

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of LEIGHTON E. MOSES and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Kansas City, MO

*Docket No. 00-1941; Submitted on the Record;  
Issued July 26, 2001*

---

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue are: (1) whether appellant has established that he sustained greater than a four percent permanent impairment of his right lower extremity for which he received a schedule award; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 3, 1997 appellant, then a 47-year-old laborer, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained "repetitious stress and strain caused by repetitious stooping, bending and lifting of 75 pounds or more."<sup>1</sup> On October 17, 1997 his claim was accepted for "aggravation of lumbar myositis and degenerative disc disease of L4-5, lumbar spine; right tennis elbow."

On February 9, 1999 appellant filed a claim for a schedule award.

In support of his claim, appellant submitted a medical opinion dated December 14, 1998, wherein Dr. Sol H. Dubin, appellant's treating Board-certified orthopedic surgeon, noted that appellant still had decreased motion in his back and tenderness in the paravertebral muscles of the lumbar spine. Dr. Dubin opined that appellant had an 18 percent disability in his lower extremities.<sup>2</sup> In a medical report dated June 1, 1999, he noted that appellant reached maximum medical improvement prior to December 14, 1998. In a letter dated June 8, 1999, Dr. Dubin reiterated his opinion that appellant should remain on a permanent light-duty status.

---

<sup>1</sup> On January 2, 1996 appellant had filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on December 9, 1995 he sustained a sprain or strain to his lower back and right elbow. This claim was denied. However, the hearing representative suggested that appellant file the present claim.

<sup>2</sup> In a prior medical report of August 6, 1996, Dr. Dubin opined that appellant had a four percent total body disability.

The case was referred to the Office medical adviser who in a report dated July 12, 1999 stated that Dr. Dubin's report could not be accepted for schedule award purposes. He noted that, although Dr. Dubin found 18 percent disability of the lower extremities, he did not discuss whether there was weakness in either of the extremities (although he did indicate that there was pain "running down" the right leg, and did not indicate what he believed the severity of this pain or discomfort may be. He also noted that Dr. Dubin's disability rating could not have been derived by applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993). Accordingly, he recommended that appellant be examined by a physician who is skilled in the use of the A.M.A., *Guides*.

By letter dated July 19, 1999, the Office referred appellant to Dr. James Zarr, who is Board-certified in physical and medical rehabilitation, for an evaluation for a schedule award.

In a medical opinion dated August 10, 1999, Dr. Zarr concluded that appellant had low back pain with occasional radiation down the right lower extremity. In making his determination as to a schedule award, Dr. Zarr evaluated appellant according to his level of pain.<sup>3</sup> Dr. Zarr noted that appellant's pain prevented him from doing any lifting or carrying greater than 25 pounds, and by applying the A.M.A., *Guides*, awarded that appellant a 70 percent grade.<sup>4</sup> He then noted that appellant's pain is in the distribution of the right L5 nerve root that has a maximum impairment under the A.M.A., *Guides* of 5 percent.<sup>5</sup> Dr. Zarr then took 70 percent of 5 percent and arrived at a 3.5 percent impairment, which he rounded up to a 4 percent impairment of appellant's right lower extremity. Finally, he noted that his date of maximum medical improvement was December 14, 1998, as per Dr. Dubin's report of June 1, 1999.

On August 22, 1999 the Office medical examiner reviewed the report of Dr. Zarr and determined that the four percent right lower extremity rating offered by Dr. Zarr represented the pain of a radicular nature in the right leg and could be accepted for schedule award purposes.<sup>6</sup>

By decision dated November 24, 1999, the Office awarded appellant a schedule award of four percent of the right lower extremity.

By letter dated December 13, 1999, appellant requested reconsideration. Appellant's request was denied by decision dated March 10, 2000, as appellant's application was insufficient to warrant a review of the prior decision.

The Board finds that appellant does not have more than a four percent impairment to his right lower extremity.

---

<sup>3</sup> Dr. Zarr found no impairment for leg length discrepancy, gait derangement, unilateral muscle atrophy, weakness on manual muscle testing, joint ankylosis, causalgia and reflex sympathetic dystrophy, or vascular disorder.

<sup>4</sup> A.M.A., *Guides* at 151, Table 20.

<sup>5</sup> *Id.* at 130, Table 83.

<sup>6</sup> In a report dated August 13, 1999, the Office medical examiner asked the Office to check as to whether appellant had already received a schedule award for the right knee, as this could require modification of the current award. However, upon further investigation, it was determined that there was no prior award.

The schedule award provision of the Act<sup>7</sup> and its implementing regulations<sup>8</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of schedule 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 regulations as the appropriate standard for evaluating schedule losses.

In the instant case, in Dr. Dubin's December 14, 1998 opinion, he opined that appellant had an 18 percent disability in his lower extremities. However, he failed to apply the A.M.A., *Guides*. Furthermore, as properly noted by the Office medical adviser, he did not indicate the level of severity of appellant's pain or discomfort, or specify which lower extremity was the cause of appellant's condition. As Dr. Dubin did not base his conclusion on a proper application of the A.M.A., *Guides*, his report is not sufficient to establish a level of impairment.<sup>9</sup> Furthermore, as Dr. Dubin's opinion did not provide enough information for the Office medical adviser to use it to evaluate appellant's condition under the A.M.A., *Guides*, the Office properly referred appellant to another physician for evaluation.

Dr. Zarr properly applied the A.M.A., *Guides*, explained his reasoning by citing the appropriate pages and tables in the A.M.A., *Guides*, and concluded that appellant suffered from a four percent impairment of his right lower extremity. The Office medical adviser reviewed Dr. Zarr's opinion, and concluded that it was acceptable for schedule award purposes and that no modification was necessary. Accordingly, the Office properly determined that appellant suffered from a four percent permanent impairment to his right lower extremity.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>10</sup> the Office regulations provide that a claimant may obtain review of the merits of the claim by submitting evidence or argument that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>11</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.

---

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Kenneth D. Loney*, 47 ECAB 660, 661-62 (1996).

<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

In the instant case, appellant presented no new arguments that the Office erroneously applied or interpreted a point of law. Nor did appellant submit any new evidence. Therefore, appellant has not established that the Office abused its discretion in denying appellant's request for a review on the merits under section 8128(a) of the Act.

The decisions of the Office of Workers' Compensation Programs dated March 10, 2000 and November 24, 1999 are hereby affirmed.

Dated, Washington, DC  
July 26, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member