U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIGNA G. FELDNER and DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Kings Bay, GA

Docket No. 97-2094; Submitted on the Record;
Issued November 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 10 percent permanent impairment of the right lower extremity, for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of her claim under 20 C.F.R. § 10.138.

On March 17, 1995 appellant, then a 37-year-old library technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on March 16, 1995 she tripped on a piece of carpet at work and injured her right knee. She was initially diagnosed as having suffered an acute sprain with the possibility of a torn medial meniscus. On September 28, 1995 Dr. Carlos R. Tandron, a Board-certified orthopedic surgeon, performed a partial medial and lateral meniscectomy and abrasion chondroplasty.[1] The Office subsequently accepted appellant's claim for acute right knee sprain and arthroscopy and awarded her appropriate compensation benefits. On June 6, 1996 the Office, based on the recommendation of its medical adviser, granted appellant a schedule award for a 10 percent permanent impairment of the right lower extremity. On July 30, 1996 appellant sought reconsideration;[2] however, the Office denied modification in a merit decision dated October 24, 1996. Appellant filed a second request for reconsideration on February 20, 1997, which the Office denied on April 7, 1997 without reaching the merits of appellant's claim. Appellant filed a timely appeal with the Board on May 30, 1997.

[1] Appellant previously sustained an injury to her right knee that required surgical repair on two prior occasions in 1988 and 1994. During appellant's most recent September 28, 1995 surgery, Dr. Tandron found evidence of a prior tear of appellant's medial meniscus as well as evidence of a new tear in both the lateral and medial meniscus.

[2] In support of her request for reconsideration, appellant submitted a January 23, 1996 report from Dr. Tandron in which the doctor recommended an impairment rating of 17 percent for the right lower extremity.

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 10 percent permanent impairment of her right lower extremity.

Section 8107 of the Federal Employees' Compensation Act[3] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[4]

In the instant case, the Office based its 10 percent award on the March 28, 1996 and September 5, 1995 opinions of its medical adviser. In a form report dated February 2, 1996, appellant's treating physician, Dr. Tandron, indicated that appellant had attained maximum medical improvement on January 23, 1996 and that pursuant to the A.M.A., *Guides*, appellant's right knee condition represented a seven percent impairment of the "body as a whole." The doctor, however, failed to provide any explanation regarding the basis for his impairment rating and, at the time he had not submitted a separate impairment rating for appellant's right lower extremity. Inasmuch as the Act does not provide compensation for whole body impairments,[5] the Office subsequently referred the case file, along with Dr. Tandron's February 2, 1996 report, to its medical adviser for an opinion. In his March 28, 1996 report, the Office medical adviser indicated that appellant had a 10 percent permanent impairment of her right lower extremity as a result of her partial medial and lateral meniscectomy.

Two days prior to the issuance of its June 6, 1996 schedule award, the Office received additional medical evidence from Dr. Tandron. Whereas the doctor had previously provided a 7 percent impairment rating of the whole body, a May 17, 1996 entry in Dr. Tandron's treatment notes indicated that the "patient has [a] 17 percent impairment to the right lower extremity based on A.M.A., *Guides.*"

In support of her July 30, 1996 request for reconsideration, appellant submitted a January 23, 1996 report (Form CA-1303-1193) from Dr. Tandron in which he noted an impairment rating of 17 percent for the right lower extremity. In her request, appellant also noted the fact that Dr. Tandron's May 17, 1996 treatment notes similarly indicated a 17 percent impairment of her right lower extremity. On September 4, 1996 the Office referred the additional evidence to its medical adviser to determine whether, in fact, appellant had a 17 percent impairment.

In a report dated September 5, 1996, the Office medical adviser indicated that according to Table 64 at page 85 of the A.M.A., *Guides*, appellant's partial medial and lateral

[3] 5 U.S.C. § 8107.

[4] *James J. Hjort*, 45 ECAB 595 (1994).

