U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS POWELL-HOBGOOD and DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTER FOR DISEASE CONTROL, Research Triangle Park, N.C.

Docket No. 96-2123; Submitted on the Record;
Issued July 22, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether appellant has greater than a 21 percent loss of use of the left leg for which she received a schedule award.

The Office accepted appellant's claim for a fractured left knee.

In a report dated January 22, 1996, Dr. Mark H. Moriarity, a Board-certified orthopedic surgeon, stated that he detected three centimeters of atrophy measured at 10 centimeters above the superior pole of appellant's patella with the knee fully extended and the muscle relaxed. He stated that according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), Table 37, page 77, that would be assigned a 13 percent lower extremity rating. Dr. Moriarty stated that based on x-rays, he found appellant's patellofemoral joint space measured 1 millimeter in thickness and this was assigned a 15 percent lower extremity rating pursuant to Table 62, page 83 of the A.M.A., *Guides*. For her partial patellectomy, he assigned appellant a 7 percent impairment rating based on Table 64, page 8 of the A.M.A., *Guides*. Using the Combined Values Chart on pages 322-23, Dr. Moriarty found that the 7 percent impairment for the patellectomy and the 15 percent impairment to appellant's patellofemoral joint combined to a value of 21 percent, and, using the same chart, combining the 21 percent with 13 percent impairment to her left lower extremity, he obtained a 31 percent permanent impairment rating for appellant's left lower extremity.

In a report dated February 7, 1996, the district medical adviser noted Dr. Moriarty's figures of 3 centimeter atrophy to the quad or 13 percent impairment pursuant to Table 37, page 77 of the A.M.A., *Guides*, 1 millimeter atrophy to the patellofemoral joint space or 15 percent impairment pursuant to Table 62, page 83, and a 7 percent impairment for the partial patellectomy pursuant to Table 64, page 85. He then stated that per the attachment to the FECA Bulletin No. 95-17, issued March 23, 1995, Tables 62 and 64 include Table 37 but not each other

which leaves a combined value of 15 percent and 7 percent or a total of 21 percent for a permanent impairment to the left lower extremity.

By decision dated February 14, 1996, the Office awarded appellant a schedule award for a 21 percent loss of use of the left leg.

By letter dated March 13, 1996, date-stamped by the Office on March 18, 1996, appellant requested an oral hearing before an Office hearing representative.

By decision dated April 10, 1996, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was post-marked March 18, 1996, more than 30 days after the Office issued the February 14, 1996 decision, and that therefore appellant's request was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[1] Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[2] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations[3] provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request…."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[5] when the request is made after the 30-day period for requesting a hearing,[6] and when the request is for a second hearing on the same issue.[7]

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.131.

[3] 20 C.F.R. § 10.131(a).

[4] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[5] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

In the present case, despite the Office's asserting that the postmark date of appellant's hearing request was March 18, 1996, evidence of the postmark date is not in the record. The Board has held that if the envelope bearing the postmark date has not been retained, then the request is timely filed if it is date-stamped by the Office within 30 days of the issuance of the decision.[8] The letter containing appellant's hearing request was dated March 13, 1996, and the date stamp by the Office was March 18, 1996. Therefore, appellant's hearing request was made more than 30 days after the date of issuance of the Office's February 14, 1996 decision, and the Branch was correct in stating in that decision that appellant was not entitled to a hearing as a matter of right. The Branch informed appellant that she could submit additional evidence through a request for reconsideration. The Branch exercised its discretionary powers in denying appellant's request for a hearing.

The Board finds that appellant has no greater than a 21 percent loss of use of the left leg.

The schedule award provision of the Act[9] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[10] 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.[11]

In the present case, in his report dated February 7, 1996, the district medical adviser agreed with Dr. Moriarty that according to the A.M.A., *Guides* (4th ed. 1994), appellant had a 13 percent impairment for atrophy to her quad using Table 37, page 77 based on a 3 centimeter circumference of the thigh, a 15 percent impairment to her patellofemoral joint using Table 62, page 83 based on 1 millimeter of joint space, and a 7 percent impairment for her partial patellectomy using Table 64, page 85. He found, however, that pursuant to FECA Bulletin No. 95-17, issued March 23, 1995, Tables 62 and 64 both include Table 37 but not each other. Therefore, appellant's percentage impairment consisting of the 15 percent impairment to her patellofemoral joint and the 7 percent impairment for her partial patellectomy equal 21 percent using the Combined Values Chart, pages 322-23. The district medical adviser properly used the A.M.A., *Guides* and the FECA Bulletin No. 95-17, issued March 23, 1995, to determine that

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[6] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[7] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[8] *See Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

[9] 5 U.S.C. § 8107 *et seq.*

[10] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[11] *Arthur E. Anderson*, *supra* note 10 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

appellant had a 21 percent permanent impairment to her left lower extremity. His opinion therefore constitutes the weight of the evidence.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 10 and February 14, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 22, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member