U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH UREN and TENNESSEE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Chattanooga, TN

Docket No. 02-59; Submitted on the Record;
Issued January 2, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to greater than a 22 percent permanent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On November 2, 1976 appellant, then a 28-year-old pipe fitter, sustained a traumatic injury to his right knee while in the performance of duty. The Office accepted the claim for strain of the right knee and a tear of the right lateral meniscus. The Office also accepted that appellant suffered a consequential precipitation of arthritis in the left knee.[1]

In a report dated January 26, 2000, Dr. Thomas E. Moses, a Board-certified orthopedic surgeon, and appellant's treating orthopedic surgeon, described the results of his physical examination of appellant's left knee. He noted that appellant had pain with extension and actually hyperextended his knee 5 to 10 degrees of hyperextension with associated pain and guarding, noting that it was probably related to a ligamentous laxity of the posterior capsule and probably some moderate laxity of the posterior cruciate ligament. Dr. Moses indicated that appellant only had a hundred degrees of flexion of his knee before he started guarding and had pain with some medial joint line tenderness. At 10 centimeters above the patella, he has a circumference of 45 centimeters of both thighs. Both thighs are injured so it is difficult to tell whether he has any atrophy, as one thigh is equal to the other as far as weakness is concerned. Dr. Moses noted that an anterior-posterior view x-ray of the left knee did not show any joint space narrowing and the weight bearing films showed a four millimeter interval in the x-ray, which was normal. He noted that there was no exostosis seen although appellant had some spurring of the tibial spine to suggest some anterior cruciate laxity which appeared to have a one plus Lachman's. Dr. Moses noted using the American Medical Association, *Guides to the*

[1] Appellant was paid appropriate compensation for wage loss as well as compensation for 38 percent permanent impairment of the right leg.

Evaluation of Permanent Impairment[2] and found that hypertension secondary to posterior cruciate laxity moderate and capsule laxity, according to Table 64, page 85 resulted in a 17 percent impairment to the lower extremity, with a 100 degrees of flexion or less than 110 degrees of flexion, which is a mild deformity, according to Table 41, page 78, giving appellant a 10 percent permanent medical impairment to the lower extremity of the left knee. He opined that he could not assign any permanent medical impairment for atrophy because he could not get a definite comparison. Dr. Moses indicated that this resulted in a 25 percent permanent medial impairment to the lower extremity.

On March 3, 2000 the Office medical adviser (Dr. Williams) reviewed the January 26, 2000 report of Dr. Moses and noted that Table 64, page 3/85, allowed for a permanent partial impairment of the left lower extremity of 17 percent due to moderate posterior cruciate laxity. Dr. Williams also noted that further impairment based on decreased range of motion from Table 41, page 78, could not be given according to the A.M.A., *Guides.*[3] He opined that appellant had a seven percent permanent impairment of the left lower extremity.

In a March 30, 2000 report, Dr. Moses indicated that he believed the 17 percent impairment was for the "posterior cruciate laxity to the lower extremity and he put seven percent, which was just converting this to the whole person." He indicated further that he did not disagree with this and noted that as far as the posterior cruciate laxity was concerned, appellant had seven percent permanent impairment to the whole person. Dr. Moses referred to Table 41, page 78 and noted that he did not see where it was stated in the guidelines that it could not be included.

By decision dated April 21, 2000, the Office awarded appellant compensation for seven percent impairment of the left leg.

By letter dated April 25, 2000, appellant objected to the schedule award being a whole person as opposed to a lower extremity impairment and indicated that it should be 17 percent.

On May 3, 2000 the record was reviewed by a second Office medical adviser who noted that the first Office medical adviser made an error when he found the impairment of the left leg to be seven percent. He explained that Table 64 on page 3/85 allowed for an impairment rating of 17 percent for the lower extremity due to posterior cruciate laxity to a moderate degree.

On June 8, 2000 an Office medical adviser reviewed the record again and noted that FECA Bulletin No. 95 precluded use of Table 41 if Table 64 was utilized. Further, he opined that appellant was entitled to a 17 percent award to the left lower extremity.

By memorandum dated June 21, 2000, after receiving a correction from the Office medical adviser, the Office determined that appellant was entitled to an additional impairment of 10 percent as the previous Office medical adviser had erred in his calculations.

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[2] A.M.A., *Guides* (4th ed. rev.)

[3] *Id.*

By decision dated June 22, 2000, the Office granted appellant a schedule award for 28.80 weeks from June 18, 2000 to January 5, 2001 based upon a 17 percent permanent impairment of the left lower extremity.

