

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY F. SCHAECHER and U.S. POSTAL SERVICE,
POST OFFICE, Grand Island, NE

*Docket No. 00-2038; Submitted on the Record;
Issued August 22, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained more than a three percent permanent impairment of the left and right lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On October 27, 1989 appellant, then a 48-year-old data collection technician, injured his right lower back while lifting a sack of mail. The Office accepted the claim for lumbar strain and aggravation of degenerative disc disease.

On July 7, 1999 appellant filed a claim (Form CA-7) for a schedule award. On the claim form appellant indicated that his base pay was \$30,941.00 per year and that he received an additional 10 percent of his hourly wage for night pay.

On October 18, 1999 the Office issued a scheduled award for three percent permanent impairment of the right lower extremity and for three percent permanent impairment of the left lower extremity. The notice award stated that appellant's weekly pay rate was \$727.56, and that his weekly compensation rate would be \$545.67 without cost-of-living adjustments. The notice further stated that the period of the award covered from June 30 to October 28, 1999.

In an undated letter received by the Office on November 9, 1999, appellant disagreed with the award of compensation and requested reconsideration. By decision dated February 7, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant merit review in the case.

The Board finds that appellant has failed to establish that he sustained more than a three percent permanent impairment of both the left and right lower extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulations² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In a September 27, 1999 report, Dr. David Diamant, a Board-certified physician specializing in physical medicine and rehabilitation, evaluated appellant for a permanent impairment rating related to the accepted aggravated degenerative disc disease. Dr. Diamant concluded that appellant most appropriately qualified for section 3.2k of the A.M.A., *Guides* for peripheral nerve injuries and that his symptoms corresponded most closely to the sciatic nerve distribution. He found that appellant's impairment was secondary to pain not paresthesias or loss of strength. Dr. Diamant stated:

“According to Table 68, dysesthesias in the sciatic nerve distribution can yield a maximum of 12 percent lower extremity impairments. According to the principles of section 3.1k and Table 11, [appellant] would qualify most appropriately for grade 3 classification. He has pain that does interfere with activity. As a result, he derives 60 percent sensory deficit. 60 percent multiplied by 12 percent yields 7.2 percent. Rounded to the nearest whole number, such equates to seven percent lower extremity impairment. In summary, [appellant] derives seven percent right lower extremity permanent impairment and seven percent left lower extremity permanent impairment”

An Office medical adviser reviewed the findings outlined in Dr. Diamant's report and calculated appellant's impairment utilizing the A.M.A., *Guides*. The Office medical adviser stated that lower extremity impairment ratings were determined by evaluating residuals of pain and sensory deficit or weakness affecting one or both lower extremities. He stated that Dr. Diamant found no weakness in either lower extremity but that he offered a grade from Table 11 of 60 percent for sensory deficit and pain for both extremities. The Office medical adviser stated that Dr. Diamant incorrectly cited the sciatic nerve from Table 68 and should have used Table 83 on page 130, which provides a maximum impairment of 5 percent. He then stated that, since appellant described sensory complaint best fit the L4 level, the calculation of the lower extremity impairment rating could be done by using that nerve root level. The Office medical adviser therefore concluded that utilizing Table 11b 4 and 5, 60 percent by 5 percent equaled a 3 percent permanent impairment for each lower extremity.

The Office medical adviser properly used the A.M.A., *Guides* to conclude that appellant had a three percent permanent impairment for the left and right lower extremity. When the treating physician does not properly use the A.M.A., *Guides* in determining permanent

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

impairment, it is appropriate for the Office medical adviser to apply the A.M.A., *Guides* to the findings presented by the treating physician. The Office medical adviser pointed out that Dr. Diamant should have used Table 83 on page 130; therefore, his ratings had to be corrected which could be done using the grade for pain and sensory offered by Dr. Diamant in conjunction with Table 83. As the Office medical adviser's report is the only evaluation that conforms to the A.M.A., *Guides*, it constitutes the weight of the medical evidence.³

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal with the Board.⁴ As appellant filed his appeal with the Board on May 30, 2000, the only decision before the Board is the Office's February 7, 2000 nonmerit decision denying appellant's application for review. The Board has no jurisdiction to review the most recent merit decision of record, the May 15, 1999 decision of the Office terminating appellant's compensation benefits on the grounds that his position with the employing establishment fairly and reasonably represented his wage-earning capacity.

Under section 8128(a) of the Act,⁵ 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,⁶ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 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.⁷

On reconsideration, appellant disagreed with the impairment rating and submitted a copy of a medical report, dated September 27, 1999, from Dr. Diamant, an attending physician who concluded that appellant had an impairment of seven percent for the left lower extremity and seven percent for the right lower extremity. This report is already of record and had been previously considered by the Office before rendering its decision. Consequently, this evidence is not sufficient to warrant reopening the record for merit review.

³ *Lena P. Huntley*, 46 ECAB 643 (1995).

⁴ *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501(3)(d)(2).

⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(1)-(2).

⁷ 20 C.F.R. § 10.608(b).

In further support of his request for reconsideration, appellant submitted a copy of the October 18, 1999 award of compensation letter. He argued that his schedule award was improperly computed. The Board notes that appellant received 75 percent of his weekly pay rate or \$545.67 in weekly compensation during the period of his award from June 30 to October 28, 1999 and that he was entitled to 120.96 days or 17.28 weeks of compensation. Appellant did not submit any evidence to support his belief that the Office erred in computing his schedule award and therefore his argument is insufficient to warrant review of the case.

Appellant also submitted letters from the employing establishment dated December 29, 1997 and March 17, 1998 pertaining to administrative matters, which provided no information regarding an impairment rating in accordance with the A.M.A., *Guides* or the computation of award. Therefore, appellant has not provided any evidence that would warrant reopening the record.

Appellant has not established that the Office erroneously applied or interpreted a specific 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. Therefore, he has not established that the Office abused its discretion in denying his request for review under section 8128 of the Act.⁸

The decisions of the Office of Workers' Compensation Programs dated February 7, 2000 and October 18, 1999 are affirmed.

Dated, Washington, DC
August 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁸ With appellant's request for an appeal, appellant's counsel submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).