

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD FORST and U.S. POSTAL SERVICE,  
POST OFFICE, Cleveland, Ohio

*Docket No. 96-2051; Submitted on the Record;  
Issued June 15, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he has greater than a 57 percent permanent impairment for loss of use of his right lower extremity, for which he received a schedule award; and (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 his claim under 5 U.S.C. § 8128(a).

On March 11, 1976 appellant, a 54-year-old mail carrier, injured his right thigh when he stepped into a hole in the sidewalk. Appellant subsequently missed work from March 31 to April 8, 1976 and from May 13 to 18, 1976.

On June 22, 1976 appellant injured his right thigh when he stood up from his desk and struck a sharp metal corner with his leg. Appellant filed a Form CA-1 claim for traumatic injury based on his right leg injury on July 9, 1976. Appellant also developed a problem with his right shoulder in September 1976, for which he filed a claim and received compensation from the Office for tendinitis right shoulder, rotator cuff and rupture of the right rotator cuff, right shoulder. Appellant returned to light duty on May 15, 1978 for four hours per day and stopped working in any capacity on July 12, 1978. Appellant has not worked since that date.

Appellant received a schedule award from the Office for a 35 percent schedule award for permanent impairment of the right arm in 1980 and for a 23 percent permanent impairment of the left arm in 1989. Appellant also filed claims and received compensation from the Office for degenerative arthritis of the right hip and total right hip replacement on January 5, 1985.

On November 29, 1991 appellant filed a Form CA-7 claim for a schedule award based on partial loss of use of his right upper extremity.

On December 23, 1991 Dr. Charles P. Bartley, a Board-certified orthopedic surgeon and appellant's treating physician, submitted a medical report and impairment evaluation to the

Office which summarized the history of appellant's hip condition and indicated that he had an obvious uncomfortable total hip prosthesis which was suggestive of early failure signs. Dr. Bartley noted that appellant's orthopedic condition was deteriorating at a very slow rate and that he might soon have to be evaluated for revision of his prosthesis. Dr. Bartley recommended that appellant's orthopedic disability had increased in reference to his hip in terms of his functional deficit and symptomatic complaints. Dr. Bartley stated that he would defer to the Office for assessment of the actual percentage of appellant's disability.

On December 16, 1992 the Office granted appellant a schedule award for a 46 percent permanent impairment of the right leg for the period from November 15 to December 12, 1992, for a total of 132.72 weeks of compensation.

On May 15, 1995 appellant underwent a second surgery for right hip replacement, which was performed by Dr. Bartley.

By letters dated May 7 and November 15, 1995, appellant requested a supplemental schedule award based on the additional impairment caused by his May 15, 1995 right hip replacement surgery.<sup>1</sup>

In a report dated January 29, 1996, Dr. Bartley stated findings on examination of appellant's right lower extremity for purposes of impairment evaluation. Based on his most recent examination of appellant on November 17, 1995 Dr. Bartley made the following findings:

“Examining the hip for leg length, appellant has 1 centimeter of shortening of the right lower extremity compared to the left. The recorded range of motion of the right hip is forward flexion 0 to 90 degrees; backward flexion 0 degrees. Abduction, 0 to 30 degrees with a normal range up to 40 degrees; adduction normal 0 to 20 degrees. Internal rotation, approximately 0 to 20 degrees of internal rotation with a normal of approximately 45 degrees expected compared to his opposite extremity. External rotation, 0 to 45 degrees equal external rotation to his opposite extremity. His hip flexor power is decreased to a level of 4 on a scale of 5, in the affected extremity. Hip abductor power is also reduced to a level of 5 minus on a scale of 5 on the affected extremity.”

Dr. Bartley further stated it was apparent that appellant had generalized stiffness of his back, hips and knees. Dr. Bartley concluded that he declined to calculate a percentage of disability and requested that the Office go forward with this calculation based on his objective findings outlined above.

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<sup>1</sup> In a report dated December 12, 1995, Dr. Bartley stated that he had recently examined appellant on November 17, 1995 for evaluation of his right hip function, status post revision of a total hip. Dr. Bartley noted that appellant's previous hip replacement surgery, which he underwent nine years before, had initially been successful, but that appellant had subsequently developed progressive symptoms of discomfort. Dr. Bartley stated that appellant had progressive x-ray changes which suggested loosening of the prosthesis and, therefore, underwent a revision total arthroplasty on May 15, 1995. Dr. Bartley advised that appellant had experienced slow, steady, improvement in his leg function in terms of limping and pain relief in the six months since his hip surgery.

