U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE V. ROBBINS and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, San Diego, CA

Docket No. 02-2390; Submitted on the Record;
Issued June 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than an 18 percent impairment of the left leg and a 3 percent impairment of the right leg for which she received schedule awards; (2) whether the Office of Workers' Compensation Programs properly determined appellant's pay rate for compensation purposes; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On October 10, 1997 appellant, then a 34-year-old customs inspector, filed a claim for a traumatic injury occurring on October 9, 1997 in the performance of duty. The Office accepted appellant's claim for a back strain and a herniated lumbar disc at L5-S1, and authorized a laminectomy and discectomy at L5-S1.

By decision dated December 28, 1999, the Office granted appellant a schedule award for a 13 percent permanent impairment of the left leg. The period of the award ran for 37.44 weeks from February 17 to November 6, 1999.

In a decision dated January 10, 2000, the Office determined that appellant's actual earnings as a management program technician effective September 20, 1999 fairly and reasonably represented her wage-earning capacity.

On January 6, 2000 appellant requested a hearing regarding her schedule award. By decision dated October 26, 2000, the hearing representative set aside the Office's December 28, 1999 decision after finding a conflict in medical opinion regarding the extent of appellant's permanent impairment. In an accompanying letter, the hearing representative instructed the Office to issue a formal decision regarding appellant's pay rate for compensation purposes.[1]

[1] On January 2, 2002 appellant filed a notice of recurrence of disability on December 18, 2001 causally related to her October 9, 1997 employment injury. On July 5, 2002 the Office accepted appellant's recurrence claim and paid her compensation from December 16, 2001 through March 29, 2002.

In a decision dated July 5, 2002, the Office found that appellant had an additional eight percent impairment of the lower extremities. The period of the award ran for 23.04 weeks from April 21 to September 29, 2002 based on a weekly pay rate of $720.61.

By letter dated August 30, 2002, appellant requested reconsideration of her claim. In a decision dated September 11, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and thus insufficient to warrant review of the prior merit decision.

The Board finds that appellant has no more than an 18 percent impairment of the left leg and a 3 percent impairment of the right leg for which she received schedule awards.

The schedule award provisions of the Federal Employees' Compensation Act,[2] and its implementing federal regulations,[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 for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[4] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[5]

Section 8123 of the Act[6] provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination. In situations where there exists a conflict in medical opinion 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, is entitled to special weight.[7]

In this case, the Office determined that a conflict in medical opinion existed between appellant's physicians, Dr. Thomas Harris and Dr. Kent Feldman, and the Office medical adviser on the issue of the extent of appellant's lower extremity impairment. On December 1, 2000 the Office referred appellant to Dr. William P. Curran, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated December 27, 2000, Dr. Curran reviewed the evidence of record and listed detailed findings on examination. He measured the circumference of appellant's thighs

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.404(a).

[5] *See* FECA Bulletin No. 01-5 (issued January 29, 2001).

[6] 5 U.S.C. § 8107 *et seq*.

[7] *Leanne E. Maynard*, 43 ECAB 482 (1992).

and calves on both legs and noted findings of decreased sensation at the L5 and S1 dermatomes on the left side. Dr. Curran discussed appellant's complaints of pain in the low back and right buttock, numbness from the left buttock to the left foot, intermittent severe pain in the left heel, weakness of the lower extremity on the left and moderate to severe intermittent pain in the upper and outer right thigh. He stated:

> "[Appellant] [h]as weakness of her left hamstring and gastroc soleus musculature which corresponds to an injury to the left S1 nerve root. She also has decreased sensation corresponding to the left S1 nerve root.
>
> "I would classify [appellant's] subjective complaints of low back, bilateral buttock and left lower extremity pain as moderate in intensity. Her subjective complaints of left lower extremity pain correspond to the S1 nerve root. She complains of weakness in the left lower extremity, left heel pain, low back stiffness and numbness involving the outer aspect of her left calf, ankle and foot.
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> "[Appellant] has sensory loss involving the left S1 nerve root. More likely than not, her sensory loss is due to her herniated left lumbosacral disc and subsequent surgery.
>
> "[Appellant] has weakness of her left hamstring and gastroc soleus musculature. I would estimate a 10 to 15 percent weakness in both groups."

Dr. Curran further found that appellant had weakness of her left lower extremity "which would equal active movement against gravity with some resistance. I would classify her left calf atrophy as moderate in severity." He concluded:

> "[Appellant] has medical residuals of her injury in the form of scar tissue confirmed by contrast MRI [magnetic resonance imaging] [study], atrophy of the left calf, limitation of lumbosacral spine motions, decreased sensation S1 dermatome, and weakness left hamstrings and gastroc soleus musculature."

