U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARYN D. BANNICK and DEPARTMENT OF DEFENSE, DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

Docket No. 03-567; Submitted on the Record;
Issued April 18, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded appellant's additional schedule award of a 3 percent permanent impairment to the right arm and a 17 percent permanent impairment to the left arm; and (2) whether the Office's refusal to reopen appellant's case for further reconsideration constituted an abuse of discretion.

On July 24, 1996 appellant filed an occupational disease claim for a right shoulder condition due to repetitive activities at work. The Office accepted appellant's claim, No. 060658088, for right rotator cuff tear and repair and related surgeries on August 22 and November 25, 1996 and March 11, 1997. On June 11, 1997 appellant filed a claim for overuse of the left shoulder to the 1996 right shoulder injury. In 1998 the Office accepted left shoulder impingement and surgeries on October 14, 1997 and March 9, 1999, No. 060681261. The Office issued appellant schedule awards for a 13 percent impairment for the left arm from March 30, 1998 to January 7, 1999 and for an 18 percent impairment for the right arm from March 30, 1998 through April 27, 1999. Because the awards overlapped, appellant received both awards in a lump sum.

On December 15, 2001 appellant filed a claim for an additional schedule award. In a report dated April 11, 2002, appellant's treating physician, Dr. Rolando L. Cheng, a Board-certified orthopedic surgeon, determined that appellant had a 39 percent permanent impairment to the right upper extremity and a 10 percent permanent impairment to the left upper extremity. Although he did not specify that he applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), for rating appellant's right shoulder, Dr. Cheng determined that appellant had internal rotation of 40 degrees, external rotation of 50 degrees, forward elevation of 67 degrees, backward elevation of 41 degrees, abduction of 71 degrees and adduction of 15 degrees. For the left shoulder, Dr. Cheng determined that appellant had internal rotation of 72 degrees, external rotation of 60 degrees, forward elevation of 100 degrees, backward elevation of 60 degrees, abduction of 100 degrees and adduction of 35 degrees.

In a report dated September 15, 2002, an Office medical adviser applied the fifth edition of the A.M.A., *Guides* and determined that the 40 degrees internal rotation and 50 degrees external rotation of appellant's right shoulder equaled a 3 percent and 1 percent impairment, respectively, pursuant to Figure 16-46. He stated that the 67 degrees forward elevation and 41 degrees backward elevation of appellant's right shoulder equaled a 7 percent and 1 percent permanent impairment, respectively, pursuant to Figure 16-40 and appellant's abduction of 71 degrees and adduction of 15 degrees equaled a 5 percent and 1 percent permanent impairment, respectively, pursuant to Figure 16-47. Adding these-range-of motion impairments, the medical adviser concluded that appellant had an 18 percent permanent impairment to the right upper extremity. For the left upper extremity, the medical adviser determined that the 72 degrees of internal rotation and 60 degrees of external rotation equaled an impairment of 1 and 0 percent, respectively pursuant to Figure 16-46, that the 100 degrees' forward elevation and 60 degrees' backward elevation equaled an impairment of 5 percent and 0 percent, respectively and appellant's abduction of 100 degrees and adduction of 35 degrees equaled a 4 percent and 1 percent impairment, respectively. Adding these range-of-motion impairments, the medical adviser determined that appellant had a permanent impairment to the left upper extremity of 11 percent.