In a February 14, 1996 memorandum, the Office medical adviser reviewed Dr. Bartley's findings and, applying the standards outlined in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition), (the A.M.A., *Guides*,) determined that appellant had a total 57 percent impairment in his right lower extremity. In arriving at this figure, the Office medical adviser, noting that appellant required a cane to help him ambulate, initially calculated that appellant had a 37 percent impairment of the right lower extremity due to the right total hip arthroplasty pursuant to page 85, Table 65 of the A.M.A., *Guides* and 0 impairment derived from the 1 centimeter shortening of the right lower extremity, pursuant to page 87, Table 65 of the A.M.A., *Guides*. With regard to appellant's range of motion, the Office medical adviser found that appellant retained 90 degrees range of motion in flexion, which equated to a 5 percent impairment; 0 degrees range of motion in extension, which equated to a 5 percent impairment; 30 degrees range of motion in abduction, which equated to a 0 percent impairment; 30 degrees range of motion in abduction, which equated to a 0 percent impairment; 20 degrees range of motion in abduction, which equated to a 0 percent impairment; 20 degrees range of motion in internal rotation, which equated to a 5 percent impairment; and 45 degrees range of motion in external rotation, for a total impairment of 15 percent pursuant to page 78, Table 40 of the A.M.A., *Guides*.<sup>2</sup> The Office medical adviser calculated that appellant had a loss of right hip strength of 20 percent, based on hip flexor power of level 4 on a scale of 5.

Combining the figures above, the Office medical adviser calculated that appellant had a total of 57 percent impairment based on loss of use of his right lower extremity.<sup>3</sup>

On March 1, 1996 the Office granted appellant a schedule award for a 57 percent permanent impairment of the right lower extremity for the period from March 3 to October 10, 1996, for a total of 118.56 weeks of compensation.

By letter dated March 18, 1996, appellant requested reconsideration.

By decision dated June 3, 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 57 percent permanent impairment for loss of use of his right lower extremity, for which he has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> 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

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<sup>2</sup> The Office medical adviser did not provide the specific table he utilized in making his range of motion calculations. However, his impairment findings pertaining to appellant's range of motion correspond with Table 40 at page 78 of the A.M.A., *Guides*.

<sup>3</sup> See Combined Values Chart at page 322 of the A.M.A., *Guides*.

<sup>4</sup> 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

<sup>5</sup> 20 C.F.R. § 10.304.

of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>6</sup> 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 A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

In the instant case, the Office determined that appellant had a 57 percent permanent impairment of his right lower extremity by adopting the findings of the Office medical adviser, who calculated appellant's impairment by utilizing the findings of Dr. Bartley, appellant's surgeon and treating physician. Based on Dr. Bartley's findings, the Office medical adviser determined the precise impairment rating by calculating the total impairment of the right lower extremity due to appellant's hip arthroplasty, gauging the total loss in range of motion due to the hip arthroplasty and finding that appellant had a loss of right hip strength of 20 percent. The Office medical adviser then totaled the above figures together in the Combined Values Chart to arrive at the total percentage of impairment in appellant's left lower extremity based on the applicable figures and tables of the A.M.A., *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 57 percent permanent impairment for loss of use of the right lower extremity, for which he has received a schedule award from the Office and that appellant has failed to provide probative, supportable medical evidence that he has greater than the 57 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 his 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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<sup>6</sup> 5 U.S.C. § 8107(c)(19).

<sup>7</sup> *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

<sup>8</sup> 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.138(b)(2).

<sup>10</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

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. In addition, appellant failed to submit any new and relevant medical evidence in support of his request for reconsideration. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.<sup>11</sup>

The June 3 and March 1, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
June 15, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>11</sup> In his June 14, 1996 letter to the Board, which accompanied his appeal, appellant indicated his willingness to submit additional medical evidence to the Board, if necessary. The Board notes, however, that it cannot review any additional evidence that was not contained in the evidence of record before the Office prior to its June 3, 1996 decision; *see* 20 C.F.R. § 501.2(c). Appellant, however, may submit such evidence to the Office if he chooses to file reconsideration of the instant decision.