U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YOLANDA L. BULNES and U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA

Docket No. 99-1235; Submitted on the Record;
Issued November 21, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she has a greater than four percent permanent impairment of each foot, for which she has received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on February 23, 1999; and (3) whether appellant has established that she has a greater than 10 percent permanent impairment of each upper extremity, for which she has received a schedule award

On July, 1993 appellant, then a 30-year-old letter carrier, filed an occupational disease claim alleging that the pain in her right shoulder, right wrist and left wrist was due to her federal employment.[1] The Office accepted the claim for right shoulder strain/impingement, right forearm overuse strain and authorized right acromioplasty surgery.[2]

On May 17, 1994 appellant, filed a claim alleging that her heel pain was due to factors of her employment.[3] The Office accepted the claim for bilateral heel calluses and bilateral plantar fasciitis.

[1] This was assigned claim number 13-1021018.

[2] The Office noted on the nonfatal summary sheet for claim number 13-1021018 that the Office had accepted the condition of right shoulder bursitis in claim number 13-98500, and heel spur and plantar fasciitis in claim number 13-1047842.

[3] This was assigned claim number 13-1047842. Appellant had filed a prior claim was accepted for right shoulder strain and left wrist pain and assigned claim number A13-1021018.

Appellant filed a recurrence claim on May 30, 1995.[4] On July 5, 1995 the Office accepted appellant's claim for right shoulder impingement, right shoulder strain and right shoulder acromioplasty surgery.

In a report dated December 10, 1997, Dr. Gerald P. Keane, an attending physician Board-certified in physical medicine and rehabilitation, diagnosed bilateral carpal tunnel syndrome with flexor forearm tendinitis, status post right shoulder arthroscopy with residual tendinitis, bilateral plantar fasciitis and early left shoulder tendinitis. Dr. Keane stated that he did "not really see much else to offer her in terms of treatment."

In a letter dated April 21, 1998, the Office requested Dr. Keane to complete the enclosed form so that a determination could be made on appellant's claim for an award for permanent impairment of her upper extremities due to her accepted carpal tunnel syndrome and bilateral shoulder tendinitis.

In a report dated April 8, 1998, Dr. Keane opined that appellant had reached maximum medical improvement on December 10, 1997. Based upon a physical examination, he reported that appellant had a "full range of motion with pain bilaterally with end range rotation and extension" and that appellant was "tender over the flexor tendons on the right side at the wrist greater than the left and over the supraspinatus and biceps tendons on the right." Dr. Keane indicated that appellant had a negative Tinel's sign. He noted that appellant's wrist pain was localized and that there was "some mild slowing of the median nerve bilaterally through the carpal tunnels which is similarly associated" which "resulted in some slight intermittent sensory alteration involving the median distribution of the hands." Next, Dr. Keane noted that there was "no evidence of ankylosis of any of the wrist joint motions," no muscle atrophy and no instability or causalgia. As to appellant's range of motion of the wrist, he reported that it was within normal range.

In a report dated May 7, 1998, Dr. Lawrence Oloff, appellant's attending podiatrist, noted appellant's condition was permanent and stationary as of May 7, 1998 and noted her factors of disability as:

> "Subjective factors of disability are pain in her heels with any walking activities. She has post static dyskinesia pain. Her pain is described as constant whenever she is walking or standing for greater than 10 minutes. Her handicap seems to be described as a slight pain that can be tolerated but causes handicap in the performance of her job which does involve standing and walking.
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> "Objective factors of disability are pain with palpation of the fascial band where it attaches to her heel and for a short distance along her medial longitudinal arch. It seems to involve primarily the medical fascial band.

[4] The Office advised appellant that her claim for a recurrence of disability in claim number 13-1021018 was converted into an new occupational disease claim which was assigned claim number 13-1083018.

"She has no evidence of nerve entrapment pathology. She has no evidence of chronic stress injury to her heel. She has no pain with compression of her heel."

In a July 31, 1998 report, the Office medical adviser reviewed Dr. Keane's April 28, 1998 report and determined that appellant had a 10 percent impairment of each upper extremity due to mild entrapment of the median nerve based upon Table 16, page 57. The Office medical adviser found that appellant's date of maximum medical improvement was December 10, 1997.

