U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LESTER C. WADE and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Homer, LA

*Docket No. 02-663; Submitted on the Record;*
*Issued August 23, 2002*

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DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained a ratable permanent impairment to a scheduled member or function of the body causally related to his employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

This is appellant's second appeal before the Board. In the prior appeal, the Board issued a decision on July 6, 1999, in which it found that appellant sustained an injury and remanded the case for the Office to determine whether the September 2, 1995 employment injury resulted in any continuing disability or any periods of disability.[1] The facts and circumstances of the case are set out in the Board's prior decision and are hereby incorporated by reference.

On remand, the Office accepted appellant's claim for herniated nucleus pulposus L5-S1.[2] By decision dated February 10, 2000, the Office found the medical evidence of record failed to support that appellant was totally disabled from September 2, 1995 and continuing due to his accepted employment injury. In a July 18, 2000 decision, the hearing representative affirmed in part and modified in part the February 10, 2000 decision. The hearing representative found appellant was entitled to compensation for various periods between September 6, 1995 and August 17, 1996. Lastly, the hearing representative instructed the Office to adjudicate appellant's schedule award claim.

Appellant filed a claim for a schedule award on March 29, 2000.

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[1] Docket No. 97-1944. On September 28, 1995 appellant, then a 45-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his back on September 2, 1995 when he stepped down off the steps of a house and made a sudden turn.

[2] Appellant retired on disability effective April 25, 1997.

In a report dated February 15, 2000, submitted by appellant in support of his schedule award claim, Dr. Ronnie D. Shade, an attending Board-certified orthopedic surgeon, concluded that appellant had a 70 percent impairment of the lower extremity. A physical examination revealed muscle spasms, bilateral iliolumbar tenderness and normal heel and toe walking. The physician also noted that appellant had 4 out of 5 for weakness in the left knee with reflexes at 1 plus for the knees and 2 plus for the ankles. Atrophy of 0.5 centimeter was noted on the left calf, no atrophy in the quadriceps was noted and sensation in the left leg was slightly decreased. In reaching the 70 percent impairment conclusion, the physician stated:

> "I utilized [T]able 39 to calculate neurologic [sic] motor impairments if [sic] the lower extremities. The claimant demonstrated significant motor and sensory weakness of the left lower extremity on manual muscle testing. I utilized [T]able 68 for a sensory impairment the left lower extremity [LE]. I obtained a 70 percent LE for the motor weakness and a 1 percent LE for the sensory loss. Combining we get 70 [percent] LE."

The Office medical adviser reviewed Dr. Shade's February 15, 2000 report and by report dated October 31, 2000, opined that the report failed to meet the requirements of the Office and requested referral to a second opinion physician. In finding that the report failed to meet Office requirements, the Office medical adviser noted:

> "Dr. Shade then recommends impairment based on [G]rade 4 weakness of all the musculature in the LLE (T[able] 39, p[age] 77). Based on normal heel and toe walking, this creates a conflict. He then recommends impairment based on abnormality to peripheral nerves. It is unlikely there is motor deficit to the entire lower extremity based on a one level disc herniation at L5-S1. Sensory impairment resulting from lumbar disc herniation should be determined using abnormality of the nerve root, not the peripheral nerves. This creates another conflict…."

In a report dated February 2, 2001, Dr. James L. Zum Brunnen, a second opinion orthopedic surgeon, reported that a physical examination revealed no atrophy in the legs, no significant discrepancies in circumferences in the calves, appellant was able to stand and walk on his heels and toes, he was able to bend his knees and there were normal reflexes in his Achilles and patellar areas. Dr. Zum Brunnen concluded that appellant "had no measurable decrease in strength, muscle atrophy or ankylosis of the lower extremities." He concluded that appellant had a 10 percent impairment based upon his spinal impairment.

In a March 21, 2001 report, the Office medical adviser concluded that appellant had no impairment in his left lower extremities based upon a review of Dr. Zum Brunnen's February 2, 2001 report. In support of this conclusion, he noted:

> "Dr. Zum Brunnen notes full ROM [range of motion] of the lower extremities. He describes no atrophy in the legs. There are no objective motor deficits in the lower extremities. He describes some abnormal sensory findings in the feet and then goes further stating these sensory findings were definitely not in the same dermatome as one would expect from a lumbar disc lesion at L5-S1. These

findings result in a [zero] percent PPI [permanent partial impairment] or the lower extremity."

By decision dated April 3, 2001, the Office denied appellant's claim for a schedule award for his lower extremities as he had no ratable impairment.

Appellant requested reconsideration by letter dated May 29, 2001.

In a nonmerit decision dated October 25, 2001, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established entitlement to a schedule award in this case.

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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.[5]

No schedule award is payable for permanent loss or loss of use of, anatomical members, functions or organ of the body not specified in the Act or in the implementing regulations.[6] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole,[7] no claimant is entitled to such an award.[8] However, a schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition.[9]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

[7] The Act itself specifically excludes the back from the definition of "organ" 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB ___ (Docket No. 98-447, issued March 10, 2000); *Rozella L. Skinner*, 37 ECAB 398 (1986).

[8] *George E. Williams*, 44 ECAB 530 (1993).

[9] *Denise D. Cason*, 48 ECAB 530, 531 (1997); *Gordon G. McNeill*, 42 ECAB 140 (1990).

Appellant alleges that he has a 70 percent permanent impairment of his right lower extremity based on the February 15, 2000 report, of his orthopedic surgeon, Dr. Shade. Although he stated that appellant had a "permanent disability" of approximately 70 percent "correlated with the A.M.A., *Guides*, [4th ed.,]" and referenced Tables 39 and 68, it is unclear how Dr. Shade specifically arrived at his approximate 70 percent impairment rating. Even though he has referenced the A.M.A., *Guides*, he did not explain how his determination correlated with the tables he referenced. As such, Dr. Shade's rating is of diminished probative value in determining the extent of appellant's PPI.[10]

Dr. Zum Brunnen, the second opinion physician opined that appellant had a 10 percent impairment rating, which was due solely to his spinal injuries and provided no impairment rating to the lower extremities. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Infact, it is specifically excluded. As neither the Act nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the spine or any portion thereof, appellant is not entitled to a schedule award. The Office medical adviser properly reviewed Dr. Zum Brunnen's report to conclude that appellant had no ratable impairment in his lower extremities

The Office, however, erred in determining whether appellant had no ratable impairment pursuant to the A.M.A., *Guides* (4th ed. 1994) because the A.M.A., *Guides* (5th ed. 1995) became effective February 1, 2001[11] and, therefore, the Office should have used the fifth edition of the A.M.A., *Guides* in determining appellant's entitlement to a schedule award. This error is harmless, however, because appellant's resulting lower extremity impairment would have been the same if calculated under the fifth edition of the A.M.A., *Guides*.[12]

The Board finds the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[13] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office 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.[14] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the

[10] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[11] FECA Bulletin No. 01-05 (issued January 29, 2001).

[12] *See* A.M.A., *Guides*, pp. 530-31, 550-51 (5th ed., 2000)

[13] 20 C.F.R. § 10.608(a) (1999).

[14] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

In the instant case, appellant did not submit any evidence with his May 29, 2001 reconsideration request. Thus, the Board finds that appellant did not submit new and relevant evidence, or show that the Office erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument. Accordingly, the Board finds that he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2) and, therefore, the Office properly denied the requests for reconsideration without merit review of the claim.

The October 25 and April 3, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 23, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] 20 C.F.R. § 10.608(b) (1999).