To resolve a conflict in the medical evidence between Dr. Cheng's and the Office medical adviser's opinions as to the extent of appellant's permanent impairment, the Office referred appellant to an impartial medical specialist, Dr. Thomas M. Loeb, a Board-certified orthopedic surgeon. In a report dated June 7, 2002, Dr. Loeb considered appellant's history of injury, performed a physical examination and diagnosed rotator cuff disease and outlet impingement syndrome of both shoulders and residual disability in the right shoulder. He stated that appellant had a 3 percent permanent impairment of the left upper extremity and a 17 percent impairment of the right upper extremity. On a form dated June 7, 2002, Dr. Loeb indicated that he used the A.M.A., *Guides* (5th ed. 2001) and determined that as to the right upper extremity appellant had internal rotation of 45 degrees and external rotation of 40 degrees, which equaled a 2 percent and 1 percent impairment, respectively, pursuant to Figure 16-46, page 479, that appellant had forward elevation of 100 degrees and backward elevation of 10 degrees, which equaled a 5 percent and 2 percent impairment, respectively, pursuant to Figure 16-40, page 476; and appellant had abduction of 60 degrees and adduction of 20 degrees, which equaled a 6 percent and 1 percent impairment, respectively, pursuant to Figure 16-43, page 477. Adding the right range-of-motion impairments, Dr. Loeb obtained a total permanent impairment to appellant's right upper extremity of 17 percent. For the left upper extremity, he determined that appellant had internal rotation of 80 degrees and external rotation of 70 degrees, which equaled a 0 percent impairment for each rotation pursuant to Figures 16-46, page 479; appellant had forward elevation of 170 degrees and backward elevation of 40 degrees, which equaled a 1 percent impairment for each elevation pursuant to Figure 16-40, page 476; and that he had 160 degrees of abduction and 40 degrees of adduction, which equaled a 1 percent impairment and 0 percent impairment, respectively, pursuant to Figure 16-43, page 477. Adding the left upper extremity's range-of-motion impairments, Dr. Loeb obtained a total of 3 percent impairment to the left upper extremity.

On June 28, 2002 a medical adviser agreed with Dr. Loeb's ratings, finding them in accordance with the A.M.A., *Guides* (5th ed. 2001).

By decision dated July 30, 2002, the Office issued appellant an award for an additional 17 percent permanent impairment for the right arm and an additional 3 percent permanent impairment for the left arm. The award was for 62.4 weeks and ran for the period June 7 to July 13, 2002.

By decision dated October 2, 2002, the Office rescinded the July 30, 2002 decision, finding that appellant had previously been issued a schedule award for a 13 percent impairment for the left arm and an 18 percent impairment for the right arm and the Office had not considered the prior schedule awards in issuing appellant the July 30, 2002, schedule award. The Office found that the evidence of record did not show that appellant had greater permanent impairments to his upper extremities than the awards issued in the 1998 award. Apparently, referring to the July 30, 2002 award, the Office stated that the award was an overpayment.

By letter dated October 14, 2002, appellant requested reconsideration of the Office's decision. She stated that she received the first schedule award after she had three surgeries and had three more surgeries after receiving the award. Appellant stated that the condition of her shoulders had worsened since the surgeries, that she could only lift 5 pounds, could not do activities with her son and she could only use her right hand for 5 to 10 minutes due to pain and tingling. Appellant stated that she was in constant pain, with numbness and tingling up and down her right arm and hand and up her shoulder. Appellant requested the additional award be granted because of her pain and suffering. Appellant submitted copies of Dr. Loeb's June 7, 2002 rating reports and reports of her surgeries on October 14, 1997, June 5, 2000 and June 7, 2001.

By decision dated November 19, 2002, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly rescinded the July 30, 2002 decision on the basis that the record does not establish that appellant has more than a 13 percent permanent impairment to her left arm and an 18 percent permanent impairment to her right arm.

The Board has long held that the power to annul an award is not an arbitrary one and that an award of compensation can only be set aside in the manner provided by the compensation statute. It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office decides it erroneously accepted the claim.[1]

In this case, the record establishes that appellant received schedule awards in 1998 for a 13 percent permanent impairment to her left arm and an 18 permanent impairment to her right arm. On December 15, 2001 appellant filed a claim for an additional schedule award. To resolve the conflict between the opinion of appellant's treating physician, Dr. Cheng, that appellant had a 39 percent permanent impairment to the right upper extremity and a 10 percent permanent impairment to the left upper extremity, and the Office medical adviser's opinion, that appellant had permanent impairments of 18 percent to the right upper extremity and of

[1] *Stephen N. Elliot*, 53 ECAB _____ (Docket No. 01-363, issued July 12, 2002); *Edward W. Malaniak*, 51 ECAB 279, 280 (2000). *See generally* 20 C.F.R. § 10.610.

