U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA DOMINGUEZ and DEPARTMENT OF THE AIR FORCE, LACKLAND AIR FORCE BASE, TX

Docket No. 02-46; Submitted on the Record;
Issued April 24, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On April 26, 1999 appellant, then a 57-year-old medical records technician, filed a traumatic injury claim alleging that on that date as she was leaving the building by way of the outer stairwell, she fell on the last step and landed on her tailbone and right arm/elbow.

By letter dated June 10, 1999, the Office accepted appellant's claim for a contusion of the coccyx and a contusion of the right elbow.

On April 4, 2000 appellant filed a claim for a schedule award accompanied by *inter alia*, a February 22, 2000 report of Dr. Gregg S. Gurwitz, an orthopedic surgeon and appellant's treating physician, finding that she had a five percent permanent impairment of the whole body.

The Office requested that an Office medical adviser review a statement of accepted facts and appellant's medical records to determine the date of maximum medical improvement and whether appellant had any impairment of her lower extremities based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On December 15, 2000 the Office medical adviser reviewed Dr. Gurwitz's report and determined that appellant had a zero percent impairment of the lower extremities based on the fourth edition of the A.M.A., *Guides*.

By decision dated December 19, 2000, the Office found that appellant was not entitled to a schedule award for her employment-related injury based on the Office medical adviser's opinion. In a January 10, 2001 letter, appellant requested reconsideration of the Office's decision.

In an August 17, 2001 decision, the Office denied appellant's request for reconsideration, without a review of the merits, on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and thus, it was insufficient to warrant further review of the claim.

The Board finds that appellant is not entitled to a schedule award for her accepted employment injury.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulations,[2] 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*[3] as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

In this case, appellant's attending physician, Dr. Gurwitz, reported on February 22, 2000 that appellant had no back or leg pain. He stated that appellant only had pain in her tailbone. Dr. Gurwitz provided his findings on physical examination, which included a less tender tailbone, manual motor testing of 5/5 and full range of motion of the lumbar. Dr. Gurwitz stated that appellant had reached maximum medical improvement. He further stated that based on Table 94, Section IIIG of the A.M.A., *Guides* and residual coccydynia type symptoms, appellant had a five percent impairment of the whole body.

The Office medical adviser stated that appellant reached maximum medical improvement on February 22, 2000. The Office medical adviser noted Dr. Gurwitz's findings and determined that appellant had a zero percent impairment of the lower extremities while noting that the spine was not a scheduled member. The back, which includes the cervical, lumbar and sacral vertebrae, is specifically excluded from the schedule of organs at section 8107 of the Act.[5] Inasmuch as neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,[6] appellant is not entitled to such an award.[7]

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

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] A.M.A., *Guides* (4th ed. 1993).

[4] *Leisa D. Vassar*, 40 ECAB 1287 (1989).

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

[6] *See* 5 U.S.C. § 8107(c); *George E. Williams*, 44 ECAB 530, 533 (1993).

[7] *E.g., Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

impairment to a lower extremity where the cause of the impairment originates in the spine, as in this case.[8] The Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had a zero percent permanent impairment of the lower extremities. Further, Dr. Gurwitz did not provide an impairment rating for appellant's lower extremities. Consequently, appellant has not established entitlement to a schedule award.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[10] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[12]

In her request for reconsideration, appellant did not raise any new relevant legal argument or show that the Office erroneously applied or interpreted a specific point of law. Appellant also did not submit any relevant and pertinent new evidence with her request for reconsideration.[13] The Office, therefore, acted within its discretion in denying appellant's reconsideration request for a merit review.

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

[9] 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).

[10] 20 C.F.R. § 10.606(b)(1)-(2).

[11] *Id*. at § 10.607(a).

[12] 20 C.F.R. § 10.608(b).

[13] The Board notes that appellant stated that she submitted Dr. Gurwitz's February 22, 2000 report in support of her request for reconsideration. However, it does not appear that this report accompanied appellant's reconsideration request. Even if Dr. Gurwitz's report had accompanied appellant's request it would be deemed duplicative of evidence already considered by the Office and, therefore, would not warrant a merit review in this case. *James A. England*, 47 ECAB 115 (1995).

The August 17, 2001 and December 19, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 24, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member