U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERNAE HULSEY and U.S. POSTAL SERVICE,
POST OFFICE, West Sacramento, CA

Docket No. 98-571; Submitted on the Record;
Issued January 24, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has established entitlement to greater than five percent permanent impairment of her right upper extremity for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128 constituted an abuse of discretion.

The Board has duly reviewed the case record in this case, and finds that appellant has no more than a five impairment of her right arm.

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 for all claimants the Office adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[3]

In this case, Dr. Lorraine Abate, a family practitioner, in report dated April 1, 1997, stated that appellant had a nagging ache in her left shoulder deltoid region maybe three times a week, but still retained normal sensation. No measurable atrophy was noted and appellant retained 90 percent strength of her normal limits. Range of motion values of the affected and

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[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 10.304.

[3] *James A. England*, 47 ECAB 115 (1995).

opposite side revealed equal measurements. The date of maximum medical improvement was stated to be April 1, 1997.

In a July 26, 1997 report, Dr. Ellen Pichey, an Office medical adviser, reviewed the medical evidence of file and, based on Dr. Abate's April 1, 1997 report, calculated the extent of permanent partial loss to appellant's right upper extremity. Utilizing Tables 11 and 12 of the A.M.A., *Guides*,[4] Dr. Pichey noted that appellant's impairment due to pain or sensory deficits and loss of power or motor deficits was classified as 25 percent. Utilizing Table 15, page 54, he found that the maximum combined impairment based on the suprascapular nerve was 20 percent, for impairment due to combined motor and sensory deficits. Multiplying the maximum combined impairment value of 20 percent by appellant's of 25 percent, Dr. Pichey found a 5 percent maximum upper extremity impairment.

The Board finds appellant has no more than a 5 percent upper extremity impairment. Page 49 of the A.M.A., *Guides* states that "The impairment percents due to pain or sensory deficits and those due to loss of power or motor deficits are determined for each peripheral nerve structure involved (spinal nerves, brachial plexus and peripheral nerves). The impairment for a structure with mixed motor and sensory fibers is calculated by *combining* the sensory and motor deficit impairments using the Combined Values Chart (p. 322)." The Office medical adviser found that the impairment classification due to loss of strength and pain was 25 percent. Table 15, page 54 provides a maximum impairment of the suprascapular nerve to be 5 percent for sensory deficit or pain and 16 percent for motor deficit. Utilizing the grading scheme at table 11 and table 12, 25 percent times 5 yields a 1.25 sensory deficit percentage and 25 percent times 16 yields a 4 percent motor deficit. Utilizing the Combined Values Chart on page 322, a 1.25 sensory deficit and a 4 percent motor deficit totals a 5 percent upper extremity permanent partial impairment. Accordingly, the medical evidence of record does not establish that appellant has a greater than 5 percent impairment found by the Office medical adviser.

The Board additionally finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] 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 considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[6] To be entitled to a 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.[7] When a claimant fails to meet one of the above standards, it is a

[4] *A.M.A., Guides*, Table 11, page 48; Table 12, page 49.

[5] 5 U.S.C. §§ 8101-8193. 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).

[6] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[7] 20 C.F.R. § 10.138(b)(2).

matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[8]

Appellant submitted a letter indicating that she disagreed with the impairment rating and stated that her entire life has changed due to her work-related impairment. Appellant's contention that her life has changed does not relate to the relevant issue of the present case, *i.e.*, whether appellant has established entitlement to greater than a 5 percent permanent impairment of her right upper extremity. In this regard, the Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.[9]

In the present case, appellant has not established that the Office abused its discretion in its September 22, 1997 decision by denying appellant's request for a review on the merits of its decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated October 24 and September 22, 1997 are affirmed.

Dated, Washington, D.C.
January 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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

[9] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).