

**United States Department of Labor
Employees' Compensation Appeals Board**

RICHARD A. NEIDERT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Colorado Springs, CO, Employer**

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**Docket No. 05-1330
Issued: March 10, 2006**

Appearances:
Richard A. Neidert, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 7, 2005 appellant filed a timely appeal of the January 13 and 25, 2005 merit decisions of the Office of Workers' Compensation Programs which found that he had no more than a 28 percent impairment of the left lower extremity and a 20 percent impairment of the right lower extremity, for which he received schedule awards. He also appealed a decision dated March 3, 2005 which denied his claim for recurrence of disability and a May 23, 2005 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant had no more than a 28 percent impairment of the left lower extremity and a 20 percent impairment for the right lower extremity, for which he received a schedule award; (2) whether he met his burden of proof to establish that he sustained a recurrence of disability; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

The case has previously been before the Board. In a decision dated June 3, 1997, the Board affirmed a November 29, 1994 schedule award for a 13 percent impairment to the right lower extremity.¹ In a decision dated January 7, 2002, the Board affirmed a decision of the Office dated April 7, 2000,² finding that appellant had not established a recurrence of disability commencing March 1, 1995. In a decision dated June 10, 2003, the Board affirmed the decision of the Office dated November 21, 2002, finding a 13 percent impairment of the right leg and 28 percent of the left leg.³ The history of the case provided in the Board's prior decisions is incorporated herein by reference.

By decision dated January 15, 1999, the Office found a 28 percent left lower extremity impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁴

In a letter dated February 19, 2004, appellant alleged that his medical condition had worsened and he believed he was entitled to an additional schedule award. He submitted a report dated February 9, 2004, from Dr. Oregon Hunter, a physiatrist, who provided results on examination and stated that appellant had chronic low back syndrome, L3-4 herniated nucleus pulposus, L4-5 and L5-S1 bilateral bulges and stenosis and worsening of L5-S1 disc disease. He referred to his report dated November 18, 2002, which advised that appellant's impairment rating was 7.5 percent in each lower extremity and advised that this was not an additional rating from the prior 13 percent impairment rating for the right leg and 28 percent impairment for the left leg.

By decision dated May 14, 2004, the Office denied modification of the November 21, 2002 decision.

In a letter dated June 15, 2004, appellant requested reconsideration, contending that he had greater impairment under the A.M.A. *Guides*. He submitted a report dated May 24, 2004 from Dr. Hunter, who provided results on examination and stated that appellant had chronic low back syndrome, L3-4 herniated nucleus pulposus, L4-5 and L5-S1 bilateral bulges and stenosis and worsening of L5-S1 disc disease.

By decision dated August 31, 2004, the Office denied modification of the May 14, 2004 decision.

In a letter dated October 12, 2004, appellant alleged that his medical condition had worsened and that he had additional impairment. He submitted a report dated September 27, 2004 from Dr. Hunter, who provided results on examination and stated that appellant had chronic

¹ Docket No. 95-1371. The accepted conditions in the case are aggravation of low back strain and lumbar radiculopathy. Appellant returned to work in a limited-duty capacity and retired on March 1, 1995.

² Docket No. 00-2016.

³ Docket No. 03-647.

⁴ A.M.A., *Guides* (5th ed. 2001).

low back syndrome, L3-4 herniated nucleus pulposus L4-5 and L5-S1, bilateral bulges and stenosis and worsening of L5-S1 disc disease. Dr. Hunter noted a maximum 37 percent impairment allowed for loss of strength in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*. He rated appellant as having power and motor deficit of 25 percent of the right and left legs, Grade 4 in the distribution of the L5 spinal nerve root under Table 15-16.⁵ Impairment due to power and motor deficits was calculated as 9 percent impairment for the right and left legs by multiplying the 25 percent grade with the 37 percent maximum allowed for the L5 nerve. Dr. Hunter noted a maximum 20 percent impairment allowed for loss of strength in the distribution of the S1 nerve root under Table 15-18 of the A.M.A., *Guides*. He rated appellant as having power and motor deficit of 25 percent of the right and left legs, Grade 4, in the distribution of the S1 spinal nerve root under Table 15-16.⁶ Impairment due to power and motor deficits was calculated as 5 percent impairment for the right and left legs by multiplying the 25 percent grade with the 20 percent maximum allowed for the S1 nerve.