On January 31, 2001 the Office medical adviser reviewed Dr. Curran's report and found as follows:

> "In attempting to calculate an award for the permanent functional loss of the left lower extremity, this reviewer would recommend grading the pain complaints and/or altered sensation as described as a maximal Grade II as per Table 15-15, Determining Impairment Due to Sensory Loss, Page 424, fifth edition of the [A.M.A.,] *Guides*. This would be a maximal 80 percent grade of a maximal 5 percent for branches of L5 and 5 percent for branches of S1 (Table 15-18: Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity, Page 424), or thus an 80 percent grade of a maximal 10 percent equivalent to an 8 percent impairment of the left lower extremity, or leg, for the pain factors described. The physician indicates a maximal Grade IV weakness, which according to Table 15-16: Determining Impairment Due to Loss of Power and Motor Deficits, page 424, would be a maximal 25 percent motor deficit. The physician identifies the S1 nerve root affecting the strength of the hamstrings and

gastrocnemius, and this would be assessed a maximal 20 percent as per Table 15-18. A 25 percent of this would be a 5 percent lower extremity impairment.

"A second method of calculating the lower extremity weakness would be the 1 [inch] calf atrophy documented. Calf atrophy of 1 [inch] would be equivalent to 2.54 [centimeters], and, according to Table 17.6: Impairment Due to Unilateral Leg Muscle Atrophy, this would be equivalent to an 11 percent impairment of the lower extremity for the calf atrophy. This second method, that assessed for atrophy, is higher than that assessed for the muscle strength weakness. The value for the atrophy should be adopted, and not that for the loss of strength. The records do not document any loss of peripheral joint range of motion involving any of the left lower extremity joints, for a zero percent impairment.

"Utilizing the Combined Values Chart, the 11 percent impairment for calf atrophy, combined with the 8 percent impairment for pain factors and/or altered sensation, combined with the 0 percent for loss of motion would be equivalent to an 18 percent impairment of the left lower extremity, or leg.

"The records describe some right buttock pain, and some right posterior thigh and right outer thigh pain with no description that this follows any one specific dermatome, or involves any one specific nerve root. This would correspond to S1 nerve involvement, which again is assessed a maximal five percent impairment as per Table 15-18. One would grade the right lower extremity complaints -- pain -- as less than that involving the left, or a Grade III which would be pain which interferes with some activities, or a maximal 60 percent sensory deficit. A 60 percent of a maximal 5 percent would be equivalent to a 3 percent impairment of the right lower extremity, or leg. The records did not document any right lower extremity atrophy or weakness, for a zero percent impairment. Utilizing the Combined Values Chart, the three percent impairment for pain factors, combined with the zero percent for loss of motion, combined with the zero percent for atrophy/weakness would be equivalent to a three percent impairment of the right lower extremity, or leg."

The Office medical adviser's finding, which was based on the report of Dr. Curran, the impartial medical examiner, constitutes the weight of the medical evidence. Dr. Curran provided a detailed and well-rationalized report and thus his opinion is entitled to special weight as the impartial medical examiner. The Office medical adviser applied the appropriate tables and pages of the A.M.A., *Guides* to Dr. Curran's findings in reaching his conclusions. He found that the A.M.A., *Guides* provided two methods for determining appellant's impairment due to weakness of the left lower extremity and properly used the method which yielded the greater impairment, 11 percent.[8] Additionally, the Office medical adviser determined that, based on the physical findings of Dr. Curran, appellant had a three percent impairment of the right leg and an eight percent impairment of the left leg due to pain.[9] He combined the 11 percent impairment due to

[8] A.M.A., *Guides* at 530, Table 17-6.

[9] *Id*. at 424, Tables 15-15, 15-18.

weakness and the 8 percent impairment due to pain of the left lower extremity using the Combined Values Chart[10] and properly concluded that appellant has an 18 percent permanent impairment of the left lower extremity and a 3 percent permanent impairment of the right lower extremity.

The Board finds that the case is not in posture for decision on the issue of whether the Office properly determined appellant's pay rate for compensation purposes.

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which she was injured substantially the entire year preceding the injury or would have been afforded employment for substantially the whole year except for the injury.[11] Section 8114(d) of the Act provides:

> "Average annual earnings are determined as follows --
>
> "(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
>
> (A) was fixed, the average annual earnings are the rate of pay; or
>
> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.
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> "(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee for the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place as determined under paragraph (1) of this subsection."[12]

Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.[13]

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[10] *Id*. at 604.

[11] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

[12] *Id*.

[13] 5 U.S.C. § 8114(d)(3).