On August 13, 1998 the Office granted appellant a schedule award of 10 percent impairment of each arm. The Office determined her period of compensation would be from April 29, 1998 to July 9, 1999.

By letter dated September 18, 1998, the Office requested Dr. Oloff to provide an impairment rating for both of appellant's feet using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). In a faxed message dated September 29, 1998, Dr. Oloff advised the Office that he was not familiar with the A.M.A., *Guides* and that appellant should be referred to another physician for rating purposes.

On October 1, 1998 the Office referred appellant, together with a statement of accepted facts and medical records, to Dr. Richard Stone, a second-opinion Board-certified podiatric surgeon.

In a report dated November 1, 1998,[5] Dr. Stone, based upon a physical examination, statement of accepted facts, medical and employment injury history and review of the medical records, noted no sensory loss or alteration in sensation as well as no limitations in the motions of her toes or feet. He stated that appellant indicated that she was "not able to stand or walk for prolonged periods because of pain." As to a rating, Dr. Stone provided no rating pursuant to the A.M.A., *Guides* for appellant's permanent impairment in both her feet.

Following receipt of Dr. Stone's report, the Office referred appellant's case record to the Office medical adviser for an opinion regarding the extent of appellant's permanent impairment in accordance with the A.M.A., *Guides*. In a December 29, 1998 report, the Office medical adviser reviewed Dr. Stone's report and the record, calculated appellant's impairments in each foot, and then concluded that appellant had a four percent permanent impairment of each foot. In reaching this conclusion, the Office medical adviser determined that appellant had a grade 2 or 25 percent impairment due sensory deficit or pain by using Table 11 on page 48[6] and a 14 percent impairment of her medial and lateral plantar nerves using Table 68 on page 89. The Office medical adviser then multiplied these two calculations to arrive at a total impairment of four percent (rounded up) in each foot.

[5] Dr. Stone also provided a work capacity evaluation (Form OWCP-5c) dated November 15, 1998 which reiterated the range of motion measurements he had noted in his November 1, 1998 report.

[6] Although the Office medical adviser used Table 11 on page 48 of the A.M.A., *Guides* instead of Table 20 on page 151 to determine appellant's impairment rating, this was harmless error since the two Tables are the same in content.

On January 12, 1999 the Office granted appellant a schedule award of four percent impairment for her left foot and four percent impairment for her right foot. The Office found that appellant's condition became permanent and stationary on November 1, 1998[7] and that her period of compensation would be from November 1, 1998 to January 2, 1999.

In an undated letter received by the Office on February 17, 1999, appellant requested reconsideration of her schedule award determination regarding her feet. Appellant submitted treatment notes dated November 10, 1998, from Dr. Keane which diagnosed left shoulder tendinitis, history of bilateral carpal tunnel syndrome and "status post right shoulder arthroscopy with chronic residual tendinitis."

In another undated letter received by the Office on February 17, 1999, appellant requested reconsideration of the schedule award issued for her upper extremities.

On February 23, 1999 the Office denied appellant's request for a merit review on the basis that the evidence submitted was insufficient and her arguments were immaterial or irrelevant in nature regarding whether she was entitled to more than a four percent impairment in each foot.

In a second decision dated February 23, 1999, the Office denied appellant's request for a merit review on the basis that the evidence submitted was insufficient and her arguments were immaterial or irrelevant in nature regarding the issue of her schedule award for her upper extremities. The Office found that Dr. Keane's November 10, 1998 report was insufficient as a left shoulder condition was not an accepted condition and Dr. Keane's report did not support a finding that she was entitled to a greater than 10 percent award for each upper extremity.[8]

The Board finds that appellant has no more than a four percent impairment in each foot, for which she received a schedule award.

[7] The Board notes that Dr. Oloff, appellant's attending physician, had indicated in his report that appellant's condition had become permanent and stationary as of May 7, 1998 and the date the Office is using appears to be the date of Dr. Stone's report.

