U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OSCAR B. GARZA and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, San Antoinio, TX

Docket No. 02-1245; Submitted on the Record;
Issued February 26, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for reconsideration.

On December 6, 1999 appellant, then a 35-year-old detention enforcement officer, filed a claim alleging that on December 3, 1999 he sprained his right knee while in the performance of duty.[1] The Office accepted right knee meniscus tear, authorized a magnetic resonance imaging (MRI) scan, an arthroscopic procedure and paid appropriate benefits. On April 6, 2000 Dr. Daniel C. Valdez, appellant's treating physician and a Board-certified orthopedic surgeon, performed a medial meniscectomy, a lateral release and a chondroplasty to the medial condyle. Appellant returned to full duty on August 28, 2000.

In a report dated August 21, 2000, Dr. Valdez determined that appellant had a 20 percent impairment of the right lower extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). He noted that a two percent impairment based on appellant's meniscectomy and a seven percent impairment based on his collateral ligament laxity for a nine percent impairment rating.[2] He then rated appellant's muscle function as Grade 4 based on loss of knee extension for an impairment of 12 percent for lower extremity muscle weakness.[3] Dr. Valdez stated that appellant's total right lower extremity impairment rating was 20 percent.

On August 30, 2000 appellant filed a claim for a schedule award.

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[1] The Office accepted appellant's May 17, 1995 right foot injury and on December 9, 1998 awarded a 19 percent right lower extremity impairment. The Board, in a decision dated May 8, 2000, affirmed the Office's December 9, 1998 decision.

[2] A.M.A., *Guides*, 85, Table 64.

[3] *Id.* at 77, Table 38.

In a report dated November 2, 2000, the Office medical adviser determined that appellant had a 12 percent impairment of the right lower extremity. The Office medical adviser noted that FECA Bulletin 95-17 "does not allow using diagnostic based estimates and loss of strength as this constitutes duplication. Loss of strength will be used as this is the greater."[4]

In a report dated December 18, 2000, Dr. Valdez found a 2 percent impairment based on eversion[5] and 17 percent based on lower extremity weakness[6] for a 19 percent "lower extremity -- ankle foot" impairment, which he combined with his prior 20 percent knee impairment rating to find a 35 percent total right lower extremity impairment. In a report dated January 8, 2001, the Office medical adviser determined that appellant's 19 percent impairment of the right ankle and his 12 percent impairment of the right knee resulted in a 29 percent impairment of the right lower extremity.

In a decision dated February 5, 2001, the Office awarded appellant an additional 10 percent impairment of the right lower extremity for a 29 percent impairment of the right lower extremity.

On April 25, 2001 appellant requested reconsideration. In support of his request, appellant submitted a March 24, 2001 report from Dr. Valdez who stated:

> "[Appellant] should qualify for the partial meniscectomy category for 2 percent and collateral ligament laxity -- mild (secondary to Grade II medial collateral ligament tear) for 7 percent. Both categories are per table 64, page 85.
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> "If the diagnostic impairment category (9 percent) is integrated along with previously issued Grade 4 knee extension weakness (12 percent), [appellant's] right knee lower extremity impairment would be 20 percent."

Dr. Valdez further noted that appellant's right knee impairment would be combined with his right ankle impairment of 19 percent for a total right lower extremity impairment of 35 percent.

By decision dated January 28, 2002, the Office denied reconsideration on the grounds that appellant failed to submit relevant new evidence.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[7] As appellant filed his appeal with the Board on May 20, 2002 the Board lacks jurisdiction to review the Office's most recent merit decision dated February 5, 2001. Consequently, the only decision

[4] The Office medical adviser eliminated Dr. Valdez' finding of a nine percent impairment based on meniscectomy and collateral ligament weakness, stating that FECA Bulletin 95-17 precluded the use of Table 64, p.p. 85-86 in conjunction with Table 39 at page 77.

[5] A.M.A., *Guides*, at 78, Table 43.

[6] *Id.* at 77, Tables 38 and 39.

[7] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

properly before the Board is the Office's January 28, 2002 decision denying appellant's request for reconsideration.

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

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[8]

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.[9]

In this case, appellant submitted evidence that the Office had previously reviewed, specifically Dr. Valdez' March 24, 2001 report, included data that he submitted in his August 21, 2000 report, noting appellant's impairment for meniscectomy and collateral laxity as well as his Grade 4 knee extension weakness.[10] The Office correctly noted that impairment ratings drawn from Tables 64 and 39 may not be combined in accordance with FECA Bulletin 15-17 to determine an impairment rating. Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim.[11] Because this report is repetitious of evidence the Office had evaluated previously, it is insufficient to require the Office to reopen appellant's claim for merit review.

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[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.608(b) (1999).

[10] In its January 28, 2002 decision, the Office noted that it had reviewed Dr. Valdez' October 21, 1998 report. Although the record is not clear as to whether the Office reviewed this report pursuant to appellant's schedule award for his knee, it is noted that, in his October 21, 1998 report, Dr. Valdez relied on Tables 38, 39, 42 and 43 in his right ankle impairment rating. These tables would not have been used in conjunction with Table 64 to establish appellant's right knee impairment rating; *see supra* note 4.

[11] *James A. Castagno*, 53 ECAB ____ (Docket No. 02-975, issued September 19, 2002).

In its January 28, 2002 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

The January 28, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.[12]

Dated, Washington, DC
February 26, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] The Board notes that, as of February 1, 2001, evaluations for schedule awards are to be evaluated under the A.M.A., *Guides* (5th ed. 2001). However, Dr. Valdez' March 24, 2001 report does not represent a new evaluation as it merely repeats his prior evaluation results.