Dr. Hunter noted a maximum 5 percent impairment for sensory deficit or pain in the distribution of the L5 spinal nerve root under Table 15-18 of the A.M.A., *Guides*.⁷ He rated that appellant had a sensory loss of 80 percent of the right and left legs, Grade 2, in the distribution of the L5 spinal nerve root under Table 15-15.⁸ Impairment due to sensory loss was calculated as 4 percent impairment for the right and left lower legs by multiplying the 80 percent grade with the 5 percent maximum allowed for the L5 nerve. Dr. Hunter noted a maximum percent impairment of the right and left legs for sensory deficit or pain in the distribution of the S1 spinal nerve root under Table 15-18 of the A.M.A., *Guides*.⁹ He rated appellant with sensory loss of 80 percent of the right and left legs, Grade 2, in the distribution of the S1 spinal nerve root under Table 15-15.¹⁰ Impairment due to sensory loss was calculated as 4 percent impairment for the right and left lower extremities by multiplying the 80 percent grade with the 5 percent maximum allowed for the S1 nerve. Dr. Hunter concluded that appellant had a 20 percent impairment of the left and right lower extremity.

In a December 15, 2004 report, an Office medical adviser concurred with Dr. Hunter's finding and agreed that appellant had a 20 percent impairment of the left and right lower extremities based on motor and sensory deficits. He noted that the increased deficit was an empirical decision without any confirmation of an electromyography (EMG) or nerve conduction studies; however, the Office medical adviser opined that the increased gradient of deficits for lower extremities, both motor and sensory, were treated as factual.

In a January 13, 2005 decision, the Office found that appellant had an additional impairment of 7 percent of the right leg, for a total of 20 percent impairment to the right leg. The

⁵ A.M.A., *Guides* at Table 15-16, page 424.

⁶ *See id.*

⁷ *Id.* at Table 15-18, page 424.

⁸ *Id.* at Table 15-15, page 424.

⁹ *Id.* at Table 15-18, page 424.

¹⁰ *Id.* at Table 15-15, page 424.

Office found that the evidence was insufficient to show that he had greater impairment to his left leg than the 28 percent impairment previously awarded. The Office noted that it would issue a separate decision awarding additional impairment for the right leg.

By schedule award dated January 25, 2005, the Office granted an additional 7 percent impairment of the right leg, for a total of 20 percent impairment to the right leg. The period of the award was September 20, 2002 to February 8, 2003.

On January 26, 2005 appellant filed a Form CA-2a, recurrence of disability claim. He did not note a date of recurrence but indicated that his condition had worsened and believed this change was causally related to the original accepted work-related injury of January 7, 1992. Appellant noted that, after the original injury, he returned to a light-duty position and remained in this position until he retired in 1995.

By letter dated January 31, 2005, the Office advised appellant of the factual and medical evidence needed to establish his claim for recurrence and requested that he submit a physician's reasoned opinion addressing the relationship of his claimed recurrent condition and specific employment factors.

Appellant submitted a February 14, 2005 report from Dr. Hunter which noted a history of his work-related injury of January 7, 1992. He diagnosed chronic low back syndrome, L3-4 herniated nucleus pulposus, L4-5 and L5-S1 bilateral bulges and stenosis and worsening of L5-S1 disc disease. Dr. Hunter advised that appellant's back condition was treated conservatively with physical therapy and a fitness program. He noted tenderness of the left leg, decreased sensation in bilateral L5-S1 distribution, right greater than left and decreased motor strength in the lower extremities in the right L5 distribution. Dr. Hunter opined that appellant was unable to return to his usual occupation as a letter carrier due to his back injury of January 7, 1992 and bilateral lower extremity radiculopathy. He quoted from his report of February 1, 2001, which stated: "It would appear that [appellant] is unable to return to his usual occupation as a letter carrier. It is my opinion that he is unable to return to uninterrupted gainful employment due to [the] need to lie down intermittently due to his spine condition."

In a decision dated March 3, 2005, the Office denied appellant's claim for a recurrence of disability.

By letter dated April 1, 2005, appellant requested reconsideration. He submitted a duplicate report from Dr. Hunter dated February 14, 2005.

By a decision dated May 23, 2005, the Office denied appellant's reconsideration request on the grounds that it neither raised substantive legal questions, nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹¹ and its implementing regulation¹² sets 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 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.

