

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANICE E. WILLS and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Merrifield, VA

*Docket No. 98-1051; Submitted on the Record;  
Issued March 20, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On July 19, 1991 appellant, then a 47-year-old mailhandler, sustained a left heel spur and left knee sprain in the performance of duty.

In notes dated August 24, 1994, Dr. John A. Bruno, Jr., appellant's attending orthopedic surgeon, related that she underwent a partial medial meniscectomy and had a 30 percent permanent impairment of her left knee.

In a memorandum dated January 11, 1995, an Office medical adviser stated that appellant had a 7 percent permanent impairment of the left lower extremity for a partial medial meniscectomy according to Table 64 on page 85 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993) (hereinafter the A.M.A., *Guides*).

By decision dated September 8, 1995, the Office granted appellant a schedule award based upon a seven percent permanent impairment of the left lower extremity.

By letter dated March 5, 1996, appellant requested reconsideration and submitted additional evidence.

In a report dated January 16, 1996, Dr. Stephen C. Saddler, an orthopedic surgeon, provided findings on examination, including the finding that appellant had 12 degrees of valgus in the alignment of her left knee.

In reports dated February 29 and July 20, 1996, Dr. Bruno stated that appellant had a 30 percent permanent impairment of the left lower extremity based upon Table 62 at page 83 of the A.M.A., *Guides*.

In a memorandum dated July 5, 1996, an Office medical adviser indicated that appellant had a 10 percent permanent impairment of the left lower extremity based upon her 12 degrees of valgus in the alignment of her left knee.

In a report dated July 22, 1996, Dr. Douglas E. Stabile, a podiatrist, stated that appellant had a 30 percent permanent impairment of the left foot due to a heel spur and plantar fasciitis.

By decision dated September 9, 1996, the Office granted appellant an additional schedule award based upon a three percent permanent impairment of the left knee.

In a memorandum dated November 4, 1996, an Office medical adviser stated that appellant was not entitled to an additional schedule award for the conditions of a heel spur and plantar fasciitis as the A.M.A., *Guides* did not provide any rating for these conditions.

By letter dated September 17, 1997, the Office referred appellant, together with the entire case record and a statement of accepted facts, to Dr. German H. Nader, a Board-certified orthopedic surgeon, for an examination and evaluation in order to resolve the conflict in medical opinion as to the extent of appellant's permanent impairment due to her employment injury.

By letter dated September 24, 1997, appellant requested reconsideration and submitted additional evidence.

In a report dated September 19, 1996, Dr. Bruno stated that appellant had a 30 percent permanent impairment of the left lower extremity based upon Table 62 at page 83 of the A.M.A., *Guides*. He wrote, "Impairment is, therefore, between 25 and 50 percent. Why do you not accept my 30 percent rating?"

In a report dated September 25, 1997, Dr. Nader provided a history of appellant's condition and findings on examination and diagnosed a left heel spur, possible mild-to-moderate plantar fasciitis, degenerative arthritis of the left knee. He stated his opinion that appellant's left knee arthritis was not due to her 1991 employment injury. Dr. Nader stated, however, that the plantar fasciitis was probably aggravated by frequent ambulation and, therefore, related to appellant's work.

By decision dated November 7, 1997, the Office denied appellant's request for reconsideration.<sup>1</sup>

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

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<sup>1</sup> The Board notes that this case record contains documents relating to another claimant. Upon return of the case record these documents should be placed in the correct file. The Board also notes that this case record contains evidence submitted subsequent to issuance of the Office's November 7, 1997 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

Section 10.138(b)(1) 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.<sup>2</sup> 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 these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

In this case, by decision dated September 8, 1995, the Office granted appellant a schedule award based upon a seven percent permanent impairment of the left lower extremity. By decision dated September 9, 1996, the Office granted appellant an additional schedule award based upon a three percent permanent impairment. Appellant requested reconsideration by letter dated September 24, 1997 and submitted additional evidence.

In a report dated September 19, 1996, Dr. Bruno, appellant's attending orthopedic surgeon, stated that appellant had a 30 percent permanent impairment of the left lower extremity based upon Table 62 at page 83 of the A.M.A., *Guides*. He wrote, "Impairment is, therefore, between 25 and 50 percent. Why do you not accept my 30 percent rating?" The record shows that Dr. Bruno had previously submitted reports, in which he opined that appellant had a 30 percent permanent impairment and in which he cited Table 62 at page 83 of the A.M.A., *Guides*. Therefore, this report does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant also did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or a fact not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration.<sup>4</sup>

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<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> The Board notes that the Office has not yet issued a final decision subsequent to its referral of appellant to Dr. Nader, a Board-certified orthopedic surgeon and impartial medical specialist selected to resolve the conflict in medical opinion as to the extent of appellant's permanent impairment. Upon return of the case record, the Office should issue an appropriate merit decision following any further development it deems necessary.

The decision of the Office of Workers' Compensation Programs dated November 7, 1997 is affirmed.

Dated, Washington, D.C.  
March 20, 2000

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member