

FACTUAL HISTORY

On January 25, 1997 appellant, then a 31-year-old aviation safety inspector, filed a claim for compensation for a traumatic injury, a herniated disc at L4-5, sustained on December 10, 1996 when loading his car to depart for an inspection. The Office accepted that appellant sustained an aggravation of a herniated disc, and authorized surgery for this condition. On February 1, 1997 Dr. Bernard O. Rand, a Board-certified neurosurgeon, performed a hemilaminectomy and removal of a large extruded disc at L4-5 on the left side.

On August 29, 2003 appellant filed a claim for a schedule award. In a September 15, 2003 report, Dr. Rand stated that appellant was still having difficulty with his persistent neurological deficit, and still had weakness of his gastrocnemius muscle and difficulty raising on his toes on the left side, and numbness in the posterior gastrocnemius area and in the heel and little toe of his left foot. Dr. Rand stated that appellant's neurological deficit was stable and permanent, and estimated his permanent impairment due to this deficit at 20 percent of the whole person. In an October 10, 2003 report, Dr. Rand estimated appellant's permanent impairment of the lower extremity at 40 percent, but stated that he did not use the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

The Office authorized an orthopedic evaluation of appellant's permanent impairment. Appellant submitted a February 17, 2004 report from Dr. David G. Changaris, a Board-certified neurosurgeon, who stated that appellant complained of constant pain in the left leg, weakness in the left leg, dragging of the left foot on ambulation, inability to walk on the ball of his left foot, and the feeling that the bottom of the left foot was swollen and numb. Examination revealed good strength of all the muscle groups of the lower extremities, though the left extensor hallucis longus was weaker, absent deep tendon reflexes of the left knee and ankle, allodynia¹ in the ball of the left foot, and decreased sensation in the left foot and calf. Dr. Changaris diagnosed postlaminectomy syndrome, complex regional pain syndrome of the left leg, and allodynia of the left foot. He assigned a 19 percent impairment of the whole person for the complex regional pain syndrome of the left leg, referring to Table 13-15 of the A.M.A., *Guides*, and stated that this translated into a 48 percent impairment of the lower extremity using Table 17-3. Dr. Changaris stated that this impairment was solely due to the December 10, 1996 employment injury.

On July 22, 2004 an Office medical adviser reviewed the medical evidence and stated that appellant's December 10, 1996 injury resulted in a herniated disc on the right side,² for which he assigned a five percent permanent impairment for residual pain and sensory deficit.

On August 25, 2004 the Office issued appellant a schedule award for a five percent permanent impairment of his right leg. This decision stated that Dr. Changaris incorrectly used a table for the whole person.

¹ Allodynia: pain resulting from a nonnoxious stimulus to normal skin. Dorland's *Illustrated Medical Dictionary* (30th ed. 2003).

² An August 12, 2002 lumbar magnetic resonance imaging scan showed a small right paracentral disc herniation at L5-S1 and Dr. Rand stated in an August 8, 2002 report that appellant had some decreased sensation of his right foot.

By letter dated September 29, 2004, appellant requested reconsideration, stating that the schedule award was issued for the wrong leg, as his left leg was the affected one. A second Office medical adviser reviewed the medical evidence on March 17, 2005 and stated that the permanent impairment described by Dr. Changaris was for a condition not accepted by the Office.

By decision dated April 29, 2005, the Office found appellant's argument that he was entitled to a schedule award for the left leg irrelevant and refused to reopen appellant's case for further review of the merits of his claim.

LEGAL PRECEDENT

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 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.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) 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.

ANALYSIS

Although appellant used the term “reconsideration” in his September 29, 2004 letter, the Board, in reviewing this letter, notes that it did not express disagreement with the percentage of permanent impairment of the right leg in the Office's August 25, 2004 schedule award. Instead, the September 29, 2004 letter requested that the Office issue an additional schedule award for the left leg. The situation in the present case is analogous to that in *Linda T. Brown*³ and *Paul R. Reedy*⁴ where the claimants used the term “reconsideration,” but submitted evidence of a permanent impairment at a date subsequent to the prior denial of a schedule award. The Board pointed out that the new evidence did not attempt to show error in the Office's decision but rather was informing the Office of an increased schedule award. The Board found that the

³ 51 ECAB 115 (1999).

⁴ 45 ECAB 488 (1994).

Office improperly adjudicated the claimants' letters as requests for reconsideration, and found they were entitled to decisions on entitlement to a schedule award.

In the present case, unlike in *Brown and Reddy*, appellant, by his September 29, 2004 letter, was not attempting to show that his permanent impairment had increased at a later date. However, as in those cases, appellant was not attempting to overturn the Office's award.⁵ He has not indicated that he has more than the five percent permanent impairment of the right leg for which the Office issued a schedule award on August 25, 2004. By his September 29, 2004 letter, he was attempting to get the Office to adjudicate a claim for a schedule award for the left leg. The Office improperly adjudicated this letter as a request for reconsideration.⁶ The Board finds that appellant is entitled to a decision on the extent, if any, of permanent impairment of his left leg related to his December 10, 1996 employment injury.

CONCLUSION

The Office improperly adjudicated appellant's September 29, 2004 letter as a request for reconsideration of its August 25, 2004 schedule award for the right leg.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for a decision on whether appellant has a permanent impairment of his left leg.

Issued: November 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

⁵ See *Richard J. Chabot*, 43 ECAB 357 (1991) (the Board considered the attempt to have an Office decision overturned a determinant of whether the claimant was requesting reconsideration).

⁶ The Office's procedure manual also distinguishes between an amended award, which is the proper subject of a request for reconsideration, and a request for an additional award. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b (August 2002); *Reconsiderations*, Chapter 2.1602.5b (January 2004).