U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. ELLENBURG and DEPARTMENT OF DEFENSE, NATIONAL SECURITY AGENCY, Fort Meade, MD

Docket No. 00-1391; Submitted on the Record;
Issued May 1, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further consideration of the merits pursuant to 5 U.S.C. § 8128.

On January 6, 1993 appellant, then a 49-year-old executive secretary, filed a traumatic injury claim alleging that, on December 15, 1992, the heel of her shoe slipped on a tile floor causing her to fall and injure her right ankle. By letter dated February 4, 1993, the Office accepted appellant's claim for a right ankle sprain. Appellant sustained a consequential injury to her left knee on October 29, 1994 which the Office accepted as related to her federal employment on April 27, 1995.[1]

On December 16, 1997 appellant filed a claim for a schedule award for impairment to her left lower extremity. In a November 17, 1997 report, Dr. Thomas J. Harries, appellant's treating Board-certified orthopedic surgeon, applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[2] and indicated that appellant had a 47 percent impairment of the left lower extremity. The Office forwarded this report to the Office medical adviser, who opined that appellant had a 19 percent permanent impairment. A different Office medical adviser reviewed the record and determined that appellant had a 31 percent impairment of the left lower extremity.

By decision dated May 26, 1998, the Office awarded a 31 percent permanent impairment of the left lower extremity. Appellant requested a review of the written record. While this case

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[1] By decision dated February 8, 1996, the Office found that appellant had a nine percent impairment of her left leg. However, in a decision dated May 1, 1998, the Office stated that this award was actually for a nine percent impairment to appellant's right lower extremity due to her right ankle injury.

[2] A.M.A., *Guides* (4th ed. 1993) (hereinafter A.M.A., *Guides*).

was before the hearing representative, another Office medial adviser determined that a 19 percent impairment was correct.

By decision dated December 11, 1998, the hearing representative found that appellant was entitled to only a 17 percent permanent impairment rating. The hearing representative stated that, because of problems with all of the prior evaluations, she referred appellant to Dr. Virginia Miller, the medical Director of the Office. She calculated an impairment rating of 17 percent under the A.M.A., *Guides.* The hearing representative found Dr. Miller's opinion to represent the weight of the evidence.[3]

By letter dated February 13, 1999, appellant requested reconsideration and submitted a January 25, 1999 report from Dr. Harries who requested that appellant's impairment rating be reconsidered. He noted concerns about Dr. Miller's opinion:

> "Dr. Miller awarded the patient 10 percent for loss of motion, 5 percent for impairment from atrophy and 2 percent for loss of tissue from the lateral meniscectomy. She then went on to assume that the impairment was due to [appellant's] arthritis. I think that is a faulty assumption. The loss of motion and the atrophy are, in my opinion, a direct result of her anterior cruciate reconstruction and not a result of her arthritis. The calculation of Dr. Miller does not take into account, whatsoever, pain associated with her arthritis. [Appellant] could have a 17 percent impairment rating and have a painless, fully functional knee. This is not the case, however, as she suffers from significant degenerative arthritis and has a fairly painful knee. There has got to be some mechanism to compensate this patient for her arthritis and her pain and it is certainly not taken into account with Dr. Miller's method. I would suggest that the pain is an instigating factor and my experience with the A.M.A., [*Guides*] has allowed treating physicians latitude in applying an increased percentage to account for that. There also should be some accountability for the amount of arthritis that the patient has. We took a standing x-ray back in November 1997 and measured the joint space. [Appellant,] at that time, has a 1 mm loss of joint space, which would increase her impairment by at least 7 percent."

Dr. Harries concluded that Dr. Miller's evaluation did not account for pain and arthritis and opined that appellant's loss of motion and atrophy are a direct result of her successful anterior cruciate reconstruction, rather than her arthritis.

In a decision dated December 10, 1999, the Office denied appellant's request for reconsideration, finding that she did not present relevant evidence or legal contentions not previously considered.

[3] After the case was returned to the Office, the Office made a preliminary finding that appellant, through no fault of her own, received an overpayment. By letter dated October 25, 1999, appellant requested that any action regarding the overpayment of benefits be delayed pending the final resolution of her request for reconsideration of the original decision. No further action had been taken by the Office at the time of this appeal.

The Board finds that the Office abused its discretion in denying appellant's February 13, 1999 request for reconsideration.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[4] Since appellant filed her appeal on February 24, 2000, the only decision over which the Board has jurisdiction is the December 10, 1999 decision denying appellant's request for reconsideration on the merits.[5]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office regulations provide 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 not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[7] 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.[8]

The requirement pertaining to the submission of the evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.[9] A claimant has a right to secure a review of the merits of her case when she presents new evidence relevant to her contention that the decision of the Office is erroneous. The presentation of such new and relevant evidence creates a necessity for review of the full case record to determine whether the new evidence considered with that previously in the record shifts the weight of the evidence in such a manner as to require modification of the earlier decision.

The Board has held that the requirement for reopening a claim for merit review does not require that a claimant submit all evidence that may be necessary to discharge his or her burden of proof.[10] Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent evidence not previously considered by the Office.[11]

The Board finds that the February 13, 1999 report of Dr. Harries constitutes new and relevant evidence on the issue of appellant's schedule award. He raised significant concerns

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[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] *See Jacqueline M. Nixon-Steward*, 52 ECAB ____ (Docket No. 99-1345, issued November 3, 2000).

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b).

[8] 20 C.F.R. § 10.608(b).

[9] *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[10] *Joseph E. Cabral*, 44 ECAB 152.

[11] *Id.*

about the opinion of Dr. Miller, upon which the hearing representative relied in finding that appellant had only a 17 percent impairment of the left lower extremity. Dr. Harries noted several contradictions in Dr. Miller's opinion and suggested that pain is a factor that can be considered in applying the A.M.A., *Guides*. Because Dr. Harries has provided a new and relevant report regarding the amount of appellant's award under the schedule, the report constitutes new and relevant evidence on reconsideration.

In view of the foregoing, the case shall be remanded to the Office to review the entire case record. After such development as the Office deems necessary, the Office shall issue a *de novo* decision on the merits of the case.

The December 10, 1999 decision of the Office of Workers' Compensation Programs is hereby vacated and the case is remanded for further development consistent with this decision.

Dated, Washington, DC
May 1, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member