U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLETON L. CHARETTE and DEPARTMENT OF THE ARMY, COMMANDING GENERAL, Cherry Point, NC

Docket No. 01-2193; Submitted on the Record;
Issued April 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he has more than an 11 percent impairment of his right thumb for which he received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On July 15, 1999 appellant, then a 58-year-old painter, sustained a right wrist laceration and right thumb wound when a knife slipped and cut his right wrist near his thumb. On October 1, 1999 appellant underwent a surgical repair of his right median nerve which was authorized by the Office.[1] Appellant continued working in limited-duty positions for the employing establishment.

By decision dated November 17, 2000, the Office granted appellant a schedule award for an 11 percent permanent impairment of his right thumb. The Office based its schedule award on the opinion of Dr. John A. Azzato, a Board-certified orthopedic surgeon who served as an impartial medical specialist.[2] By decision dated February 27, 2001, the Office denied appellant's request for merit review on the grounds that his request for review did not require reopening of his claim. By decision dated August 27, 2001, the Office denied appellant's request for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

[1] On April 28, 2000 appellant also underwent a surgical release of the tendon sheath of the first dorsal compartment at his right wrist.

[2] The Office had determined that there was a conflict in the medical evidence between Dr. Ray B. Armistead, an attending Board-certified orthopedic surgeon, and Dr. Robert M. Moore, a Board-certified orthopedic surgeon who served as an Office referral physician.

The Board finds that appellant did not meet his burden of proof to establish that he has more than an 11 percent permanent impairment of his right thumb for which he received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[4] 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.[5] Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[6] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[7]

The Office properly determined that there was a conflict in the medical opinion between Dr. Armistead, appellant's attending Board-certified orthopedic surgeon, and Dr. Moore, a Board-certified orthopedic surgeon who served as an Office referral physician, regarding the extent of appellant's permanent impairment.[8]

In a report dated May 16, 2000, Dr. Armistead indicated that appellant had a complete sensory loss and motor loss of the median nerve in the radial palmar digital nerve to the right thumb. He stated that, using Table 15 on page 54 of the fourth edition of the A.M.A., *Guides*, there was "a combined motor and sensory deficit of this particular branch of the median nerve to yield a 7 percent impairment of the entire extremity which when using the transference tables indicates a 36 percent impairment of the hand." In contrast, Dr. Moore determined that appellant had a nine percent permanent impairment of his right thumb. He indicated that, according to the standards of the fourth edition of the A.M.A., *Guides*, appellant had a Grade 3 pain deficit in the branch of the median nerve which enervated the right thumb and that this translated into an eight percent impairment rating of the right thumb for sensory loss. In addition, he noted that

[3] 5 U.S.C. §§ 8101-8193.

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

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

[6] 5 U.S.C. § 8107(a).

[7] *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[8] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

appellant was entitled to a one percent impairment rating for limited motion of the interphalangeal joint of the right thumb.[9]

In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Azzato, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Azzato, the impartial medical specialist, selected to resolve the conflict in the medical opinion. The September 6, 2000 report of Dr. Azzato establishes that appellant has an 11 percent permanent impairment of his right thumb. In his report, Dr. Azzato indicated that appellant's motor function was intact throughout his right thumb, fingers and wrist. He indicated that appellant experienced mild pain and discomfort in his right thumb upon motion. Dr. Azzato determined that appellant's 11 percent right thumb impairment was comprised of limited flexion of the interphalangeal and metacarpophalangeal joints of the right thumb[11] and mild pain associated with the radial palmar digital branch of the median nerve.[12] The Board finds that the impairment rating of Dr. Azzato was derived in accordance with the relevant standards of the A.M.A., *Guides* and appellant has not shown that he has more than an 11 percent permanent impairment of his right thumb.[13]

The Board finds that as to the issue of the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, the case is not in posture for decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] 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

---

[9] In a June 5, 2000 report, an Office medical adviser produced similar calculations to determine that appellant had a 10 percent permanent impairment of his right thumb.

[10] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[11] Appellant's limited flexion of the interphalangeal and metacarpophalangeal joints would entitle him to a three percent impairment rating for motion deficits; *see* A.M.A., *Guides*, Figure 10, 13 at 26-27.

[12] Appellant's sensory loss would translate to a Grade 3 rating and Dr. Azzato applied the relevant standards for sensory deficits associated with the radial palmar digital branch of the median nerve to determine that appellant had a three percent impairment of the right upper extremity due to sensory loss which would translate into an eight percent impairment of the right thumb; *see* A.M.A., *Guides*, Tables 1, 2, 11-12, 15 at 18-19, 48-49, 54. Dr. Azzato inadvertently indicated that appellant had a three percent impairment of the right thumb, but it is clear that he meant to indicate that the impairment was of the right upper extremity.

[13] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989) (regarding the probative value of impairment calculations made in accordance with the standards of the A.M.A., *Guides*).

[14] 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).

previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[15] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[16] 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 on the merits.[17]

In support of his December 12, 2000 reconsideration request, appellant submitted a November 28, 2000 report in which Dr. Armistead indicated that he had a 36 percent permanent impairment of his right hand.[18] However, this report is similar to a May 16, 2000 report of Dr. Armistead which had previously been submitted and considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[19] Therefore, the Office properly determined, in its February 27, 2001 decision, that appellant was not entitled to merit review of his claim.

In support of his June 20, 2001 reconsideration request, appellant argued that the Office should have accepted the opinion of Dr. Armistead regarding his permanent impairment and claimed that the opinion of Dr. Moore was not well reasoned. By decision dated August 27, 2001, the Office denied appellant's request for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board finds, however, that appellant's June 20, 2001 reconsideration request was in fact timely in that it was filed within one year of the Office's November 17, 2000 merit decision. Therefore, the Office improperly applied the "clear evidence of error standard" in evaluating appellant's reconsideration request.[20] The case will be remanded for further review of appellant's June 20, 2001 reconsideration request.

[15] 20 C.F.R. § 10.606(b)(2).

[16] 20 C.F.R. § 10.607(a).

[17] 20 C.F.R. § 10.608(b).

[18] By decision dated February 27, 2001, the Office denied appellant's request for merit review on the grounds that his timely request for review did not require reopening of his claim.

[19] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[20] For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error." *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990). Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996).

The February 27, 2001 and November 17, 2000 decisions of the Office of Workers' Compensation Programs are affirmed. The August 27, 2001 Office decision is set aside for further action in conformance with this decision.

Dated, Washington, DC
April 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member