

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. FELDER and U.S. POSTAL SERVICE,
POST OFFICE, Columbia, SC

*Docket No. 98-1845; Submitted on the Record;
Issued June 12, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant has no more than a 60 percent impairment of his right lower extremity for which he received a schedule award; and (2) whether the Office's refusal to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128 constituted an abuse of discretion.

The Board has reviewed the case record and concludes that the Office properly found in its April 3, 1998 decision, that appellant has no more than a 60 percent impairment of his right lower extremity for which he received a schedule award.

In the present case, the Office accepted that appellant sustained a contusion of the right knee and aggravation of chondromalacia in the performance of duty on October 16, 1972. The Office authorized a patellectomy on April 27, 1973. On April 30, 1974 the Office found that appellant had a 15 percent impairment of the right lower extremity. The Office subsequently amended the schedule award on May 23, 1980 to indicate that appellant had a 30 percent impairment of the right lower extremity. Following appellant's authorized total knee replacement on April 28, 1987, the Office again amended appellant's schedule award, in a decision dated September 20, 1988, to reflect that he had a 40 percent impairment of the right lower extremity. An Office hearing representative, however, set aside that decision and remanded the case for further consideration of appellant's schedule award request. In a decision dated January 17, 1990, the Office found that appellant had a 60 percent impairment of the right lower extremity, for which he should receive a schedule award. Following another authorized surgery for a right knee replacement, appellant requested an additional schedule award on March 4, 1998 for his right lower extremity.

In support of his request for an additional schedule award, appellant submitted reports from Dr. Kim J. Chillag, his treating physician and a Board-certified orthopedic surgeon, dated August 13, 1997, February 4 and March 26, 1998, which indicated that he had a 50 percent impairment of the right lower extremity

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations,² set forth that 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 is to be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment.³

In obtaining medical evidence for schedule award purposes, the Office must obtain an evaluation by an attending physician, which includes a detailed description of the impairment including, where applicable, the loss in degrees of motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. The description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁴ If the attending physician has provided a detailed description of the impairment, but has not properly evaluated the impairment pursuant to the A.M.A., *Guides*, the Office may request that the Office medical adviser review the case record and determine the degree of appellant's impairment utilizing the description provided by the attending physician and the A.M.A., *Guides*.⁵

In the present case, there was no medical evidence establishing that appellant had greater than a 60 percent impairment of his right lower extremity, for which he had already received a schedule award on January 17, 1990. The medical reports provided by appellant's treating physician, Dr. Chillag, dated August 13, 1997, February 4 and March 26, 1998, all indicated that he had only a 50 percent impairment of the right lower extremity. Accordingly, the Office properly found in its April 3, 1998 decision that appellant failed to establish an impairment of his right lower extremity of greater than 60 percent, for which he has already received a schedule award.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review in its decision dated May 11, 1998.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *Leisa D. Vassar*, 40 ECAB 1287 (1989).

⁴ *Joseph D. Lee*, 42 ECAB 172 (1990).

⁵ *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

Under section 8128(a) of the Act,⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,⁷ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

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.⁸

In the instant case, the only evidence that appellant submitted with his April 20, 1998 request for reconsideration, which addressed the impairment to his right lower extremity, was an April 14, 1998 report from Dr. Chillag stating that appellant had a 60 percent impairment of his right lower extremity. Dr. Stephen C. Lloyd, a Board-certified internist, failed to address appellant’s right lower extremity impairment in his report dated March 3, 1998. Because appellant had already been awarded a schedule award based on a 60 percent impairment of his right lower extremity, the Office did not abuse its discretion by refusing to reopen appellant’s claim for a review of the merits in its May 11, 1998 decision.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.138(b)(1).

⁸ 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated May 11 and April 3, 1998 are affirmed.

Dated, Washington, D.C.
June 12, 2000

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member