[5] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.304(b).

meniscectomy amounted to a 10 percent impairment of the right lower extremity. Additionally, the Office medical adviser stated that no new information had been supplied that would justify changing this rating. He explained that appellant "also has crepitus (chondromalacia) but her x-rays are normal (*i.e.*, normal cartilage interval) [and], therefore, no rating is justified for this condition." The Office medical adviser further stated that "Dr. Tandron's notes indicate 'the knee has never felt better' and 'her exam[ination] is very good.'"[6]

By letter dated September 11, 1996, the Office forwarded a copy of the medical adviser's September 5, 1996 report to Dr. Tandron and asked that he respond to the discrepancy between his own 17 percent impairment rating and the 10 percent impairment rating recommended by the Office medical adviser. On September 27, 1996, in a brief handwritten note in the margin of the Office's September 11, 1996 letter, Dr. Tandron expressed his disagreement with the 10 percent rating and stated, "You have to rate for the traumatic chondromalacia, even if the symptoms are better."

The Office noted Dr. Tandron's disagreement in its October 24, 1996 merit decision, but found that the doctor failed to provide any new evidence to support an increased rating. In denying modification, the Office concluded that its medical adviser had given the maximum allowable under the A.M.A., *Guides* based on the medical evidence of record.

On November 25, 1996 the Office received additional evidence that consisted of Dr. Tandron's October 18, 1996 treatment notes, which indicated that appellant's "knee is doing very well" and "[s]he has occasional swelling and discomfort … but overall it looks real good." This evidence apparently was not considered in conjunction with appellant's February 20, 1997 request for reconsideration, which the Office denied on April 7, 1997, without reaching the merits of appellant's claim.

The Board finds that the Office medical adviser's calculation of a 10 percent permanent impairment of the right lower extremity as a result of appellant's partial medial and lateral meniscectomy properly corresponds with the diagnosis based estimates provided at Table 64, Chapter 3 of the A.M.A., *Guides*. Although Dr. Tandron indicated that appellant was entitled to an additional rating for her traumatic chondromalacia, he did not adequately explain the basis for his opinion in accordance with the A.M.A., *Guides*.[7] Inasmuch as the Office medical adviser's

[6] The passages quoted by the Office medical adviser were obtained from Dr. Tandron's January 23, 1996 treatment notes wherein he reported that appellant stated, "her knee has never felt better" and he expressed his own opinion that "her exam[ination] is very good." Dr. Tandron's treatment notes for that same date also indicate that "[appellant] has some patellofemoral crepitus."

[7] The A.M.A., *Guides* at Table 62, Chapter 3 provide ratings for arthritis impairments based on roentgenographically determined cartilage intervals. The patellofemoral joint is one of several joints noted under Table 62. With respect to impairments of this particular joint, Table 62 provides that "In a patient with a history of direct *trauma*, a complaint of patellofemoral pain and crepitation on physical examination, but without joint space narrowing on roentgenograms, a two percent whole-person or five percent lower extremity impairment is given." (Emphasis added.) A.M.A., *Guides* 83, Table 62. The Office's procedural manual clarifies that Table 62, arthritis impairments based on x-ray, is not incompatible with Table 64, diagnosis based impairment estimates; *see* Federal (FECA) Procedural Manual, Part 3 -- Medical, *Schedule Award*, Chapter 3.700 (October 1995).

calculation conforms to the A.M.A., *Guides*, his finding constitutes the weight of the medical evidence.[8] Accordingly, appellant has failed to provide any probative medical evidence that she has greater than a ten percent impairment.

The Board also finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

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.[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 the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.[10]

In her February 20, 1997 request for reconsideration, appellant did not argue that the Office erroneously applied or interpreted a point of law. Moreover, appellant did not raise a new point of law not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, as noted above the only evidence submitted subsequent to the Office's October 24, 1996 merit decision consisted of Dr. Tandron's October 18, 1996 treatment notes, in which he indicated that appellant continued to experience "occasional swelling and discomfort." This evidence, however, is insufficient to require merit review because it does not address the pertinent issue of the extent of appellant's permanent impairment.[11] Inasmuch as the newly submitted evidence on reconsideration does not constitute relevant medical evidence, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1).

As appellant is not entitled to a review of the merits of her claim based on any of the above-noted requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's February 20, 1997 request for reconsideration.

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

[9] 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2).

[11] Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

The decisions of the Office of Workers' Compensation Programs dated April 7, 1997, October 24 and June 6, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 1, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member