By letter dated April 27, 2000, appellant requested a hearing, which was held on November 28, 2000.[4]

By letter dated October 27, 2000, appellant was provided with a copy of FECA Bulletin No. 95-17, which was issued on March 23, 1995. He was advised that this Bulletin had since been incorporated into the Federal (FECA) Procedure Manual as exhibit 4 in Chapter 3.700.

By letter dated December 7, 2000, the Office referred the record to the Office medical adviser, Dr. Popovic, for further review.

By letter dated December 13, 2000, appellant provided his corrections to the transcript of hearing and again reiterated that his impairment should be higher when all the tables were combined.

In a memorandum dated December 19, 2000, the Office medical adviser, Dr. Popovic, explained that the A.M.A., *Guides* stated that, when several different methods were available to reach an impairment estimate, one evaluation method should be selected and used (page 75, section 3.2, second paragraph). He noted that Table 64 on page 85 was based on a "diagnosis-based estimate" and the impairment percent derived from this table should not be combined with values obtained from Table 41 on page 78 which derived their values from physical evaluation (page 84, section 3.2, second paragraph). Dr. Popovic indicated that the latest available physical evaluation of the leg circumference (January 25, 2000) revealed no difference in size and thus no additional percents should be allowed for "muscle atrophy." He reiterated his belief that he did not believe that the impairment rating derived from Tables 64 and 37 should be combined, as he had originally noted. Further, appellant indicated that the range of motion data provided by Dr. Moses, in his January 26, 2000 report, should not be used for additional permanent partial impairment award as per his descriptions provided above. He concluded that using Table 41 on page 78 with Table 64 on page 85 would combine (duplicate) impairments based on physical findings with those based on diagnosis, which would be contrary to the A.M.A., *Guides'* instructions.

In a January 11, 2001 report, Dr. Moses indicated that he had reviewed additional information that was brought to his attention. He noted that Dr. Pick back on June 30, 1998

[4] At the hearing, appellant contended that FECA Bulletin No. 95-17 should not be used in conjunction with the A.M.A., *Guides*. He argued that the impairment due to decreased range of motion and impairment due to atrophy should be combined with the impairment due to anterior cruciate ligament laxity. Appellant referred to the second opinion examination conducted by Dr. Susan Pick, a Board-certified orthopedic surgeon, on June 30, 1998 with respect to his claim for permanent impairment to the right leg. He noted that she reported that the circumference of the right leg at 10 centimeters above the patella was 45 centimeters and the left thigh was 48 centimeters. Appellant explained that when Dr. Moses examined him on January 25, 2000 he noted that the circumference of both thighs at 1.0 centimeters above the patella was 45 centimeters. He contended that this demonstrated that he had permanent impairment to the left lower extremity due to atrophy of the left thigh.

found that appellant had a circumference on the left at the same level at 48 and a quarter centimeters and that this was registered on January 25, 2000 at 45 centimeters. Dr. Moses stated that he did not have this information for comparison in the past. He concluded that there was a difference of three and one-quarter centimeter difference or atrophy, which is measured on June 30, 1988 and according to Table 37 of the A.M.A., *Guides* this translated to a, 13 percent permanent medical impairment to the lower extremity.

On January 25, 2001 the Office referred the record to the Office medical adviser, Dr. Popovic, for further review.

In a memorandum dated January 26, 2001, Dr. Popovic stated that he was using the fourth edition of the A.M.A., *Guides.*[5] He indicated that he was taking into consideration an apparent thigh muscle atrophy of three centimeters. Dr. Popovic stated that, in accordance with Table 37 on page 77, appellant warranted a 13 percent permanent impairment to the left lower extremity. He also noted that, on the basis of decreased knee range of motion per Dr. Moses' January 26, 2000 report, appellant warranted an additional 10 percent impairment (Table 41, page 78). The Office medical adviser combined these values by the use of Combined Values Chart on page 322 and indicated the total permanent impairment of the left lower extremity was 22 percent. Further he explained that, although per values obtained from Table 37 and Table 41 could be combined, he indicated that neither of these values should be combined with permanent partial impairment values obtained with diagnosis based estimates using the values from Table 64 on page 85. Thus, he opined that the previously awarded permanent impairment of 17 percent could not be added to the present values (22 percent permanent impairment) obtained on the basis of physical findings.

In a February 12, 2001 decision, the hearing representative affirmed the June 22, 2000 decision in part finding that appellant had a 17 percent permanent impairment of the left leg. The hearing representative modified the decision to reflect an additional five percent impairment.

Accordingly, on March 2, 2001 the Office granted appellant a schedule award for an additional five percent permanent impairment of the left lower extremity.[6] The award covered a period of 14.40 weeks from February 25 to June 5, 2001.

