

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE L. MANNING and U.S. POSTAL SERVICE,
POST OFFICE, Springfield, MO

*Docket No. 00-2624; Submitted on the Record;
Issued July 24, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a four percent permanent impairment of the right upper extremity, for which she received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 11, 1996 appellant, then a 36-year-old MPLSM clerk filed a notice of occupational disease claim alleging that she developed a right wrist and elbow condition due to the repetitive keying motion required in her position. The Office accepted the claim for right carpal tunnel syndrome with release and right epicondylitis.¹

The Office referred appellant, along with a statement of accepted facts and case record to Dr. Kevin Komes, a Board-certified orthopedic surgeon, for an impairment rating of the right upper extremity with reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). In a September 10, 1999 report, Dr. Komes reviewed the statement of accepted facts and appellant's history of treatment for right upper extremity dysfunction and discussed his findings on examination. He found that manual muscle testing showed 5/5 strength in shoulder flexors, elbow flexors and extensors and wrist flexors and extensors. Appellant's grip strength tested with a dynamometer averaged 40 pounds on the right on settings one through five and on the left there was a bell shaped curve with a maximum strength of 70 pounds on the second setting. Dr. Komes further found no deficits to pinpricks. He stated that appellant's range of motion of the right wrist showed 60 degrees of flexion and 60 degrees of extension, which according to figure 26, page 36 equaled 0 percent impairment. Dr. Komes noted that 25 degrees of radial deviation and 20 degrees of ulnar deviation, according

¹ The Office initially denied appellant's claim in a decision dated August 14, 1996, which was affirmed by a hearing representative in a decision dated March 21, 1997. The Office later rescinded the prior decision in a decision dated November 4, 1997 and accepted the claim.

to Figure 29, page 38 equaled 0 percent and 1 percent impairment respectively. He found that, in assessing appellant's right wrist pain, according to Table 11, page 48 appellant sustained a two percent impairment. In assessing appellant's weakness in her right wrist, he found that active movement against gravity with full resistance according to Table 5, page 54 yielded 0 percent impairment.

Dr. Komes examined appellant's elbows and found that the right elbow showed full extension to 0 degrees and 150 degrees of flexion. He further found that, with regard to range of motion in the right elbow, appellant had 90 elbow probation and 90 degree elbow supination, which according to Figure 35, page 41 equaled a 0 percent impairment.² Dr. Komes found that appellant experienced some pain in the elbows and according to Table 29, page 151 that she had a one percent impairment. With regard to elbow weakness, he found that, according to Table 13 and 21, page 151 involving movement against resistance and motor deficit, appellant had zero percent impairment. Dr. Komes concluded that combining one percent due to abnormal wrist motion, two percent due to wrist pain and one percent due to elbow pain yielded a combined value of four percent impairment of the right upper extremity. He noted that appellant's date of maximum medical improvement was March 1, 1999.

In a report dated November 8, 1999, Dr. David Zimmerman, the district medical Director advised that he had reviewed Dr. Komes' report and his application of the A.M.A., *Guides* in assessing impairment. He determined that the range of motion restriction at the wrist level as indicated by Dr. Komes did cause a one percent impairment and that the rating of two percent for wrist pain was correct as offered. Dr. Zimmerman noted, however, that the rating at the elbow level for elbow pain or decreased sensitivity was not correctly calculated, in that, using the A.M.A., *Guides*, a cervical nerve root could not be used to consider an entrapment like neuropathy at the elbow level. He then stated that, according to Figure 45, page 3/50, the nerve that is most involved in a lateral epicondylitis would be the medial antebrachial cutaneous. Dr. Zimmerman indicated that, according to Table 15, page 3/54, the maximum percentage of impairment due to sensory deficit or pain in the distribution of that nerve was five percent using Table 11b, 4 and 5 on page 3/48. He noted that 15 percent by 5 percent equaled .75, which rounded off to 1 percent. Dr. Zimmerman further stated that Dr. Komes was incorrect in calculating the rating suggested for right wrist weakness. He noted that a grade of 0 percent for weakness could not be multiplied by 10 percent as he had done in his evaluation to obtain one percent and noted, therefore, that the rating was actually 0 percent at the wrist level. Dr. Zimmerman then concluded that appellant had three percent for residuals of a right-sided carpal tunnel syndrome and one percent impairment for residuals of her right-sided epicondylitis. Using the Combined Value Chart on page 322 to 324, Dr. Zimmerman determined that appellant had a rating of four percent of the right upper extremity. He then stated that, pursuant to FECA Bulletin 96-17, the modifications made to Dr. Komes' report were required of the district medical Director and that this rating as explained conformed to the parameters of assessment in the A.M.A., *Guides* and the assessment parameters in FECA Bulletin 95-17.

² This information was derived from an addendum report dated October 27, 1999, which noted that a typographical error was made under the second range of motion of the elbow in the September 10, 1999 report.