[8] Appellant filed her appeal with the Board on February 25, 1999. Subsequently, on April 10, 1999, appellant requested reconsideration before the Office of the Office's February 23, 1999 decision and submitted additional medical evidence in support of her request. In a decision dated May 21, 1999, the Office found the additional evidence insufficient to support modification of the prior decision. The Office's May 21, 1999 decision is null and void as both the Board and the Office cannot have jurisdiction over the same issue in the same case. 20 C.F.R. § 501.2(c); *Douglas E. Billings*, 41 ECAB 880 (1990). The Board further notes that the additional evidence submitted by appellant after the Office's February 23, 1999 decision, the last decision issued by the Office prior to appellant's appeal to the Board, represents new evidence which cannot be considered by the Board. In addition, the Board notes that appellant submitted additional evidence subsequent to the May 21, 1999 Office decision, which the Board has found to be null and void. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of the final decision before the Board. 20 C.F.R. § 501.2(c).

Under section 8107 of the Federal Employees' Compensation Act[9] and section 10.304 of the implementing federal regulations,[10] 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 A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[11]

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment."[12] This 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 restrictions and limitations.[13]

The Office medical adviser reviewed Dr. Stone's November 1, 1998 report and reviewed the record. The Office medical adviser then properly applied the grading scheme and procedure found in the A.M.A., *Guides* for determining the impairment of an affected body part due to pain, discomfort, or loss of sensation. She identified the innervating nerves as the medial and plantar nerves. The Office medical adviser then noted that the maximum impairment of appellant's feet allowable for peripheral nerve deficits was 14 percent for each foot, using Table 68 on page 89. Next, the Office medical adviser concluded that appellant had a Grade 2 impairment rating based on sensory deficit or pain, for a maximum impairment of 25 percent of each foot and that 14 percent multiplied by 25 percent equaled 4 percent (rounded off) impairment of each foot.

As the record contains no other probative evidence demonstrating that appellant had a permanent impairment of each foot greater than four percent, the Office medical adviser's reports are the only evaluations of record of appellant's impairments that conform with the A.M.A., *Guides*, and the Board finds that they constitute the weight of the medical evidence in the case record and establish that appellant has no more than a four percent impairment of each foot.[14]

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[9] 5 U.S.C. §§ 8101-8193.

[10] 20 C.F.R. § 10.304.

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

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (March 1995); *see John H. Smith*, 41 ECAB 444, 448 (1990).

[13] *Alvin C. Lewis*, 36 ECAB 595, 596 (1985).

[14] *See Thomas P. Gauthier*, 34 ECAB 1060 (1983).

The Board also finds that appellant has no more than a 10 percent permanent impairment of each upper extremity, for which she has received a schedule award.

The Office, in this case, based its assessment of the impairment of appellant's upper extremities on the Office medical adviser's July 31, 1998 medical report. In this report, the Office medical adviser, based on the report of Dr. Keane dated April 28, 1998 and the A.M.A., *Guides*, stated that appellant had reached maximum medical improvement on December 10, 1997. Regarding the upper extremities, the Office medical adviser stated that based on Table 16, page 57 of the fourth edition of the A.M.A., *Guides*, the median nerve entrapment at the wrist was mild and that appellant had a 10 percent impairment of the each upper extremity. The Board has reviewed the Office medical adviser's calculations of the upper extremities and finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had no more than a 10 percent impairment of the right upper extremity and the left upper extremity for which she has received a schedule award.

As the record contains no other probative evidence demonstrating that appellant had a permanent impairment of each upper extremity greater than 10 percent, the Office medical adviser's reports are the only evaluations of record of appellant's impairments that conform with the A.M.A., *Guides*, and the Board finds that they constitute the weight of the medical evidence in the case record and establish that appellant has no more than a 10 percent impairment of each upper extremity.[15]

Lastly, the Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on February 23, 1999.

Under section 8128(a) of the Act,[16] 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 10.606(b)(2) of the implementing federal regulations,[17] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the OWCP."

[15] *Id.*

[16] 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[18]

In support of her requests for reconsideration received by the Office on February 17, 1999, appellant did not submit any relevant and pertinent evidence not previously considered by the Office and did not argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a point of law or a fact not previously considered by the Office. The Office, therefore, properly refused to reopen appellant's claim for a merit review.

The decisions of the Office of Workers' Compensation Programs dated February 23 and January 12, 1999 and August 13, 1998 are affirmed.

Dated, Washington, DC
November 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[18] 20 C.F.R. § 10.608(b).