U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBY D. REDDEN and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

Docket No. 03-1852; Submitted on the Record;
Issued January 2, 2004

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a six percent permanent impairment of the left upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128.

On September 9, 1999 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that he sustained numbness in his right hand and pain in his wrist, elbow and shoulder due to factors of his federal employment.[1] The Office accepted his claim for right cervical radiculopathy and authorized an April 19, 2000 cervical discectomy and fusion at C5-6.[2]

On May 10, 2001 appellant filed a claim for a schedule award.[3] By letter dated January 29, 2002, the Office requested that Dr. Stephen Heis, a Board-certified physiatrist and appellant's attending physician, provide an impairment evaluation for his upper extremities pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a report dated February 25, 2002, Dr. Heis found that appellant had reached maximum medical improvement. He provided range of motion measurements for appellant's neck and opined that he had a 15 percent permanent impairment of the neck according to Table 15-5 on page 392, entitled "Criteria for Rating Impairment Due to Cervical Disorders."

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[1] The record indicates that appellant underwent a C6-7 fusion in 1991.

[2] The Office initially denied appellant's claim in a decision dated October 27, 1999, on the grounds that he had not established an employment-related condition. By decision dated December 14, 1999, the Office denied modification of its October 27, 1999 decision. On February 25, 2000 the Office informed appellant that his claim had been accepted for cervical radiculopathy.

[3] By decision dated January 29, 2002, the Office found that appellant had no loss of wage-earning capacity based on his actual earnings as a supervisor of customer services.

Dr. Nabil F. Angley, a Board-certified orthopedic surgeon and an Office medical adviser, reviewed Dr. Heis' report on June 5, 2002. He found that he was not able to provide an impairment evaluation of appellant's upper extremity based on Dr. Heis' report. The Office medical adviser noted that an impairment of the upper extremity due to a cervical spine condition was determined by using Tables 16-10 through 16-13 on pages 482, 424 and 489 of the A.M.A., *Guides*, respectively. Dr. Angley recommended that the Office request that Dr. Heis provide a rating in accordance with the above-described procedure.

By letter dated June 19, 2002, the Office requested that Dr. Heis recalculate the extent of appellant's permanent impairment of the upper extremities using the appropriate tables and pages of the A.M.A., *Guides*. In a response dated June 27, 2002, Dr. Heis stated that the Office's request that he use Tables 16-10 through 16-13 of the A.M.A., *Guides* in determining the extent of appellant's upper extremity impairment was "in error." Dr. Heis related that appellant did not have any upper extremity peripheral nerve deficit as rated by Tables 16-10 and 16-11. He stated that appellant's deficit involving his right arm was from his cervical spine surgery. Dr. Heis reiterated that appellant should be rated according to Table 15-5 on page 392 of the A.M.A., *Guides*, relevant to cervical disorders. He stated:

> "Dr. Angley cannot use Table 16-10 or 16-11, since this refers to peripheral nerve disorders only. He wants to use Table 16-13, which does talk about spinal nerves, but I feel this is relating to injury to the spinal nerve after it leaves the cervical spine and before it enters the brachial plexus. [Appellant's] problem was related to his cervical spinal cord area and cervical dis[c] problem and should not be rated using the upper extremity rating system."

Dr. Heis found that appellant had 25 percent whole person impairment according to Table 15-5 of the A.M.A., *Guides*.

By letter dated October 31, 2002, the Office referred appellant to Dr. Alan Kightlinger, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion regarding the determination of appellant's permanent impairment.

In an impairment evaluation dated November 18, 2002, Dr. Kightlinger reviewed the evidence of record and listed detailed findings on physical examination. He discussed appellant's complaints of "some residual right[-]sided neck and arm pain" following his April 19, 2000 surgery. Dr. Kightlinger further noted that appellant "says his right arm never feels like the left one" and that he noticed some tremulousness into the right upper extremity with repetitive usage. He found that appellant related improvement "from his preoperative status, when he had 'terrible pain and numbness in the entire right upper extremity.'" On physical examination Dr. Kightlinger listed range of motion measurement for appellant's neck and upper extremities. He noted findings of mild tenderness over the rotator cuff on the right and decreased biceps strength on the right side. Dr. Kightlinger opined that appellant had reached maximum medical improvement. He stated:

