U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ZELLIA GRAVES and DEPARTMENT OF THE ARMY, Fort Meade, MD

Docket No. 98-791; Submitted on the Record; Issued March 8, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 53 percent permanent impairment to her right leg; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

In the present case, the Office accepted that appellant sustained a back sprain, contusion and lumbar disc syndrome causally related to a June 13, 1983 employment incident. By decision dated July 12, 1991, the Office issued a schedule award for a 53 percent permanent impairment to the right leg.

By decision dated May 15, 1997, the Office determined that appellant was not entitled to an additional schedule award. In a decision dated October 14, 1997, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that appellant has not established more than a 53 percent permanent impairment.

Section 8107 of the Federal Employees' Compensation Act, provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association (A.M.A.,)

[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

Guides to the Evaluation of Permanent Impairment, as the uniform standard applicable to all claimants.[2]

In this case, the original schedule award was based on use of the third edition of the A.M.A., *Guides*. A request for an additional impairment is determined under the current edition of the A.M.A., *Guides*; in this case, the fourth edition.[3] In a memorandum dated September 24, 1996, an Office medical adviser opined that under the fourth edition appellant's impairment was 40 percent, citing Table 83.[4] Under this table, the maximum impairment for sensory and motor impairment of the L5 nerve root is 40 percent.

The record indicates that appellant's attending physicians submitted reports that reference the A.M.A., *Guides*, but provided little reasoning or evidence of proper application of the relevant provisions of the A.M.A., *Guides*. In a report dated July 17, 1995, Dr. Jose B. Corvera, an orthopedic surgeon, stated that appellant had a 100 percent disability, based on 20 percent range of motion, 15 percent pain, 20 percent weakness 10 percent atrophy, 25 percent loss of function and 10 percent loss of endurance. Dr. Corvera did not discuss specific tables in the A.M.A., *Guides*. In a report dated May 8, 1996, Dr. Paul D. Meyer, a neurosurgeon, stated that appellant was 100 percent disabled based on the A.M.A., *Guides,* without further explanation.

In a report dated March 3, 1997, Dr. Corvera stated that appellant had 100 percent motor deficit and 75 percent sensory deficit of the right leg, citing Tables 20 and 21 of the A.M.A., *Guides*.[5] In order to apply these tables, however, the physician must first identify the affected nerve and the maximum impairment for that nerve is determined under the appropriate table. For example, Dr. Covera stated that the femoral nerve and peroneal nerves were involved but under Table 68 there are different values for the common peroneal and the superficial peroneal nerve and it is not clear how Dr. Corvera would apply this table.[6] The Board finds that Dr. Corvera's reports do not provide a reasoned opinion that appellant has more than a 53 percent permanent impairment to the right leg.

The Board notes that on February 20, 1997 the Office referred appellant for evaluation by Dr. Joseph T. Crowe, a Board-certified orthopedic surgeon. Although the Office initially referred to Dr. Crowe as an impartial specialist, the evidence from appellant's attending phsycians, as noted above, was not of sufficient probative value to create a conflict. Dr. Crowe is, therefore, considered a second opinion physician.[7]

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[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(4) (March 1995).

[4] AM.A., *Guides*, 130, Table 83.

[5] A.M.A., *Guides*, 151, Tables 20 and 21.

[6] *Id.* 89, Table 68.

[7] *See John H. Taylor*, 40 ECAB 1228 (1989).

In a report dated March 6, 1997, Dr. Crowe provided a history and results on examination. He indicated that there were marked inconsistencies based on her physical examination and a lack of cooperation with the examination. Dr. Crowe opined that appellant had a zero percent impairment to the leg and an eight percent impairment to the whole person.

The Board finds that the record does not contain any probative medical evidence containing an accurate reference to all the appropriate tables and a reasoned opinion that appellant has more than a 53 percent permanent impairment to the right leg under the A.M.A., *Guides*. Accordingly, the Board finds that the Office properly determined that appellant was not entitled to an additional schedule award in this case.

The Board further finds that the Office properly denied appellant's request for reconsideration without merit review of the claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] the Office's 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 point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[9] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[10]

In the present case, appellant submitted a brief report from Dr. Corvera dated October 3, 1997, stating that he disagreed with Dr. Crowe's report and also stating that appellant was not a malingerer. He did not refer to the A.M.A., *Guides* or provide any new evidence with respect to appellant's permanent impairment under the A.M.A., *Guides.* Appellant also submitted a magnetic resonance imaging scan dated May 27, 1997, which does not address the relevant issue. The Board finds that appellant did not meet any of the requirements of section 10.138(b)(1) and, therefore, the Office properly determined that merit review was unwarranted in this case.

The Board notes that the record contains a decision dated September 14, 1998 with respect to appellant's claim for an additional schedule award. Since this decision was issued after appellant filed an appeal and is on the same issue before the Board, it is null and void.[11]

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[8] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[9] 20 C.F.R. § 10.138(b)(1).

[10] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[11] It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990). It is also noted that the Board's jurisdiction is limited to review of evidence that was before the Office at the time of the final decisions on appeal; any evidence submitted after October 14, 1997 cannot be considered on this appeal. 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated October 14 and May 15, 1997 are affirmed.

Dated, Washington, D.C.
March 8, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member