U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD E. KASSNER and DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Jacksonville, FL

Docket No. 00-88; Submitted on the Record;
Issued November 1, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he is entitled to a schedule award for permanent impairment of the cervical vertebrae; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's June 1, 1999 request for reconsideration as insufficient to warrant a merit review of the claim.

The Office accepted that on April 30, 1997, appellant, then a 52-year-old sheet metal mechanic, lifted a 25-pound aircraft panel and sustained a cervical strain and herniated nucleus pulposus at C5-6 requiring anterior cervical diskectomy and fusion on April 13, 1998.[1] Appellant submitted periodic treatment reports beginning in July 1997 from Dr. John S. Boggs, an attending Board-certified neurosurgeon, who recommended surgery after conservative measures and physical therapy proved ineffective in alleviating appellant's symptoms.[2]

Following the April 13, 1998 surgery, appellant returned to light-duty work on May 4, 1998, with permanent restrictions from Dr. Boggs against lifting more than 20 pounds, climbing, bending, stooping, pulling or pushing. On January 20, 1999 appellant accepted a permanent light-duty position as a tool parts attendant.[3] Appellant claimed a schedule award on January 27, 1999.

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[1] The record indicates that appellant had a prior disc fusion at C6-7. Appellant was assigned to light-duty work following the April 30, 1997 injury.

[2] In a December 17, 1997 report, Dr. Boggs diagnosed a ruptured cervical disc at C5-6 and recommended anterior diskectomy and fusion at C5-6. In a March 17, 1998 report, an Office medical adviser authorized Dr. Boggs to perform this procedure.

[3] The record indicates that as appellant's previous position as a sheet metal mechanic was at WG-10 and the tool parts attendant position was at WG-6, appellant received retained pay.

In a January 22, 1999 report, Dr. Boggs opined that appellant had reached maximum medical improvement. He related that appellant had limited neck movement "in all directions," with discomfort affecting activities of daily living. Dr. Boggs noted that appellant had been performing light duty and stated that appellant's "present job limitations will be permanent." He found a 15 percent "permanent disability of the body as a whole" based on the "two ruptured cervical discs with secondary surgery" and "significant ankylosis with fixed limitation of his neck."[4]

In a February 10, 1999 letter, the Office requested that Dr. Boggs provide a report, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed.) detailing any impairment of appellant's upper extremities due to the accepted cervical condition. The Office noted that there was no schedule "award payable for the cervical area."

In a March 10, 1999 report, Dr. Boggs found an absent right biceps jerk reflex, a "slight weakness of the right deltoid, being 4/5 compared to 5/5 for the left," and no sensory loss attributable to the accepted April 30, 1997 neck injury.

In an April 20, 1999 report, an Office medical adviser reviewed Dr. Boggs' March 10, 1999 report, finding slight weakness of the right deltoid. Noting that the deltoid is enervated by the axillary nerve, the medical adviser found that according to Table 16, page 57 of the A.M.A., *Guides*[5], a "mild" impairment of the axillary nerve equaled a 10 percent impairment of the upper extremity.[6] Consulting Table 12, page 49 of the A.M.A., *Guides*,[7] the adviser assigned a grade of 4 out of 5, connoting "[a]ctive movement against gravity with some resistance," equaling a 25 percent motor deficit. The adviser then followed the motor deficit calculation instructions on page 49 of the A.M.A., *Guides*, multiplying the 25 percent motor impairment times the 10 percent impairment of the right upper extremity due to axillary nerve entrapment, to arrive at a 2 percent impairment of the right upper extremity. The medical adviser agreed that appellant had reached maximum medical improvement as of March 10, 1999.

[4] In a January 22, 1999 work restriction report, Dr. Boggs noted permanent restrictions against lifting more than 20 pounds, climbing, kneeling, bending, stooping, twisting, pulling/pushing and reaching above the shoulder.

[5] Table 16, page 57 is entitled "Upper Extremity Impairment Due to Entrapment Neuropathy."

[6] The Office medical adviser noted incorrectly in the first part of his April 20, 1999 report that a mild impairment of the axillary nerve constituted a "5" percent impairment of the upper extremity according to Table 16, page 57. However, Table 16 states that a mild impairment of the axillary nerve constitutes a 10 percent impairment of the upper extremity, not five percent. The Office medical adviser corrected this error in the second part of his calculation, where he correctly multiplied the 25 percent motor impairment by 10 percent.

[7] Table 12, page 49 is entitled "Determining Impairment of the Upper Extremity Due to Loss of Power and Motor Deficits Resulting from Peripheral Nerve Disorders based on Individual Muscle Rating."