On August 1, 2001 appellant requested reconsideration. In support of his claim, he argued that he should receive a 38 percent schedule award and enclosed additional evidence.

In a July 19, 2001 report, Dr Moses indicated that he reviewed the A.M.A., *Guides* and they were confusing; however, he reviewed them and came up with 25 percent. Dr. Moses indicated that there appeared to be a discrepancy regarding whether certain tables could be overlapped and noted that he did not see any area where this was actually stated. He repeated that his evaluation stood at 25 percent permanent impairment to the left lower extremity.

[5] A.M.A., *Guides*, (4th ed. 1993)

[6] This was in addition to the 17 percent previously awarded.

By decision dated August 24, 2001, the Office denied appellant's request for reconsideration on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that appellant is not entitled to greater than a 22 percent permanent impairment of the left lower extremity for which he received a schedule award.

The schedule award provision of the Act[7] and its implementing regulation[8] set forth the number of weeks of compensation payable to employees sustaining permanent partial 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.[9]

In the instant case, appellant's treating physician, Dr. Moses, opined that he was entitled to a 25 percent permanent impairment to the lower extremity. He calculated this impairment by combining cruciate laxity and flexion to equate to a 25 percent impairment. However, this amount was not correct as he had combined the physical rating with a diagnosis based rating, which was specifically excluded by FECA Bulletin No. 95-17, which was incorporated into the Federal (FECA) Procedure Manual as exhibit 4 in Chapter 3.700.

The Office medical adviser explained that his calculation was made based upon the information provided by Dr. Moses. He utilized the fourth edition of the A.M.A., *Guides.* The medical adviser indicated that he was taking into consideration an apparent thigh muscle atrophy of three centimeters. He stated that, in accordance with Table 37 on page 77, appellant warranted a 13 percent permanent impairment to the left lower extremity. He also noted that, on the basis of decreased knee range of motion per Dr. Moses' January 26, 2000 report, appellant warranted an additional 10 percent permanent impairment (Table 41, page 78). The Office medical adviser combined these values by the use of Combined Values Chart on page 322 and indicated the total permanent impairment as 22 percent. He explained that, although permanent partial impairment values obtained from Table 37 and Table 41 could be combined, he indicated that neither of these values should be combined with permanent partial impairment values obtained with diagnosis based estimates using the values from Table 64 on page 85. Thus, he explained why the previously awarded permanent impairment of 17 percent could not be added to the present values (22 percent permanent impairment) obtained on the basis of physical findings. As the report is fully explained and fully rationalized, it constitutes the weight of the

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] As of February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards. FECA Bulletin 01-05 (January 29, 2001).

medical opinion evidence. Appellant has not shown that he is entitled to a greater schedule award.[10]

The Board further finds that the Office did not abuse its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

In order to grant appellant's reconsideration request, he must show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.[11] Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a case for further merit review.[12] Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.[13] The submission of evidence or argument which repeats or duplicates evidence or argument already considered by the Office does not constitute a basis for reopening a case for further review on the merits.[14]

In its August 24, 2001 decision, the Office properly denied appellant's reconsideration request because he did not show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office; or submit relevant and pertinent new evidence not previously considered by the Office. He alleged that he was entitled to receive a schedule award of 38 percent to his lower extremity and argued that the Office should combine all of his impairments. However, appellant is not a physician as defined under the Act,[15] therefore, his arguments concerning whether he was entitled to an additional award are not relevant as they do not carry any weight. Further, Dr. Moses indicated that he had read the Office's decision and his evaluation stood at a 25 percent award. He did not provide any additional details to show how he came up with this number or add relevant or pertinent medical evidence not previously of record to show that appellant was entitled to an additional schedule award. Therefore, appellant's request for reconsideration did not satisfy the criteria in section 10.606(b) of the regulations to require a merit review.[16]

[10] Further, the record reflects that, after February 1, 2001, the Office should have used the fifth edition of the A.M.A., *Guides.* A comparison was made of the applicable pages and tables, to include Table 17-6, page 530 and Table 17-10, page 537 and no additional impairment would have been warranted.

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

[13] 20 C.F.R. § 10.608(b).

[14] *David E. Newman*, 48 ECAB 305, 308 (1997); *see Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[15] *See* 5 U.S.C. § 8101(2); *Sheila G. Peckenschneider*, 49 ECAB 430, 432 (1998); *Arnold A. Alley*, 44 ECAB 920-21 (1993).

[16] *See supra* note 15.

The August 24 and February 12, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
January 2, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member