U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS RUTHERFORD and DEPARTMENT OF VETERANS AFFAIRS, REGIONAL OFFICE, San Francisco, CA

Docket No. 98-2381; Submitted on the Record;
Issued August 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to a schedule award for a permanent impairment to the left 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 contusion of the left shoulder and chest, low back pain and temporary aggravation of degenerative disc disease, causally related to a slip and fall in the performance of duty on August 29, 1988. On October 11, 1995 the Office issued a schedule award for a two percent permanent impairment to the left arm.

By decisions dated December 19, 1997 and February 25, 1998, the Office determined that appellant was not entitled to a schedule award for the left leg. In a decision dated July 21, 1998, 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 entitlement to a schedule award for the left leg.

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] The permanent impairment must be causally related to an employment injury.[2]

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[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).

[2] *See Rosa Whitfield Swain*, 38 ECAB 368 (1987).

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, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[3]

With respect to a permanent impairment to the left leg, the Office requested that an Office medical adviser provide an opinion on the issue. In a report dated July 6, 1997, the Office medical adviser indicated that appellant had a 10 percent impairment to the leg under the A.M.A., *Guides*, due to sciatic nerve impairment. The Office then requested a supplemental report addressing the issue of causal relationship with employment. In a report dated July 15, 1997, the Office medical adviser noted that the record contained an August 15, 1995 report from Dr. Mark Shelub, a Board-certified specialist in physical medicine acting as a second opinion referral physician. In that report Dr. Shelub opined that there was no evidence of a permanent aggravation of degenerative joint disease related to the August 29, 1988 employment injury. He indicated that recurrences of pain are typical of the degenerative process and would not be attributable to the employment injury; Dr. Shelub found that any continuing pain would be related to the underlying degenerative process and other nonemployment factors. The Office medical adviser concluded that based on his review of the record, the impairment due to the sciatic nerve was not causally related to the employment injury.

The Board finds that the Office medical adviser's report constitutes the weight of the evidence with respect to a schedule award for the left leg. Appellant did not submit any medical evidence supporting a permanent impairment to the left leg causally related to the employment injury. For example, in a report dated May 26, 1994, Dr. Elizabeth Kelly, an internist, reported that appellant had numbness and burning in his leg, but she did not provide an opinion as to a permanent impairment causally related to the employment injury. In the absence of any probative medical evidence supporting a left leg permanent impairment causally related to the August 29, 1988 employment injury, the Board finds the Office properly determined that appellant was not entitled to a schedule award for the left leg.

The Board further finds that the Office properly determined that appellant's request for reconsideration did not require reopening the case for merit review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] 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.[5] Section 10.138(b)(2) states that any

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

[4] 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").

[5] 20 C.F.R. § 10.138(b)(1).

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.[6]

In this case, appellant submitted a report dated April 10, 1998, from Dr. Michael Taekman, a neurosurgeon, with his request for reconsideration. Dr. Taekman indicated that appellant complained of pain radiating from his back to his left leg, provided results on examination and concluded that appellant did have some abnormality in the left leg, but was not interested in further treatment. This report cannot be considered new and relevant evidence, because Dr. Taekman did not discuss the issue of a permanent impairment to the left leg causally related to the August 29, 1988 employment injury. The Board finds that appellant did not meet any of the requirements of section 10.138(b)(1) and, therefore, the Office properly denied his request for reconsideration without reopening the case for merit review under 5 U.S.C. § 8128(a).

The decisions of the Office of Workers' Compensation Programs dated July 21 and February 25, 1998 and December 19, 1997, are affirmed.

Dated, Washington, D.C.
August 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

[6] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).