By decision dated May 7, 1999, the Office awarded appellant a schedule award for a two percent permanent impairment of the right upper extremity.[8]

Appellant disagreed with this decision, and in a June 1, 1999 letter requested reconsideration. Appellant did not assert that the schedule award was calculated incorrectly. Rather, he argued that he was entitled to an additional schedule due to impairment of the cervical vertebrae, as the "neck" was not specifically excluded under the schedule award provisions of the Federal Employees' Compensation Act

By decision dated June 10, 1999, the Office denied appellant's request for reconsideration on the grounds that he submitted no new or relevant evidence. The Office noted that appellant's erroneous opinion that the neck was not specifically excluded under the compensation schedule at 5 U.S.C. § 8107 was insufficient to "establish an argument for error in fact or law."

The Board finds that appellant is not entitled to a schedule award for permanent impairment of the cervical vertebrae.

The schedule award provisions of the Act and its implementing regulations[9] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule.[10] However, the Act does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter, which rests in the sound discretion of the Office.[11] The Board has held, however, that for consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitate the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition, (1993), as an appropriate standard for evaluating schedule losses and to ensure equal justice for all claimants.[12] The Board has concurred with the adoption of these *Guides*.

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.[13] All factors that prevent a limb from functioning normally should

[8] The schedule award was equivalent to 6.24 weeks of compensation, based on a $705.17 weekly pay rate at the 66 2/3 percent compensation rate. The award was paid by a single check in the amount of $2,933.49, for the period March 10 to April 22, 1999.

[9] 20 C.F.R. § 10.404.

[10] 5 U.S.C. §§ 8107-8109.

[11] *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[12] FECA Bulletin No. 89-30 (issued September 28, 1990).

[13] *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited

be considered, such as pain and weakness, together with loss of motion, in evaluating the degree of permanent impairment.

In his April 20, 1999 report, the Office medical adviser noted that appellant had a mild weakness of the right deltoid muscle attributable to the April 30, 1997 neck injury, with no loss of sensation. The adviser opined that appellant had a two percent impairment of the right upper extremity due to weakness, in accordance with the A.M.A., *Guides*. Appellant has presented no medical evidence or test results to establish that his right upper extremity impairment is any greater than two percent and he has presented no evidence of impairment of any other scheduled member.

The schedule award provisions of the Act[14] and the implementing regulations[15] provide for payment of schedule awards for the permanent loss, or loss of use, of only those members, functions or organs of the body specifically enumerated in the Act.[16] A schedule award is not payable for the loss, or loss of use, of a part of the body not specifically enumerated in the Act or its regulations.[17] However, the Act does provide for an award for impairment to a scheduled member of the body regardless of whether the cause of the disability originated in a scheduled or nonscheduled member. For this reason, a claimant may be entitled to a schedule award for impairment to an upper extremity where the cause of the impairment originates in the spine, as in this case.[18] Nevertheless, the cervical vertebrae, which are part of the spine, are not included as a scheduled member or organ in the Act. Further, the back, which includes the cervical, lumbar and sacral vertebrae, is specifically excluded from the schedule of organs at section 8107 of the Act.[19]

Thus, appellant has not established that he is entitled to a schedule award for permanent impairment of the cervical vertebrae.

The Board also finds that the Office properly denied appellant's June 1, 1999 request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] the Office's regulations provides that a claimant may obtain review of the merits of the

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therein.

[14] 5 U.S.C. §§ 8101-8193.

[15] 20 C.F.R. § 10.403-404.

[16] *Thomas E. Stubbs*, 40 ECAB 647 (1989).

[17] *Ted W. Dietderich*, 40 ECAB 963 (1989).

[18] *John Litwinka*, 41 ECAB 956 (1990).

[19] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[20] 5 U.S.C. § 8128(a) (providing that "[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)."

claim by; (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[21] Section 10.608(b) states that any timely application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without reopening the case for a review on the merits.[22]

In this case, appellant submitted no evidence in support of his request other than his June 1, 1999 letter setting forth his erroneous interpretation of the Act's schedule award provisions. Thus, the Office correctly denied appellant's request for reconsideration on the grounds that it failed to demonstrate legal or factual error by the Office, or present new and relevant evidence.

The decisions of the Office of Workers' Compensation Programs dated June 10 and May 7, 1999 are hereby affirmed.

Dated, Washington, DC
November 1, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[21] 20 C.F.R. § 10.606(b)(2).

[22] 20 C.F.R. § 10.608(b).