ANALYSIS -- ISSUE 1

Dr. Hunter opined that appellant sustained a total of 20 percent impairment of the left and right lower extremity based on motor and sensory deficits. He noted a maximum of 37 percent impairment allowed for loss of strength in the distribution of the L5 nerve root under Table 15-18 of the A.M.A., *Guides*. Dr. Hunter rated appellant with a power and motor deficit of 25 percent of the right and left legs, Grade 4, in the distribution of the L5 spinal nerve root under Table 15-16.¹³ Impairment due to motor deficits was calculated as 9 percent impairment for the right and left lower extremities by multiplying the 25 percent grade with the 37 percent maximum allowed for the L5 nerve. Dr. Hunter noted a maximum of 20 percent impairment allowed for loss of strength in the distribution of the S1 nerve root under Table 15-18 of the A.M.A., *Guides*. He rated appellant with a power and motor deficit of 25 percent of the right and left legs, Grade 4, in the distribution of the S1 spinal nerve root under Table 15-16.¹⁴ Impairment due to motor deficits was calculated as 5 percent impairment for the right and left lower extremities by multiplying the 25 percent grade with the 20 percent maximum allowed for the S1 nerve.

Dr. Hunter noted a maximum of 5 percent impairment allowed for sensory deficit or pain in the distribution of the L5 spinal nerve root under Table 15-18 of the A.M.A., *Guides*.¹⁵ He rated appellant with an 80 percent sensory loss of the right and left legs, Grade 2, in the distribution of the L5 spinal nerve root under Table 15-15.¹⁶ Impairment due to sensory loss was calculated as 4 percent impairment for the right and left lower extremities by multiplying the 80 percent grade with the 5 percent maximum allowed for the L5 nerve. Dr. Hunter noted a maximum 5 percent impairment allowed for sensory deficit or pain in the distribution of the S1 spinal nerve root under Table 15-18 of the A.M.A., *Guides*.¹⁷ He rated appellant with a sensory

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404 (1999).

¹³ A.M.A., *Guides* at Table 15-16, page.

¹⁴ *See id.*

¹⁵ *Id.* at Table 15-18, page 424.

¹⁶ *Id.* at Table 15-15, page 424.

¹⁷ *Id.* at able 15-18, page 424.

loss of 80 percent, Grade 2, in the distribution of the S1 spinal nerve root under Table 15-15.¹⁸ Impairment due to sensory loss was calculated as 4 percent impairment for the right and left lower extremities or legs by multiplying the 80 percent grade with the 5 percent maximum allowed for the S1 nerve. Dr. Hunter opined that appellant sustained a total of 20 percent impairment of the left and right lower extremity based on motor and sensory deficits.

The Office medical adviser applied the A.M.A., *Guides* to the information provided in Dr. Hunter's report and reached an impairment rating of 20 percent of the right and left leg based on motor and sensory deficits set forth in Tables 15-15, 15-16 and 15-18, page 424 of the A.M.A, *Guides*. However, the Board notes that neither Dr. Hunter, nor the Office medical adviser properly utilized the Combined Values Chart, page 604 of the A.M.A, *Guides*¹⁹ in determining total impairment.²⁰ Section 17.2., Methods of Assessment, page 525 of the A.M.A, *Guides*, provides that, when more than one rating method is used, the individual impairment ratings are combined using the Combined Values Chart.²¹ The impairment values in this case are based on Table 15-18, page 424 of the A.M.A, *Guides* for impairment of the L5 and S1 nerve root. As noted above, impairment due to motor deficits was calculated as nine percent impairment for the right and left lower extremities for the L5 nerve and impairment due to motor deficits was calculated as five percent impairment for the right and left lower extremities for the S1 nerve. Impairment due to sensory loss was calculated as four percent impairment for the right and left lower extremities for the L5 nerve and impairment due to sensory loss was calculated as four percent impairment for the right and left lower extremities for the S1 nerve. Therefore, adding the respective values for strength deficit of 9 percent and 5 percent for a total of 14 percent and sensory deficit of 4 percent and 4 percent for a total of 8 percent, appellant's impairment rating is 21 percent to the right and left lower extremity when these two values are combined under the Combined Values Chart. Although this rating does not establish greater impairment than the 28 percent previously granted for the left lower extremity, this impairment is greater than the 20 percent impairment for the right lower extremity granted by the Office in its decision dated January 25, 2005. The Office properly noted that appellant was previously granted a schedule award for 13 percent impairment of the right leg and, therefore, would be entitled to an additional award of 7 percent impairment of the right leg. As he was previously granted a schedule award for 28 percent impairment of the left leg, appellant was not entitled to an additional schedule award for the left leg.

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability

¹⁸ *Id.* at Table 15-15, page 424.

¹⁹ See page 604, A.M.A., *Guides*.

