

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. CARPENTER and U.S. POSTAL SERVICE,
POST OFFICE, Oklahoma City, OK

*Docket No. 02-1797; Submitted on the Record;
Issued January 29, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he has more than a 75 percent impairment of the right lower extremity, for which he received a schedule award;¹ and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

The Office granted appellant a schedule award for a 20 percent impairment of the right leg as a result of a January 2, 1985 work-related injury and the period of award ran from March 12 to September 26, 1985 and from October 5, 1985 to April 27, 1986. Appellant has not worked since March 1986.

The Office subsequently awarded appellant an additional 21 percent impairment for his right leg for a total impairment of 41 percent; the period of award ran from July 1, 1987 to August 27, 1988. He disagreed with the additional percentage and requested an oral hearing.

A hearing was held on August 10, 1988. In a decision issued on April 25, 1989 and finalized on April 27, 1989, the hearing representative affirmed the Office's January 6, 1988 decision awarding appellant an additional 21 percent right lower extremity impairment. The hearing representative also noted that appellant's contention that he should receive concurrent compensation for total disability and impairment was without merit.²

On December 9, 1999 the Office placed appellant on the periodic rolls retroactive to September 14, 1985. The Office noted that appellant's period of entitlement was continuous.

¹ The Board notes that the original record was lost after an oral hearing held on August 10, 1988. The record before the Board is a reconstructed record.

² The hearing representative noted that appellant's initial schedule award for 20 percent was interrupted from September 27 to October 4, 1985 for payment of compensation for total disability.

On March 17, 2000 the Office of Personnel Management (OPM) approved appellant's disability retirement. On March 30, 2000 he elected OPM retirement with an effective date of June 23, 2000.

On April 17, 2000 appellant filed a claim for a schedule award for his left lower extremity.

In a report dated May 1, 2000, Dr. Joseph Kopta, a Board-certified orthopedic surgeon, stated that he performed a total right knee replacement surgery on appellant, noting that the earlier replacement surgery had failed.

In a report dated May 10, 2000, the Office medical adviser responded to the Office's request for a calculation of appellant's left lower extremity and recommended impairment rating of 22 percent.

On June 23, 2000 the Office terminated appellant's disability compensation benefits.

On July 24, 2000 the Office awarded appellant a 22 percent impairment of the left lower extremity. The period of award ran from June 18, 2000 to September 4, 2001.

On September 21, 2000 the Office awarded appellant a lump sum payment for his left lower extremity schedule award of \$27,568.78. The Office noted the amount "is from September 10, 2000 to September 4, 2001."

In a report dated August 21, 2000 and received by the Office on December 19, 2000, Dr. John W. Ellis, to whom appellant was referred by his treating physician,³ evaluated appellant's left and right lower extremities and reported findings.⁴ He noted: "obvious swelling and instability of the right knee," 19 degrees of extension, 79 degrees of flexion and 8 degrees of anterior posterior movement. Dr. Ellis noted 9 millimeters of medial laxity and movement. He also noted that appellant's right leg circumference of 44.8 centimeters was smaller than his left, which measured 48.4 centimeters. Dr. Ellis stated that because appellant had a right knee replacement surgery, he had no right knee reflexes and that the surgery caused atrophy and decreased use of the right calf. He diagnosed a reinjury of the right knee with instability requiring additional surgery and an increase in traumatic chondromalacia and osteoarthritis. Dr. Ellis stated that appellant's total knee replacement had a "poor result" and based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), he had a 75 percent right lower extremity impairment. He noted that his date of maximum medical improvement was August 21, 2000.⁵

³ Dr. Ellis is Board-certified in family practice and has a specialty in legal medicine and a secondary specialty in occupational medicine.

⁴ Appellant appealed only the Office's right lower extremity determination and thus the decision will limit its review to the evidence concerning the right lower extremity only.

⁵ A.M.A., *Guides* (4th ed. 1993) 88, Table 66.

On May 25, 2001 the Office medical adviser reviewed appellant's medical file and determined that he had a 75 percent impairment of his right lower extremity and that his date of maximum medical improvement was August 21, 2000.⁶

On August 29, 2001 the Office awarded appellant a 75 percent impairment of the right lower extremity. The period of award ran from August 21, 2000 to October 10, 2004.