11 percent to the left upper extremity, the Office referred appellant to an impartial medical specialist, Dr. Loeb, a Board-certified orthopedic surgeon. Applying the A.M.A., *Guides* (5th ed. 2001), Dr. Loeb determined that appellant had a 3 percent permanent impairment to the left upper extremity and a 17 percent permanent impairment to the right upper extremity. The Office medical adviser agreed with Dr. Loeb's findings.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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.[4]

The Board finds that Dr. Loeb properly applied the A.M.A., *Guides* (5th ed. 2001) in determining that appellant had a 3 percent permanent impairment to the left upper extremity and an 11 percent permanent impairment to the right upper extremity. As to the left upper extremity, he correctly determined that pursuant to Figure 16-46, page 479, appellant's internal rotation of 80 degrees and external rotation of 70 degrees for the left upper extremity equaled a 0 percent impairment for each rotation; pursuant to Figure 16-40, page 476, appellant's forward elevation of 170 degrees and backward elevation of 40 degrees equaled a 1 degree impairment for each elevation; and pursuant to Figure 16-43, page 477, appellant's 160 degrees abduction of 160 degrees and 40 degrees of adduction equaled a 1 and 0 percent impairment, respectively. Dr. Loeb added the range-of-motion impairments to total a 3 percent impairment to appellant's left upper extremity.

As to the right upper extremity, Dr. Loeb determined that pursuant to Figure 16-46, p. 479, appellant's internal rotation of 45 degrees and external rotation equaled 2 percent and 1 percent, respectively; pursuant to Figure 16-40, p. 476, appellant's forward elevation of 100 degrees and backward elevation of 10 degrees equaled 5 percent and 2 percent, respectively; and pursuant to Figure 16-43, appellant's abduction of 60 degrees and adduction of 20 degrees equaled 6 percent and 1 percent, respectively. He added the right range-of-motion impairments to total 17 percent impairment to the right upper extremity. In situations where there are 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 on a proper factual background, must be given special weight.[5] Since Dr. Loeb's calculations and application of the A.M.A., *Guides* (5th ed. 2001) are proper, as the impartial medical specialist, his opinion constitutes the weight of the evidence. Moreover, the Office medical adviser concurred with his calculations. No other

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

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

[5] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

evidence of record establishes that appellant's impairments to her upper extremities are greater than the degree of impairment identified by Dr. Loeb. The evidence of record establishes that appellant did not have a greater impairment to her upper extremities than the 13 percent previously awarded for the left arm and the 18 percent awarded for her right arm in the original 1998 schedule awards. Appellant, therefore, was not entitled to additional awards of 17 percent for her right arm and 3 percent for her left arm issued in the Office's July 30, 2002 decision. The Office erred in awarding appellant an additional 17 percent for the right arm and an additional 3 percent for the left arm. Based on this error, the Office properly rescinded the July 30, 2002 decision.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[6] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).[7]

In her request for reconsideration, appellant submitted Dr. Loeb's June 7, 2002 calculations of the degree of her impairments to her upper extremities. This is repetitive evidence. The evidence of her surgeries in 1997, 2000 and 2001 appellant submitted are duplicative of evidence of record and not relevant because Dr. Loeb considered that appellant underwent those and other surgeries in forming his opinion. Since appellant did not show that the Office erroneously applied or interpreted a point of law and did not advance a point of law or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied appellant's request for reconsideration.

[6] 20 C.F.R. § 10.606(b)(2) (i-iii).

[7] 20 C.F.R. § 10.608(a). The regulation goes on to provide that, "If reconsideration is granted, the case is reopened and the case is reviewed on its merits…."

The November 19 and October 2, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 18, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member