²⁰ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (an attending physician's report is of little probative value where the A.M.A., *Guides* were not properly followed).

²¹ See *id.*

and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.²²

ANALYSIS -- ISSUE 2

Appellant has not submitted sufficient evidence to support a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.

Appellant returned to work in a light-duty capacity and stopped working due to his retirement on March 1, 1995. He did not allege or establish a change in the duties of this position. Further, the medical evidence of record fails to establish a recurrence of disability for the light-duty position commencing March 1, 1995, the date of last exposure when he retired or anytime since his retirement. Appellant submitted a report dated February 14, 2005 from Dr. Hunter, a specialist in rehabilitation medicine, who provided results on examination and diagnosed chronic low back syndrome, L3-4 herniated nucleus pulposus, L4-5 and L5-S1 bilateral bulges and stenosis and worsening of L5-S1 disc disease. He noted findings and opined that appellant was unable to return to his usual job as a letter carrier due to his back injury of January 7, 1992 and bilateral lower extremity radiculopathy. Dr. Hunter quoted his report of February 1, 2001, which stated: "It would appear that [appellant] is unable to return to his usual occupation as a letter carrier. It is my opinion that he is unable to return to uninterrupted gainful employment due to [the] need to lie down intermittently due to his spine condition." The issue in the case is whether there was a change in appellant's employment injury after his retirement in 1995 that rendered him disabled for the light-duty position, not whether he could no longer perform his regular date-of-injury job. Dr. Hunter does not provide a specific and reasoned opinion on this issue.²³ Additionally, he did not indicate a specific date of a recurrence of disability, nor did he note a particular change in the nature of appellant's physical condition arising from the employment injury, which prevented him from performing his light-duty position.²⁴ Therefore, this report is insufficient to meet his burden of proof.

Other medical reports submitted by appellant failed to specifically address whether he sustained a recurrence of disability after his retirement in 1995 causally related to the January 7, 1992 work injury, nor do they note a particular change in the nature of appellant's physical condition arising from the employment injury that prevented him from performing his light-duty position. The record contains other reports from Dr. Hunter but these reports do not specifically address a recurrence of disability commencing after 1995. Therefore, the Board finds that appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition. The Board accordingly finds that appellant did not meet his burden of proof to show a change in the nature and extent of his injury-related condition.

²² *Terry R. Hedman*, 38 ECAB 222 (1986).

²³ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

²⁴ *Id.*

Appellant also did not establish a change in the nature and extent of the light-duty requirements. He was working in a light-duty position when he retired from the employing establishment. When a claimant stops working at the employing establishment for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of the Act.²⁵ The Board finds that there is no credible evidence substantiating that appellant had a change in the nature and extent of his light-duty requirements or was required to perform duties that exceeded his medical restrictions. The light-duty position performed by appellant was in conformance with the medical restrictions set forth by his treating physicians. Furthermore, the employing establishment noted that the light-duty position would have remained available until a permanent light-duty position was identified.

Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements, which would prohibit him from performing the light-duty position he assumed after he returned to work.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Act,²⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,²⁷ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by the (Office); or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.²⁸

²⁵ See *John W. Normand* 39 ECAB 1378 (1988) (where the claimant was removed from his light-duty position for disciplinary reasons, the Board found no disability within the meaning of the Act). Office regulations indicate that there is no recurrence of disability when withdrawal of light duty occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force. 20 C.F.R. § 10.5(x). Regarding the Act, see 5 U.S.C. §§ 8101-8193.

²⁶ 5 U.S.C. § 8128(a).

²⁷ 20 C.F.R. § 10.606(b).

²⁸ *Id.*

ANALYSIS -- ISSUE 3

Appellant's April 1, 2005 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration appellant submitted a medical report from Dr. Hunter dated February 14, 2005. However, this evidence was duplicative of evidence already contained in the record²⁹ and was previously considered by the Office in its decision dated March 3, 2005 and found deficient. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."³⁰

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his April 1, 2005 request for reconsideration.

CONCLUSION

The Board finds that appellant has no more than a 28 percent impairment of the left lower extremity and modifies the award for the right lower extremity to find a 21 percent impairment. The Board also finds that appellant has not met his burden of proof in establishing a recurrence of disability. The Board further finds that the Office properly denied his requests for reconsideration without conducting a merit review of the claim.

²⁹ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

³⁰ 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated May 23 and March 3, 2005 are affirmed, the January 25 and 13, 2005 decisions are modified in part and the August 31, 2004 decision is affirmed.

Issued: March 10, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board