U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT D. HAMILTON and DEPARTMENT OF THE AIR FORCE, McCHORD AIR FORCE BASE, Tacoma, WA

Docket No. 02-1622; Submitted on the Record;
Issued December 9, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to a schedule award for permanent impairment of each upper extremity; and (2) whether the denial by the Office of Workers' Compensation Programs of appellant's request for reconsideration constituted an abuse of discretion.

On December 19, 1998 appellant, then a 36-year-old aircraft jet engine work inspector, filed an occupational disease claim alleging that on December 1, 1997 he became aware of soreness in his elbows called, medial epicondylitis and realized that it was caused or aggravated by his employment. The Office accepted appellant's claim for left and right lateral epicondylitis and authorized bilateral carpal tunnel release surgeries on October 4, 1999.[1] Appellant received appropriate compensation benefits.

In an April 3, 2001 report, Dr. Richard A. Camp, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He indicated that appellant continued to have problems in his forearms and described aching on the dorsum of the forearm that occurred with any activity. Dr. Camp reported that appellant still experienced tingling in the palms of his hands, especially when attempting to ride his motorcycle. Dr. Camp indicated that physical examination revealed an adult male who appeared to be in no acute distress with no obvious swelling or deformity noted in his upper extremities. He stated that appellant's area of discomfort was in the extensor muscle masses of his forearm but there was no local tenderness. Dr. Camp also had no discomfort with resisted wrist extension. He indicated that the range of motion of appellant's elbows, forearms, wrists, fingers and thumbs was pain free, symmetrical and unrestricted and the forearm circumference was 31 centimeters bilaterally, noting that appellant was well muscled in the forearms and hands. He opined that there was no evidence of atrophy or weakness to manual muscle testing in finger abduction or thumb opposition even

[1] The record reflects that appellant returned to work in a light-duty capacity as a telephone operator on July 30, 2000. A formal loss of wage-earning capacity was entered on February 7, 2001.

though appellant stated that with resisted thumb opposition, he had a little bit of discomfort in the volar distal right forearm that was more ulnar sided. Dr. Camp stated that at this time, light touch was symmetrical in appellant's forearms and hands and vibratory sensation was slightly less in his left small finger than the index finger, further vibratory sensation was equal between the two digits on his right hand. He determined that two-point discrimination was four millimeters throughout both hands, noting the sweating and coloration patterns were symmetrical between the two hands. Dr. Camp indicated that grip strength testing on the second setting of the Jamar dynamometer was consistently 100 to 105 pounds in the right hand and 110 to 115 pounds in the left hand. Further, he noted the lateral pinch strength was 20 to 21 pounds bilaterally and the 3-point pinch was 17 pounds bilaterally. Dr. Camp also indicated that the Tinel's sign was negative over the carpal and cubital tunnels. Additionally, he indicated that the elbow flexion, Phalen's and median nerve compression tests were all negative. Dr. Camp diagnosed bilateral carpal tunnel syndrome, status post surgical release and lateral humeral epicondylitis. He found no measurable permanent impairment according to the fifth edition of the A.M.A., *Guides* as appellant's examination was essentially normal. Dr. Camp added that, although appellant continued with some subjective complaints, this was mostly muscular in origin.

In a November 20, 2001 report, Dr. Mohammad A. Saeed, Board-certified in internal medicine, indicated that appellant was seen for an electrodiagnostic consultation and his impression was a normal study with no evidence of recurrent carpal tunnel syndrome or median neuropathy on either side. Further, he added there was evidence of "good" improvement since the last study of July 8, 1999.

In treatment notes dating from October 25, 2001 to January 4, 2002, Dr. Gary Henriksen, Board-certified in occupational medicine, indicated that appellant was having increasing pain and his current status was that he was cleared for light duty only.

By decision dated January 17, 2002, the Office determined that appellant was not entitled to a schedule award for the right upper extremities.

By letter dated February 15, 2002, appellant requested reconsideration. In support of his request, he indicated that his last visits to his doctors were in December 2001 and January 2002 and both noted that there was no treatment available at this time. He indicated that Dr. Camp stated at the end of his report that there was a problem that appeared to be muscular in origin. Appellant indicated that he was unable to physically qualify for his old job or any other position on the base. Dr. Camp explained that he believed that he should qualify him for permanent impairment.

In a December 17, 2001 report, Dr. James J. Wyman indicated that appellant reported continued bilateral shoulder, elbow and wrist problems. He noted that on physical examination appellant had full motion of all joints with some discomfort at extremes of motion at the shoulders. Dr. Wyman also indicated that there was some mild point tenderness over the epicondyles of the elbows with erythema or swelling. He diagnosed bilateral multiple upper extremity complaints of pain and added that appellant was going to continue to have problems with his upper extremities.

In a January 4, 2002 duty status report, Dr. Henriksen indicated that appellant could pull, push or grasp for no more than 2 hours a day and set a limitation of no more than 10 pounds.

In progress notes dated January 29, 2002, Dr. Henriksen indicated that he had explained the rating system to appellant at some length and that by the A.M.A., *Guides* criteria, given his now normal electromyogram (EMG), this would rate as no permanent impairment.

Appellant submitted a February 2, 2002 pain diagram indicating that he had continuous pain in his arms.

In a March 26, 2002 decision, the Office denied appellant's request for reconsideration on the grounds that he had not submitted new and relevant medical evidence nor raised substantive legal questions in his request for reconsideration.

The Board finds that appellant has failed to establish that he sustained a permanent impairment of each upper extremity.

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[4] The schedule award provision of the Act[5] and its implementing regulation[6] 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.[7]

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from his attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[4] *See Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 20 C.F.R. § 10.404 (1999).

[6] 20 C.F.R. § 10.404 (1999).

[7] A.M.A., *Guides* (5th ed. 2001).

disturbance of sensation or other pertinent description of the impairment."[8] This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[9]

With respect to a schedule award, there is no medical evidence establishing permanent impairment to a scheduled member. Appellant's physician, Dr. Camp, indicated that appellant did not have any permanent impairment. On appeal, appellant argued that he is entitled to an impairment rating because he was limited from performing or returning to his regular work duties. However, Dr. Camp did not assess any impairment rating to his upper extremity and indicated that he had some subjective complaints, mostly muscular in origin. Further, Dr. Henriksen indicated that, since appellant's EMG was normal, he was not entitled to an impairment rating. Appellant has not shown that he is entitled to a schedule award for permanent impairment of the upper extremities.

The Board finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (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) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10]

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[11] In support of his request for reconsideration, appellant submitted duty status reports, progress notes and a pain diagram. However, these reports were not relevant, as they did not contain any ratings of impairment. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2)

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6c (March 1995); *see John H. Smith*, 41 ECAB 444, 448 (1990).

[9] 20 C.F.R. § 10.606(b).

[10] 20 C.F.R. § 10.608(b) (1999).

[11] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

(1999). Accordingly, the Board finds that the Office properly denied appellant's February 15, 2002 request for reconsideration.[12]

The March 26 and January 17, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 9, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[12] The Board notes that, subsequent to the Office's March 26, 2002 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).