U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYDELLE MENDELSON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Las Vegas, NV

Docket No. 98-2063; Submitted on the Record;
Issued January 13, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has sustained an increased permanent impairment of her left leg which would entitle her to an additional schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On May 7, 1993 appellant, then a 68-year-old clerk/typist, filed a traumatic injury claim alleging that on May 3, 1993 an insect stung her left leg. The Office accepted appellant's claim for an insect bite to the left ankle with complications of infection, necrosis, cellulitis and skin graft surgery.

On November 28, 1994 appellant, filed a claim for a schedule award. By decision dated June 12, 1995, the Office granted appellant a schedule award for a 44 percent permanent impairment of the left leg. The period of the award ran for 126.72 weeks from April 5, 1995 to September 8, 1997.

By letter dated September 11, 1995, appellant requested reconsideration of her schedule award. In a decision dated October 24, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

On April 15, 1997 appellant, filed a claim for an additional schedule award. By decision dated July 25, 1997, the Office denied appellant's claim on the grounds that the medical evidence did not establish that she had more than a 44 percent impairment, for which she had previously received a schedule award. By letter dated August 9, 1997, appellant requested reconsideration. In a decision dated September 22, 1997, the Office denied merit review of the prior decision.

The Board finds that appellant is not entitled to an additional schedule award.

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 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* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

In support of her claim for an increased schedule award, appellant submitted a report dated March 24, 1997, from Dr. Theodore Jacobs, a Board-certified internist and her attending physician. Dr. Jacobs discussed appellant's history of injury and related that she "has constant chronic severe pain and dysaethesias in the left leg which became much worse as the day went on. In my opinion this degree of pain and disability will not change with time and may very well become worse." He recommended that the Office extend appellant's schedule award.

By letter dated April 4, 1997, the Office informed appellant of the information required to evaluate her degree of permanent impairment according to the fourth edition of the A.M.A., *Guides*. The Office enclosed forms for appellant's physician to complete.

In a report dated May 22, 1997, Dr. Maureen E. Mackey, a Board-certified physiatrist, found that appellant had no dorsiflexion of her ankle, which constituted a three percent impairment of the whole person.[4] Dr. Mackey further found, for appellant's left ankle, that 50 degrees plantar flexion constituted no impairment, 50 percent inversion constituted no impairment; and 30 degrees eversion constituted no impairment. She further determined that appellant had 0 degrees extension of the great toe, which constituted a 2 percent whole person impairment and noted that the remaining toe and foot measurements were normal. Dr. Mackey stated:

> "[Appellant] does have a causalgia in the affected areas. Using Table 38, referring to the peroneal nerve, she has moderate pain which is 2 [percent] for dysesthesia and she has decreased dorsiflexion and decreased extension of the toes. This would be a 20 [percent] deficit of the peroneal nerve. 20 [percent] [times] 15 [percent] is 3 [percent] on a body basis, again referring to table 68."

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

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

[4] The Act does not provide a schedule award for whole person impairments. 5 U.S.C. § 8107(c).

> "The entire impairment then is 3 [percent] for lost dorsiflexion of the ankle, 2 [percent] for lost extension of the big toe, 2 [percent] for dysesthesia and 3 [percent] for weakness in the peroneal nerve distribution. These all 3 being combined yield 10 [percent] on a body basis. 10 [percent] on a body basis equals 25 [percent] of the lower extremity."

On July 16, 1997 an Office medical adviser reviewed Dr. Mackey's May 22, 1997 report and properly applied the provisions of the A.M.A., *Guides* to her findings. The Office medical adviser found that the maximum allowable percentage due to pain in the common peroneal nerve was 5 percent,[5] which he multiplied by 60 percent in accordance with the grading scheme of the A.M.A., *Guides*[6] to reach an impairment value of 3 percent due to pain. Dr. Mackey found that, for appellant's range of ankle motion, 0 degrees dorsiflexion and 50 degrees plantar flexion constituted a 7 percent impairment of the lower extremity.[7] He further determined that 0 degrees extension of the great toe constituted a 5 percent lower extremity impairment.[8] The Office medical adviser classified appellant's loss of strength as 25 percent,[9] which Dr. Mackey multiplied by the maximum impairment for weakness of the common peroneal nerve, 42 percent,[10] to find an 11 percent impairment due to loss of strength. Using the Combined Values Chart, he then combined the impairment findings, 3 percent for pain, 7 percent for loss of ankle motion, 5 percent for loss of motion of the great toe, and 11 percent for weakness and concluded that appellant had a 23 percent impairment of the left lower extremity.[11] The Office medical adviser noted that the impairment determination was less than that previously awarded appellant.

As the weight of the medical evidence establishes that appellant does not have more than a 44 percent impairment, for which she received a schedule award, the Office properly denied her claim for an additional schedule award.

The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

[5] A.M.A., *Guides* 89, Table 68.

[6] *Id*. at 48, Table 11.

[7] *Id*. at 78, Table 42.

[8] *Id*. at 78, Table 45.

[9] *Id*. at 49, Table 12.

[10] *Id*. at 89, Table 68.

[11] *Id*. at 88, 322.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[12]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[13] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[14] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[15]

In the present case, the Office denied appellant's claim for an increased schedule award on the grounds that the medical evidence did not establish that she had more than a 44 percent permanent impairment of her left leg, for which she received a schedule award. In support of his request for reconsideration, appellant resubmitted Dr. Mackey's May 22, 1997 report. Copies of evidence previously considered by the Office are repetitive in nature and, therefore, insufficient to warrant a merit review of the case.[16]

Appellant further submitted a report dated June 19, 1997, from Dr. Thomas Dunn, who diagnosed "[m]echanical back pain secondary to osteoarthrits, lumbar spine, aggravated by abnormal gait pattern from previous leg injury." Dr. Dunn found appellant's range of motion of her back to be 80 percent of normal. He did not address the degree of permanent impairment of appellant's left leg and thus his opinion is not pertinent to the issue at hand.[17]

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established

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[12] 20 C.F.R. § 10.138(b)(1).

[13] *See* 20 C.F.R. § 10.138(b)(2).

[14] *Daniel Deparini*, 44 ECAB 657 (1993).

[15] *Id.*

[16] *Eugene F. Butler*, 36 ECAB 393 (1984) (where the Board held that evidence that repeats or duplicates evidence already contained in the case record has no evidentiary value and does not constitute a basis for reopening a case).

[17] The Act does not provide a schedule award for impairments of the back or spine. 5 U.S.C. § 8107(c).

that the Office abused its discretion in denying her request for review under section 8128 of the Act.[18]

The decisions of the Office of Workers' Compensation Programs dated September 22 and July 25, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 13, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[18] The Board notes that subsequent to the Office's September 22, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).