> "Your instructions are not to use the whole person impairments and to confine this to upper extremity impairment only. I feel uncomfortable about this because some of [appellant's] impairment is certainly localized to the cervical spine and so

> what I will endeavor to do is to give you a whole body impairment including the upper extremity and in addition giv[ing] you an upper extremity impairment only and you can decide which of these best suites your purposes….
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> "[Appellant,] based on [T]ables 15-7 and 15-18 has a 6 [percent] body as a whole impairment due to decreased cervical range of motion primarily for lack of extension. In addition, there is sensory loss determined by utilizing [T]ables 15-15 and 15-17. He has scattered symptomatology which best fits into the C7 radicular pattern. A [G]rade 3, *i.e.* 25 [percent] out of a maximum of 5 [percent] sensory impairments, equals a 1.25 [percent] sensory loss of the upper extremity. Table 15-16 indicates to me, that he has a Grade 4 loss, *i.e.* 15 [percent] out of a maximum of 35 [percent,] which equates to a 5.25 motor loss in the upper extremity.
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> "If I am to conclude only the upper extremity impairment this would be 5.25 combined with 1.25 equates to a 6 [percent] [impairment] of the upper extremity."

On January 5, 2003 an Office medical adviser reviewed Dr. Kightlinger's report and agreed that appellant had a 6 percent permanent impairment of the left upper extremity according to the A.M.A., *Guides*.

By decision dated January 27, 2003, the Office granted appellant a schedule award for a six percent permanent impairment of the left upper extremity. The period of the award ran for 18.72 weeks from November 18, 2002 to March 29, 2003.

On March 23, 2003 appellant requested reconsideration of his claim. He submitted reports from Dr. Heis dated January 9 and February 20, 2003. In a decision dated April 14, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and thus insufficient to warrant review of the prior merit decision.

The Board finds that appellant has no more than a six percent impairment of the right upper extremity.

The schedule award provisions of the Federal Employees' Compensation Act[4] and its implementing federal regulation,[5] set 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

In this case, the Office found a conflict in medical opinion between the Office medical adviser and Dr. Heis, appellant's attending physician, "regarding [appellant's] permanent impairment percentage rating pertaining to a schedule award claim." The Office medical adviser advised that he was unable to determine the extent of appellant's permanent impairment of the upper extremities based on Dr. Heis' report and recommended that the Office obtain additional information from Dr. Heis, including references to the appropriate tables and pages of the A.M.A., *Guides*. Dr. Heis, in response, opined that it was not appropriate to rate appellant according to the upper extremity tables indicated by the Office medical adviser and provided a whole person impairment rating for the cervical spine. The Board notes that, although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.[8] Additionally, a schedule award is not payable under the Act for an impairment of the whole person.[9] As Dr. Heis did not provide an impairment rating for a scheduled member under the Act, his opinion was insufficient to create a conflict with the Office medical adviser regarding the degree of appellant's permanent impairment under the Act. The record, therefore, did not contain a conflict at the time of the Office's referral of appellant to Dr. Kightlinger. The Board finds that Dr. Kightlinger served as an Office referral physician rather than an impartial medical specialist.

Section 15.12 of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of the maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[10]

In a November 18, 2002 report, Dr. Kightlinger discussed appellant's complaints of residual pain and "tremulousness" in the right upper extremity and listed detailed findings on examination. He identified C7 as the affected nerve root. Utilizing Table 15-15, Dr. Kightlinger

[6] 20 C.F.R. § 10.404(a).

[7] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, Chapter 3.700, Exhibit 4 (November 2002); FECA Bulletin No. 01-5(1) (issued January 29, 2001).

[8] *James E. Mills*, 43 ECAB 215 (1991). In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity, even though the cause of the impairment originated in the spine. *See George E. Williams*, 44 ECAB 530 (1993). 5 U.S.C. § 8101(19) specifically excludes the back from the definition of "organ" under the Federal Employees' Compensation Act. *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[9] *See Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

[10] A.M.A., *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) at 423.