By decision dated November 15, 1999, the Office issued a schedule award based on a four percent impairment of the right upper extremity, for the period March 1 to May 27, 1999.

In a letter dated February 8, 2000, appellant disagreed with the degree of impairment awarded and requested reconsideration. In support, appellant submitted two decisions issued by Office hearing representatives in cases unrelated to her case. She also submitted a medical report from Dr. David Paff, attending physician, dated December 17, 1999, in which he reviewed appellant's employment history, symptoms related to the accepted condition and his findings on examination. He stated that appellant had borderline left grip strength and that her dominant right hand was definitely decreased on settings one through five. Dr. Paff noted that appellant had normal sensation to pinprick and full range of motion of her elbow and shoulder. He then opined that, based on a reasonable degree of medical certainty, as a result of the carpal tunnel syndrome, that appellant had a 15 percent permanent impairment to her right upper extremity according to Table 16, page 3/57 of the A.M.A., *Guides*.

By decision dated May 8, 2000, the Office denied modification of the November 15, 1999 decision. The Office found that the two Office decisions submitted in support of her claim were irrelevant as they involved other employees and did not relate to her particular case. The Office further found that the December 17, 1999 report submitted by Dr. Paff did not explain how he arrived at the percentage of impairment, nor did he discuss how he applied Table 16 to arrive at his conclusion. Therefore, the Office determined that his report was not sufficient to overcome the detailed report provided by Dr. Komes and the district medical Director's application of the A.M.A., *Guides*.

On June 1, 2000 appellant requested reconsideration of the May 8, 2000 decision and submitted additional evidence. By decision dated July 25, 2000, the Office denied appellant's request for a merit review on the grounds that appellant failed to submit any new and relevant evidence to warrant a merit review of the prior decision.

The Board finds that appellant has failed to establish that she has more than a four percent permanent impairment of the right upper extremity, for which she received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

The Office in this case based its schedule award on a November 8, 1999 evaluation, in which the district medical Director reviewed the September 10, 1999 findings of Dr. Komes, according to the A.M.A., *Guides* and determined that appellant had a four percent permanent impairment of her right upper extremity. The district medical Director reported that, while the referral physician was incorrect in the rating suggested for wrist weakness and elbow pain, the remaining impairment ratings provided by Dr. Komes were calculated in accordance with the A.M.A., *Guides* (4th ed. 1993). The district medical Director reevaluated appellant's impairment for wrist weakness and elbow pain and reviewed the calculations of Dr. Komes in the remaining areas of her right upper extremity. He determined that appellant had a four percent permanent impairment of the right upper extremity by adding together the impairment findings of Dr. Komes and utilizing his own calculations and applying them to the Combined Values Chart. The Board has held that, when an attending physician's report gives an estimate of permanent impairment which is not based on a proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser if he or she has properly used the A.M.A., *Guides*.⁵

The report of the Dr. Zimmerman, the district medical Director, correctly assessed appellant's impairment of the right upper extremity, utilizing the report of Dr. Komes and applying the derived measurements to the appropriate tables and figures of the A.M.A., *Guides*. As such, the medical evidence of record at the time of the November 15, 1999 and May 8, 2000 decisions, established that appellant has no more than a four percent permanent impairment of the right upper extremity for which she received a schedule award.

The Board further finds that the Office in its July 25, 2000 decision, abused its discretion in denying appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.⁶

Under section 8128(a) of the Act,⁷ 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,⁸ which provides that a

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

⁶ *See* 20 C.F.R. § 10.606(b)(2)(i-iii).

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b) (1999).

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 OWCP erroneously applied or interpreted a specific point of law;
or

“(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.⁹

In the present case, the Office denied appellant’s claim on July 25, 2000 without conducting a merit review on the grounds that appellant failed to submit any new and relevant evidence to warrant a merit review of the prior decision. In support of her June 1, 2000 request for reconsideration of the May 8, 2000 decision, appellant submitted evidence already of record including: hearing representative decisions unrelated to her case letters by Dr. Zimmerman, the district medical Director dated August 16 and October 5, 1999; the impairment evaluation by Dr. Komes dated September 10, 1999 and the May 8, 2000 Office decision denying modification. These reports are duplicative of evidence previously considered by the Office and, therefore, do not warrant a merit review in this case. Appellant, however, did submit new evidence in support of her request, namely correspondence from Dr. Paff to appellant dated May 22, 2000, which outlined how he reached his conclusion in a previous report that appellant sustained a 15 percent permanent impairment of her right upper extremity. Because this is relevant and new evidence not previously considered by the Office, the Office abused its discretion in not conducting a merit review of the case.

On remand the Office should review the additional report of Dr. Paff. After such further development as is deemed necessary, the Office shall issue an appropriate decision.

⁹ 20 C.F.R. § 10.608(b).

The May 8, 2000 and November 15, 1999 decision of the Office of Workers' Compensation Programs are affirmed. The decision dated July 25, 2000 is set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
July 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member