report on February 20, 1997 and reported his physical findings as mild to moderate patellar femoral grinding. Dr. Longnecker noted that x-rays demonstrated mild to moderate degenerative changes of the patellar femoral joint and that a magnetic resonance imaging scan revealed degenerative changes involving the medial meniscus. He found that appellant had no evidence of instability and normal range of motion. Dr. Longnecker diagnosed chronic degenerative arthritis of her knee to mild to moderate degree with underlying synovitis. He stated, "I would estimate a five percent loss of function to each knee as a scheduled member...."

The Office medical adviser reviewed this report on April 14, 1997 and noted that Dr. Longnecker had not referenced specific provisions of the A.M.A., *Guides* for appellant's knee impairments. However, he stated, "I am inclined to agree with his estimate of claimant's impairment of five percent for each lower extremity and [a] date of maximum improvement of February 20, 1997." As there is no medical evidence to the contrary, the Board finds that the Office properly granted appellant schedule awards for five percent impairment of each of her lower extremities.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on June 12 and September 11, 1997.

In her June 2, 1997 request for reconsideration, appellant stated that she was displeased with Dr. Longnecker's examination and impairment rating. She stated that her medical bills exceeded her schedule award. Appellant again requested reconsideration on July 22, 1997 and stated that she was submitting additional medical evidence. The Office denied these requests by decisions dated June 12 and September 11, 1997, respectively, finding that appellant failed to submit new evidence or an argument.

Section 10.138(b)(1) 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.<sup>5</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a

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<sup>3</sup> A.M.A., *Guides* 4<sup>th</sup> ed. (1993).

<sup>4</sup> A. George Lampo, 45 ECAB 441, 443 (1994).

<sup>5</sup> 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>6</sup>

Appellant's requests for reconsideration did not include any new medical evidence necessary to establish a greater degree of permanent impairment. She also failed to offer any point of law or fact not previously considered by the Office. Appellant did not show that the Office erroneously applied the law. She merely alleged that she believed that her impairment was greater than that provided by the Office and Dr. Longnecker. Appellant's unsupported opinion is not sufficient to require the Office to reopen her claim for consideration of the merits.

The Board further finds that appellant has not met her burden of proof in establishing any disability during the period August 25 to October 25, 1987.

Appellant filed a claim for compensation on July 22, 1997 requesting wage-loss compensation from August 25 to October 5, 1987. By decision dated September 30, 1997, the Office denied her claim finding that she had not submitted sufficient medical evidence.

An employee seeking benefits under the Act<sup>7</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>8</sup>

In support of her claim, appellant submitted an attending physician's report dated October 8, 1987 completed by Dr. Joseph L. Faison, a general practitioner. He indicated that appellant was totally disabled on August 25, 1987 and that she could return to full duty on August 26, 1987. Dr. Faison further indicated that appellant received medical treatment on September 14, 21 and 28 and October 5, 1987. Appellant also submitted a form report dated August 31, 1987 indicating that she received treatment on that date and that she could return to regular duty.

These reports are not sufficient to meet appellant's burden of proof in establishing total disability for any day claimed other than August 25, 1987.<sup>9</sup> Although the physicians indicate that appellant received medical treatment on additional dates, there is no evidence in the record that she missed work or lost wages in order to obtain treatment. On the reverse of her claim form the employing establishment indicated that appellant's pay had not stopped. In a note to

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<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>9</sup> The Board notes that appellant is not entitled to continuation of pay for August 25, 1987 as continuation of pay starts the first day or shift after the date or shift of injury, in this case on August 26, 1987. 20 C.F.R. § 10.201(b); *Kathy P. Roberts*, 45 ECAB 548, 552 (1994).

the Office, the employing establishment stated that appellant's pay records for that period were not available.

As appellant has not submitted medical evidence establishing that she lost time for work due to the accepted employment injury and as the employing establishment has no records that appellant lost wages for the period in question, the Board finds that appellant has not met her burden of proof in establishing that she was disabled from August 25 to October 5, 1987.

The decisions of the Office of Workers' Compensation Programs dated September 30, September 11, June 22 and May 5, 1997 are hereby affirmed.

Dated, Washington, D.C.  
December 10, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member