found that appellant had a Grade 3 or 25 percent, impairment due to sensory loss.[11] He multiplied the 25 percent impairment due to sensory loss by 5 percent, the maximum impairment due to sensory loss at C7 according to Table 15-17 on page 424, to find a 1.25 percent impairment of the upper extremity due to sensory loss. Dr. Kightlinger further found that appellant had a Grade 4 or 15 percent, loss of strength according to Table 15-16 on page 424 of the A.M.A., *Guides*. He multiplied the 15 percent loss of strength by 35 percent, the maximum impairment possible for loss of strength due to spinal nerve root impairment at C7.[12] Dr. Kightlinger combined the 1.25 percent impairment due to sensory loss with the 5.25 motor deficits using the Combined Values Chart[13] to find that appellant had a total of 6 percent impairment of the upper extremity.[14]

An Office medical adviser reviewed Dr. Kightlinger's report and concurred with his conclusion that appellant had a six percent impairment of the upper extremity. The Office medical adviser, however, found that appellant's impairment was to the left upper extremity. Appellant's accepted condition was right cervical radiculopathy and a review of Dr. Kightlinger's report indicates that appellant's subjective complaints and loss of strength were on his right side. The Board, therefore, finds that the Office's decision should be modified to reflect that appellant has a six percent impairment of the right rather than the left upper extremity. The record contains no evidence establishing that appellant has a greater right upper extremity impairment.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128.

Section 10.606 of the Code of Federal 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 specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[15] Section 10.608 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 review the merits of the claim.[16]

On reconsideration appellant submitted a chart note from Dr. Heis dated January 9, 2003. He noted that appellant had received a permanent impairment evaluation by another physician. Dr. Heis stated: "I feel that his pain complaints and numbness and tingling in the right arm and hand are in the C7 dermatone and this is consistent with irritation of his nerve root from his

[11] *Id* at 424, Table 15.

[12] *Id.* at 424, Table 15-17.

[13] *Id*. at 604.

[14] The A.M.A., *Guides* provide that rounding off is to be to the nearest whole number. A.M.A., *Guides* at 9-10, 20.

[15] 20 C.F.R. § 10.606(b)(2).

[16] 20 C.F.R. § 10.608(b).

previous surgery." However, Dr. Heis' chart note is of diminished relevance to the pertinent issue of whether appellant has more than a six percent permanent impairment of his right upper extremity. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

In a report dated February 20, 2003, Dr. Heis discussed Dr. Kightlinger's report and his own prior impairment ratings of appellant. He stated:

> "This new evaluation that occurred on November 18, 2002 by Dr. Kightlinger is not valid since he was limited in his evaluation of only dealing with the upper extremity and not dealing with the cervical spine and the previous surgery he had, that was a two level fusion. Not taking into account the surgery [appellant] had on the cervical spine is a false evaluation and to me seems to have some unlawful intent to try to decrease the impairment award that [appellant] is due."

As noted above, the Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.[18] The Office considered a similar report from Dr. Heis dated June 27, 2002, in which he challenged the Office's failure to consider appellant's impairment of the cervical spine in reaching a schedule award determination. Dr. Heis' report is, therefore, cumulative in nature and insufficient to warrant reopening appellant's case for a review of the merits.[19]

In his request for reconsideration, appellant argued that he was entitled to a greater schedule award due to the impact of his injury on his life. However, the Act and its accompanying regulations determine the maximum number of weeks of compensation to be paid according to the degree of impairment of a scheduled member.[20] Such factors, as the effect of his impairment upon employment opportunities, sports hobbies or other activities, are not considered in determining permanent impairment.[21] Appellant's allegation, therefore, does not have sufficient legal basis to require a merit review of his claim.

Appellant also argued that he was entitled to a schedule award for a cervical impairment based on the reports of Dr. Heis and Dr. Kighlinger. However, lay persons are not competent to render a medical opinion and, therefore, appellant's statement does not constitute relevant and pertinent new evidence not previously considered by the Office.[22]

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[17] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[18] *Francesco C. Veneziani*, 48 ECAB 572 (1997).

[19] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute basis for reopening a case.

[20] 5 U.S.C. § 8107; *Margie H. Black*, 52 ECAB 303 (2001).

[21] *See Robert R. Kuehl*, 13 ECAB 77, 78 (1961).

[22] *See James A. Long*, 40 ECAB 538 (1989).

The decision of the Office of Workers' Compensation Programs dated April 14, 2003 is affirmed and the decision dated January 27, 2003 is affirmed as modified.

Dated, Washington, DC
January 2, 2004

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member