U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY ROLON and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, El Centro, CA

Docket No. 00-2771; Submitted on the Record;
Issued July 10, 2001

DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 16 percent permanent impairment of the right lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office accepted that on July 30, 1997 appellant, then a 29-year-old border patrol agent, sustained a right knee sprain and meniscus tear in the performance of duty. On September 12, 1997 Dr. Paul C. Murphy, a Board-certified orthopedic surgeon and his attending physician, performed an arthroscopy with an anterior cruciate ligament reconstruction, a posterior horn medial and lateral meniscectomy and an abrasion of chondroplasty of the medial femoral condyle. On February 1, 1999 he performed a second arthroscopy of the right knee with a partial lateral meniscecomy and partial anterior cruciate ligament tear debridement and removal of hardware.

On October 22, 1999 appellant filed a claim for a schedule award.

By decision dated March 27, 2000, the Office granted appellant a schedule award for a 16 percent permanent impairment of the right lower extremity. The period of the award ran for 46.08 weeks from September 27, 1999 to August 15, 2000.

In a letter dated April 22, 2000, appellant requested reconsideration. The Office, in a June 6, 2000 decision, denied her request for reconsideration on the grounds that the evidence submitted was repetitious and immaterial and thus insufficient to warrant merit review of its prior decision.

The Board finds that appellant has no more than a 16 percent permanent impairment of the right lower extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing federal regulations,[2] 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 for 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.

By letter dated October 12, 1999, the Office requested that Dr. Murphy provide an opinion regarding the extent of any permanent impairment of appellant's right lower extremity in accordance with the A.M.A., *Guides*. The Office enclosed forms for Dr. Murphy to complete.

In a report dated September 27, 1999, Dr. Murphy listed range of motion findings and noted that appellant was status post anterior cruciate ligament reconstruction and status post repeat arthroscopy and hardware removal with a partial anterior cruciate ligament debridement. He noted that appellant had pain which was "intermittent and slight to moderate in nature" and listed findings of surgical incisions, tenderness, swelling and one-half inch of thigh atrophy of the right knee. Dr. Murphy concluded that appellant "has lost approximately 25 [percent] of his preinjury capacity for running, jumping, kneeling, squatting and very heavy lifting." In an accompanying form report, he indicated that appellant's condition was permanent and stationary. However, Dr. Murphy did not refer to the A.M.A., *Guides* in rendering his findings. The Office medical consultant, on the other hand, applied Dr. Murphy's clinical findings to the appropriate tables and pages of the A.M.A., *Guides*.

The Office medical consultant properly found that appellant had a 10 percent impairment of the right lower extremity due to his partial medial and lateral meniscecotomy[3] and a 7 percent impairment due to mild laxity of the anterior cruciate ligament.[4] The Office medical consultant noted that appellant reached maximum medical improvement on September 27, 1999 and stated:

> "Although [appellant] has [one-half inch] right thigh atrophy, the impairment for this is taken into account by the impairment given to him for having undergone his partial medical and lateral meniscectomy and residual anterior cruciate ligament insufficiency."

The Office medical adviser combined the 10 percent impairment due to the partial medial and lateral meniscectomy and the 7 percent impairment for anterior cruciate ligament

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] A.M.A., *Guides* at 85, Table 64.

[4] *Id*.

insufficiency using the Combined Values Chart and concluded that appellant had a 16 percent impairment of the right lower extremity.[5]

Accordingly, the Board finds that the opinion of the Office medical adviser constitutes the weight of the medical evidence of record establishes that appellant has no more than a 16 percent impairment of the right lower extremity for which he received a schedule award.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration under section 8128.

Section 10.606 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[6] Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[7]

Appellant alleged that the Office erred in determining that the period of the award ran from September 27, 1999 to August 15, 2000. She argued that he should be paid according to the number of weeks which he was under medical care. However, the Office properly began the award on the date of maximum medical improvement as found by Dr. Murphy and the Office medical adviser. The award ran for 46.08 weeks, which the amount of time statutorily mandated under the Act for a 16 percent impairment of the right lower extremity.[8]

Appellant argued that the Office erred in failing to find that Dr. Murphy's opinion constituted the weight of the medical evidence. However, the Office properly referred appellant's claim to an Office medical consultant as Dr. Murphy's findings were not in accordance with the A.M.A., *Guides*. The Office previously considered the weight to be accorded Dr. Muphy's report and thus appellant's argument does not constitute a new and relevant legal argument. Additionally, lay persons are not competent to render a medical opinion; therefore, appellant's statement does not constitute relevant evidence not previously considered by the Office.[9]

Abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

[5] *Id*. at 84, 322.

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.608(b).

[8] *See* 5 U.S.C. § 8107.

[9] *See James A. Long*, 40 ECAB 538 (1989).

deductions from known facts.[10] Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.[11]

The decisions of the Office of Workers' Compensation Programs dated June 6 and March 27, 2000 are hereby affirmed.

Dated, Washington, DC
July 10, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[10] *Rebel L. Cantrell*, 44 ECAB 660 (1993).

[11] The Board notes that appellant submitted evidence subsequent to the Office's June 6, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).