In this case, appellant did not work in her position with the employing establishment for substantially the whole year prior to her employment injury but she was in a position that would have been available for a substantial portion of the following year.[14] Therefore, section 8114(d)(2) is applicable in determining appellant's rate of pay for compensation purposes.

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[15] Section 8101(4) of the Act defines "monthly pay" as "the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater."[16] This section applies to compensation benefits paid pursuant to a schedule award.[17]

On November 19, 1999 the Office determined appellant's pay rate for compensation purposes based on its finding that her employment as a border patrol agent constituted similar employment under section 8114(d)(2). The Office utilized the date disability began, April 26, 1998, as the appropriate date to establish appellant's pay rate for compensation purposes. By letter dated October 30, 2000, a hearing representative instructed the Office to develop the issue of appellant's pay rate and issue an appropriate decision. By letter dated January 22, 2001, the Office requested pay rate information from the employing establishment. The Office noted that it was using the date disability began, April 26, 1998, to establish appellant's pay rate for compensation purposes of $720.61 per week. The Office requested information regarding whether appellant had sustained any disability between October 9, 1997 and April 26, 1998.

In a response dated March 16, 2001, the employing establishment informed the Office that, from April 16 through August 30, 1997, at her work for another employing establishment, appellant earned an average of $536.38 per week and listed her night differential, availability pay, Sunday and holiday pay, and Federal Leave Standard Act.[18] The employing establishment further indicated that, from August 31 through April 26, 1998, appellant earned $564.21 per week and provided her earnings for night differential, Sunday pay and holiday pay.

By letter dated April 4, 2001, an Office claims examiner requested that appellant and the employing establishment submit additional information in order to determine whether appellant's pay rate for compensation purposes should be based on her date-of-injury, date-of-recurrence or

[14] Appellant began working for the employing establishment on August 30, 1997. She was injured on October 9, 1997 while participating in a training program for customs inspectors. Prior to her injury, appellant worked as a border patrol agent for another employing establishment.

[15] 5 U.S.C. § 8105(a); *see id.* § 8110(b) (a disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of 8 1/3 percent of his monthly pay if that compensation is payable under section 8105 or 8107(a)).

[16] 5 U.S.C. § 8101(4).

[17] *Sherron A. Roberts*, 47 ECAB 617 (1996).

[18] Extra pay authorized under the Federal Leave Standard Act.

date-of-disability pay rate. The Office claims examiner noted that appellant had established a date-of-injury pay rate because she was totally disabled for two days following her employment injury. He indicated that the Office would also determine whether appellant was entitled to a date-of-recurrence pay rate effective April 10, 1998. The Office claims examiner requested that the employing establishment provide salaries of employees similarly situated to appellant for both her date of injury, October 9, 1997 and the date disability began, April 26, 1998. He noted that appellant had "premium pay earnings in other federal employment" but that her prior employment was "not the same as her date-of-injury job and the Office cannot average out such earnings. Instead, the Office must follow the instructions provided in 5 U.S.C. § 8114."

The employing establishment did not respond to the Office's request for information. On July 5, 2002 the Office issued appellant a schedule award based on its prior determination that she was entitled to a pay rate of $720.61 per week. The Office utilized a pay rate of $720.61 per week without receiving the requested information from the employing establishment regarding comparable earnings for employees in substantially similar employment. The Office further did not determine whether appellant was entitled to a date-of-injury, date-of-disability or date-of-recurrence pay rate, or issue a decision showing how it had arrived at its pay rate determination in accordance with the hearing representative's instructions. Once the Office undertakes development of the record, it has the responsibility to do so in a proper manner.[19] In this case, the Office did not properly develop the factual record regarding appellant's pay rate. Consequently, the case must be remanded for recalculation of appellant's pay rate.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (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) submitting relevant and pertinent new evidence not previously considered by the Office.[20] Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[21]

In her request for reconsideration, appellant argued that the Office should have accepted the findings of her attending physician. Appellant also contended that she was entitled to an additional schedule award for an impairment of the foot. However, the issue in this case, the degree of impairment of appellant's lower extremities, is medical in nature and can only be resolved by the submission of medical evidence.[22] Additionally, Dr. Curran, the impartial medical examiner, considered appellant's foot problems when he issued his findings regarding

[19] *Henry G. Flores*, 43 ECAB 901, 905 (1992).

[20] 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.608(b).

[22] *Ronald M. Cokes*, 46 ECAB 967 (1995).

the degree of her permanent impairment. Thus, appellant has not raised a legal argument sufficient to require reopening of the case for merit review.[23]

The decisions of the Office of Workers' Compensation Programs dated September 11 and July 5, 2002 are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
June 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[23] Appellant questioned the Office's determination of her pay rate; however, the Board has addressed the issue of her pay rate in the merits of this decision.