U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARLAN A. HINTZ and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

Docket No. 01-1952; Submitted on the Record;
Issued March 22, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant has more than a seven percent permanent impairment of his left arm, for which he received a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs 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.

In August 1999 appellant, then a 51-year-old mail carrier, filed a claim alleging that he sustained a left shoulder condition due to the repetitive motion duties required by his job. The Office accepted that appellant sustained employment-related left shoulder tendinitis and paid compensation for periods of disability. By award of compensation dated April 30, 2001, the Office granted appellant a schedule award for a seven percent permanent impairment of his left arm. By decision dated July 6, 2001, the Office denied appellant's request for merit review.

The Board finds that appellant has no more than a seven percent permanent impairment of his left arm, for which he received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

The schedule award provisions of the Act[4] and its implementing 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 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

The Office based its April 30, 2001 schedule award on a February 5, 2001 report in which Dr. David S. Diamant, a Board-certified orthopedic surgeon who served as an Office medical adviser, determined that appellant had a seven percent impairment of his left arm.[7] In his February 5, 2001 report, Dr. Diamant determined that, according to the standards of the fourth edition of the A.M.A., *Guides* (1993), appellant was entitled to a four percent impairment rating due to limited motion upon abduction (one percent rating); extension (one percent); and internal rotation (two percent). Dr. Diamant should have used the fifth edition of the A.M.A., *Guides* to perform his rating because appellant's schedule award was issued on April 30, 2001, a date after the February 1, 2001 effective date of the fifth edition.[8] However, Dr. Diamant committed a harmless error with regard to appellant's impairment related to limited motion in that, under the circumstances of the present case, applying the standards of the fourth edition of the A.M.A., *Guides* yields the same impairment rating for limited motion as applying those of the fifth edition.[9]

Dr. Diamant further calculated that appellant was entitled to a three percent impairment rating due to sensory loss. He arrived at this rating by determining, under the standards of the fourth edition of the A.M.A., *Guides*, that appellant warranted a Grade 3 pain rating of 60 percent[10] and then multiplying this figure by the maximum value (5 percent) for sensory loss or pain associated with an axillary nerve distribution. Under the circumstances of the present case, applying the standards of the fourth edition of the A.M.A., *Guides* would yield the same impairment rating for sensory loss as applying the parallel standards of the fifth edition.[11]

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[7] Moreover, in a report dated February 21, 2001, an Office medical adviser indicated that he agreed with Dr. Diamant's assessment that appellant sustained a seven percent permanent impairment of his left arm.

[8] *See* FECA Bulletin No. 01-05 (issued January 29, 2001).

[9] Compare the relevant standards of the A.M.A., *Guides* (4th ed. 1993) 43-45, Figures 38, 41, 44, with the relevant standards of the A.M.A., *Guides* (5th ed. 2001) 476-77, 479, Figures 16-40, 16-43, 16-46.

[10] The medical evidence of record supports such an assessment of the level of appellant's sensory loss.

[11] Compare the relevant standards of the A.M.A., *Guides* (4th ed. 1993) 48, 54, Tables 11, 15, with the relevant standards of the A.M.A., *Guides* (5th ed. 2001) 482, 492, Tables 16-10, 16-15.

Therefore, Dr. Diamant's use of the fourth edition of the A.M.A., *Guides* in this regard was a harmless error. Dr. Diamant then properly combined the 4 percent rating for limited motion with the 3 percent rating for sensory loss or pain to correctly conclude that appellant had a total permanent impairment of his left arm of 7 percent.[12] Therefore, the Office properly issued a schedule award to appellant for such a permanent impairment.

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 Act,[13] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[14] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[15] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[16]

In support of his reconsideration request, appellant submitted medical evidence which had already been considered by the Office. He also claimed that the July 28, 2000 report of Dr. Strasburger warranted a higher impairment rating, but this argument had already been considered and rejected by the Office. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[17]

In the present case, appellant has not established that the Office abused its discretion in its July 6, 2001 decision by denying his request for a review on the merits of its April 30, 2001 decision under section 8128(a) of the Act, because he did not show that the Office erroneously

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[12] Appellant claimed that a July 28, 2000 report of Dr. Scott E. Strasburger, an attending Board-certified orthopedic surgeon, entitled him to a schedule award for a 10 percent impairment. However, the opinion of Dr. Strasburger is of limited probative value in that Dr. Strasburger failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses; *see James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[13] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b)(2).

[15] 20 C.F.R. § 10.607(a).

[16] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[17] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

The July 6 and April 30, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
March 22, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member