On October 7, 2001 appellant made a request for a lump-sum payment of his schedule award.

On February 20, 2002 the Office corrected its August 29, 2001 decision to award a 34 percent impairment of the right lower extremity. The Office noted that appellant was "initially granted an impairment percentage of 75 percent," but that it had failed to deduct "the amount previously paid to you for the right lower extremity in the amount of 41 percent." The period of award ran from February 24, 2002 to August 4, 2002.

On March 20, 2002 appellant requested reconsideration and stated that he had not received a schedule award for 41 percent of the right lower extremity.

In a decision dated April 5, 2002, the Office denied modification of its February 20, 2002 decision. The Office found that appellant was awarded a 21 percent impairment for the right lower extremity and that the period of award ran from March 12 to September 26, 1985 and from October 5, 1985 to April 27, 1986. The Office also noted that appellant was paid for total disability from September 27 to October 4, 1985. The Office further noted that appellant was paid for an additional 20 percent impairment from July 1, 1987 to August 27, 1988, which totaled 41 percent impairment for his right lower extremity.

By letter dated May 12, 2002, appellant again requested reconsideration. On June 11, 2002 the Office denied review on the grounds that appellant failed to present new and relevant evidence or to raise substantive legal questions not previously considered.

The Board finds that appellant is not entitled to a schedule award more than 75 percent for the right lower extremity, for which he had been previously awarded 41 percent.

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulation⁸ 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

⁶ The Office medical adviser stated that he relied on the 4th ed. of the A.M.A., *Guides*.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

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 present case, the consulting physician and the Office medical adviser properly relied on the A.M.A., *Guides* in determining the degree of appellant's total right lower extremity impairment of 75 percent. The Office previously had awarded appellant two separate awards totaling 41 percent impairment of his right lower extremity. The Board notes that Dr. Ellis calculated appellant's schedule award based on the fourth edition of the A.M.A., *Guides*. The fifth edition of the A.M.A., *Guides*¹⁰ became effective February 1, 2001 and, thereafter, the Office issued its August 29, 2001 and February 20, 2002 decisions. Upon review of both the fourth and fifth editions of the A.M.A., *Guides* the Board notes that there is no difference in the impairment rating in appellant's case.¹¹

As appellant's total right lower extremity impairment equaled 75 percent and as he had already been compensated for 41 percent of that total impairment, he was due only the remainder of that total impairment rating or 34 percent. Therefore, the Office correctly granted appellant an additional 34 percent award to compensate him for a total right lower extremity impairment of 75 percent.

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 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--

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”¹²

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

⁹ *Id.*

¹⁰ See FECA Bulletin 01-05 (issued January 31, 2001).

¹¹ See *supra* note 5 and A.M.A., *Guides* (5th ed. 2001) 549, Table 17-35.

¹² 5 U.S.C. § 8128(a).

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.¹³

In this case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration.

While appellant argued that he did not receive a schedule award for 41 percent, for his right lower extremity, the record includes multiple references to two prior right lower extremity schedule awards, which together equal a 41 percent impairment. Appellant also argued that his schedule award benefits were not interrupted from September 27 to October 4, 1995, as the hearing representative stated in his April 27, 1989 decision. However, an Office worksheet reflects that appellant was paid a schedule award for his right lower extremity from March 12 to September 20, 1985 and again from October 5, 1985 to April 27, 1986. In its June 11, 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.

Consequently, appellant is not entitled to a merit review 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.¹⁴

The decisions of the Office of Workers' Compensation Programs dated June 11, April 5 and February 20, 2002 are affirmed.

Dated, Washington, DC
January 29, 2003

Colleen D. Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 20 C.F.R. § 10.608(b) (1999).

¹⁴ On appeal, appellant argued that he should have been able to receive compensation for a disability while receiving compensation for a schedule award. The Board has long held that a claimant cannot receive both disability compensation and a schedule award concurrently. *See Marie J. Born*, 28 ECAB 89 (1976).