U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOWARD H. KOENIG and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Pensacola, FL

Docket No. 97-2852; Submitted on the Record;
Issued January 5, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a two percent permanent impairment of the right lower extremity for which he 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 his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On June 3, 1994 appellant, then a 48-year-old instrument mechanic, sustained an employment-related internal derangement of the right knee for which he underwent a partial meniscectomy on June 24, 1994. On January 24, 1996 appellant filed a schedule award claim. By decision dated June 24, 1997, the Office granted appellant a schedule award for a 2 percent permanent impairment for partial loss of use of the right lower extremity for the period August 8 to September 17, 1995 for a total of 5.76 weeks of compensation. On July 8, 1997 appellant requested reconsideration and submitted medical evidence. By decision dated August 1, 1997, the Office denied his request, finding the evidence submitted duplicative. The instant appeal follows.

Initially, the Board finds that appellant has no greater than a two percent permanent impairment of the right lower extremity.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*[3] (hereinafter A.M.A., *Guides*) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

The relevant medical evidence includes an August 8, 1995 report from appellant's treating Board-certified orthopedic surgeon, Dr. Charles A. Roth, who advised that appellant had 120 degrees of retained active flexion and that there was no additional impairment of function due to weakness, atrophy, pain or discomfort. Dr. Roth stated that appellant reached maximum medical improvement on August 8, 1995 and recommended an impairment rating of 11 percent of the right lower extremity or 4 percent of the whole person. By letter dated October 28, 1996, the Office informed Dr. Roth that he needed to furnish appellant's impairment rating in terms of the A.M.A., *Guides*. In a December 11, 1996 letter, he informed the Office that he had used the A.M.A., *Guides* when rating appellant's disability. In a May 13, 1997 report, an Office medical adviser utilized the A.M.A., *Guides* and found that under Table 41, page 78 retained flexion of 120 degrees equaled a 0 percent impairment. He, however, noted that a partial medial meniscectomy equaled a two percent impairment of the lower extremity.

The Board finds that the Office medical adviser properly rated appellant's permanent impairment. Table 64 of the A.M.A., *Guides* indicates that appellant's degree of impairment from a partial medial meniscectomy is equal to a two percent impairment of the lower extremity.[5] The A.M.A., *Guides* indicates that when diagnosis-based ratings are applied it is usually not appropriate to also apply ratings for physical examination findings.[6] In this case, while Dr. Roth provided a conclusory statement that appellant had an 11 percent impairment of the right lower extremity, he provided no specific findings that would support a greater award. The Office therefore properly granted appellant a schedule award for a two percent permanent impairment of the right lower extremity.[7]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] 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

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[3] A.M.A., *Guides* (4th ed. 1993).

[4] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[5] A.M.A., *Guides*, *supra* note 3 at 85.

[6] *Id.* at 85.

[7] *See Luis Chapa, Jr.*, 41 ECAB 159 (1989).

[8] 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; or (3) submit relevant and pertinent evidence not previously considered by the Office.[9] 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.[10] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11]

In this case, appellant did not advance a point of law not previously considered or articulate any legal argument with a reasonable color of validity in support of her request. While he submitted the August 8, 1995 medical report from Dr. Roth, this had been previously considered by the Office. The Office, thus, properly denied appellant's application for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 1 and June 24, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 5, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] 20 C.F.R. § 10.138(b)(1) and (2).

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

[11] 20 C.F.R. § 10.138(b)(2).