U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEAN M. BATTY and U.S. POSTAL SERVICE,
POST OFFICE, Sparta, N.J.

Docket No. 97-1114; Submitted on the Record;
Issued February 22, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she has greater than a five percent permanent impairment for loss of use of the right leg, for which she received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

. On August 8, 1988 appellant, a 48-year-old clerk, injured her lower back while lifting a bundle of magazines. Appellant filed a Form CA-1 claim for compensation for traumatic injury on the date of injury, which the Office accepted for L5-S1 disc herniation by decision dated October 13, 1988.[1] Appellant received temporary total disability compensation until October 2, 1988, and returned to work on light duty for five hours per day. Appellant filed a claim for recurrence of disability on January 5, 1989, which the Office accepted. Appellant went off work on the date of recurrence and returned to work on limited duty on February 8, 1989. She received temporary total disability during this period and subsequently missed work due to her employment-related back injury for intermittent periods.

In a letter dated November 22, 1995, appellant's attorney formally applied for a schedule award for permanent partial disability based on loss of use of the hip. Accompanying the request was a July 30, 1995 report and November 6, 1995 permanent impairment evaluation from Dr. Bartholomew R. D'Ascoli, a Board-certified orthopedic surgeon. In his July 30, 1995 report, Dr. D'Ascoli stated that he had been treating appellant since her August 8, 1988 employment injury, and that his most recent evaluation of appellant occurred on October 20, 1994, at which time she was still on light, limited duty, for four hours per day, performing sedentary work with no heavy lifting. Dr. D'Ascoli diagnosed L5-S1 disc disease with herniation, C5-6 protruded

[1] The Office initially denied the claim by decision dated October 3, 1988. Upon appellant's submission of additional medical evidence, which the Office deemed sufficient to establish her entitlement to compensation, the Office vacated its prior decision and accepted appellant's claim in its October 13, 1988 decision.

disc material, SI radiculopathy, left side, and left subacromial bursitis, all of which were causally related to the August 8, 1988 employment injury. Dr. D'Ascoli advised that appellant was a candidate for partial and permanent disability, and was unable to return to her preinjury employment.

In his November 6, 1995 impairment evaluation, Dr. D'Ascoli stated that appellant had decreased motion and degenerative disease of the left hip, lower back disease and depreciated gait, with no loss of sensation. In evaluating appellant's range of motion in the affected hip, Dr. D'Ascoli found, with regard to adduction, 130 degrees motion; with regard to forward flexion, 150 degrees motion; with regard to internal rotation, 30 degrees motion; with regard to external rotation, 70 degrees motion; with regard to abduction, 15 degrees motion; with regard to extension, 30 degrees motion. Dr. D'Ascoli further opined that appellant had weakness or atrophy of the lower extremity resulting from her hip pathology. He specifically stated that appellant's left hip had 50 percent of the strength of her right hip, with general weakness and atrophy.

By decision dated December 1, 1995, the Office denied appellant's claim for compensation based on a schedule award for permanent partial disability. The Office noted that it had accepted appellant's claim for herniated disc at L5-S1, but indicated that there was no provision under the Federal Employees' Compensation Act[2] for payment of a schedule award based on permanent impairment of the back. The Office noted that Dr. D'Ascoli's impairment evaluation had been reviewed by an Office medical adviser who determined that if a peripheral nerve disorder had resulted from appellant's employment-related back condition, appellant could be entitled to a schedule award. In a memorandum dated November 29, 1995, the Office medical adviser indicated that additional development was needed, and that an impairment report utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition) was required.

On December 7, 1996 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of her left hip.

By letter dated February 21, 1996, appellant's attorney requested reconsideration of the Office's previous decision.[3] Appellant's attorney stated that he had attached an updated report from Dr. D'Ascoli, dated February 13, 1996, which responded to the Office's request for additional information. Appellant's attorney advised that, "As [appellant] has sustained an injury to a disc in the back which affects nerves running down into her legs resulting in limitation and loss of use of one of her legs, she is entitled to an award pursuant to the terms of [the Act]."

In his February 13, 1996 report, Dr. D'Ascoli stated that appellant's back condition had caused extreme pain, limitation of motion, and a significant change in her gait pattern with

[2] 5 U.S.C. §§ 8101-8193.

[3] Appellant's attorney did not use the specific terms, "requesting reconsideration." Rather, he stated that he was responding to the Office's December 21, 1995 letter. This was sufficient to constitute a request for reconsideration.

regards to the hip region. Dr. D'Ascoli further stated that "It is also medically noted that [appellant] has nerve root compression affecting [sic] the peripheral nerve."

In a report dated March 13, 1996, the Office medical adviser reviewed Dr. D'Ascoli's November 6, 1995 impairment evaluation and, utilizing Dr. D'Ascoli's range of motion calculations, found that appellant had a five percent permanent partial impairment of the right lower extremity according to Table 40, page 78 of the *Guides.* The Office medical adviser also found that appellant reached maximum medical improvement on November 6, 1995, the date of Dr. D'Ascoli's impairment evaluation.

On March 19, 1996 the Office granted appellant a schedule award for a five percent permanent impairment of the right leg for the period from November 6, 1995 to February 14, 1996, for a total of 14.40 weeks of compensation.

By letter dated June 8, 1996, appellant requested reconsideration of the Office's previous decision. Appellant contended that she was entitled to a schedule award for her right hip greater than the five percent awarded by the Office, and that she was also entitled to a schedule award for her left hip. Appellant subsequently submitted a July 26, 1996 letter from Dr. D'Ascoli, who reiterated his earlier findings and stated "[w]e are in agreement, medically, with [appellant], based on clinical exam[ination]s and [appellant's] continued current symptomatology." Dr. D'Ascoli enclosed a copy of his November 5, 1996 impairment evaluation.

By decision dated October 23, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that appellant has no more than a five percent permanent impairment for loss of use of her right leg, for which she has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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.[6] However, neither the Act nor its regulations 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 Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*

[4] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 81079(c).

[5] 20 C.F.R. § 10.304.

[6] 5 U.S.C. § 8107(c)(19).

(fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[7]

In the instant case, the Office determined that appellant had a five percent permanent impairment of her right leg by adopting the findings of the Office medical adviser, who determined the precise impairment rating by gauging the total reduced range of motion in appellant's right lower extremity[8] based on the applicable figures and table of the *Guides.*

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

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[9] 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.[10] 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.[11]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law, and has not advanced a point of law or fact not previously considered by the Office. The only new medical evidence appellant submitted was Dr. D'Ascoli's July 26, 1996 letter, in which he merely reiterated his earlier findings and indicated his agreement with appellant's contentions. All of the other medical evidence appellant submitted had previously been considered by the Office in reaching prior decisions. Appellant contended in her June 8, 1996 letter that she was entitled to a schedule award for her right hip greater than the five percent awarded by the Office, and that she was also entitled to a schedule award for her left hip,

[7] *Thomas D. Gunthier,* 34 ECAB 1060 (1983).

[8] The Office medical adviser apparently based his finding of an impairment to appellant's right lower extremity on the fact that Dr. D'Ascoli's range of motion calculations were listed on the right side, in the "Affected side" column, notwithstanding the fact that Dr. D'Ascoli had indicated that appellant had a left hip impairment. The Board finds that this is harmless error, however, as it had no affect on the amount of compensation the Office awarded appellant.

[9] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.138(b)(2).

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

but failed to support this contention with new and relevant medical evidence. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated October 23 and March 19, 1996 are hereby affirmed.

Dated, Washington, D.C.
February 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member