U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE L. PACHECO and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Layton, Utah

Docket No. 96-1348; Submitted on the Record;
Issued June 15, 1998

DECISION and ORDER

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

The issues are whether: (1) appellant has established a permanent impairment entitling him to a schedule award under 5 USC § 8107, and (2) whether the Office properly denied appellant's request for a hearing as untimely.

On February 9, 1993 appellant, then a 33 year-old electronics mechanic, filed a claim alleging that he suffered neck and back strains when he slipped on ice. The Office accepted the claim for cervical strain and low back strain. Appellant received appropriate wage-loss for intermittent periods of disability.

By decision dated June 19, 1995, the Office denied appellant's claim for a schedule award. In a letter postmarked October 5, 1995, appellant requested a hearing on his claim. In a decision dated January 2, 1996, the Office denied appellant's request for a hearing as untimely and found that the matter could be further pursued through the reconsideration process.

The Board has reviewed the case record and finds that appellant has not established entitlement to a schedule award in this case.

The schedule award provisions of the Act provide for compensation to employees sustaining impairment from loss, or loss of use of, specified members of the body.[1] The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.[2] For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association's *Guides to the Evaluation of Permanent*

[1] 5 U.S.C. § 8107.

[2] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

Impairment (hereinafter A.M.A., *Guides*)[3] as been adopted by the Office as a standard for evaluation of schedule losses, and the Board has concurred in such adoption.[4]

In the present case, appellant's treating physician, Dr. Joel T. Dall, submitted a November 18, 1994 report stating that appellant's diagnosis was chronic cervical sprain/strain syndrome. Dr. Dall noted that, on examination, appellant presented persistent muscle spasm and asymmetric occipito-anterior (OA) glide but normal cervical and shoulder ranges of function. He further noted that the EMG study performed on July 22, 1994 and the magnetic resonance imaging (MRI) of the cervical spine dated August 10, 1994 did not reveal any abnormalities. Dr. Dall concluded that appellant had a 5 percent impairment of the whole person, due to cervicothoracic spine impairment, under the fourth edition of the AMA, *Guides*.[5]

As noted above, schedule awards are limited to permanent impairments of specified members of the body. The Board has held:

> "A schedule award is not payable for the loss or loss of use, of a part of the body not specifically enumerated in the Act. Neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of `organ' under the Act."[6]

However, as the schedule award provisions include the extremities, a claimant may be entitled to a schedule award for an employment-related permanent partial impairment to an upper extremity if the cause of the impairment originated in the spine.[7]

It is evident from Dr. Dall's report that the impairment rating he has provided is based on impairments to the cervical spine.[8] The table Dr. Dall referred to are limited to impairments of the spine and do not provide for impairments to a member of the body enumerated under 5 USC § 8107 or its implementing regulations. Dr. Dall did not indicate that appellant had any impairment due to the work injury affecting a schedule member of the body.

In his May 5, 1995 report, Dr. John C. Burrell, an orthopedic surgeon who treated appellant after Dr. Dall moved, reported no basis on which an upper extremity schedule award could be attributed. Dr. Burrell noted that appellant's shoulder girdles moved fully, that there

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

[4] *Luis Chapa, Jr.*, 41 ECAB 159 (1989).

[5] *See* A.M.A., *Guides*, 110, Table 73 (4th ed. 1993). Dr. Dall indicated that appellant had a diagnosis-related estimate (DRE) Impairment Category II.

[6] *James E. Mills*, 43 ECAB 215 (1991); *James E. Jenkins*, 39 ECAB 860 (1988).

[7] *Edward C. Dustman*, 32 ECAB 1332 (1981).

[8] The Board also notes that the neck is not a member of the body enumerated under 5 USC § 8107 with respect to loss of use. A schedule award may be awarded for "serious defigurement" of the face, head, or neck under 5 USC § 8107(21), but disfigurement is not at issue in this case.

was no weakness or wasting in the shoulder girdle or upper limbs, and that neurologic assessment revealed "normal myotomes, dermatomes, and reflexes in the upper extremities." Dr. Burrell further concluded that there was no evidence of disc prolapse or nerve root involvement. Dr. Burrell diagnosed chronic cervical strain of musculoligamentous origin. In addition, an Office medical advisor in his June 15, 1995 report noted that there was "no evidence of nerve root impairment of the cervical spine or residual motor or sensory deficits in the upper extremities." The Office medical adviser found no basis to find a permanent impairment under the A.M A., *Guides*.

In reviewing the record, the Board finds no probative evidence of record providing a description of a permanent impairment to the upper extremities or any other enumerated part of the body.

Accordingly, the Board finds that appellant has not established entitlement to a schedule award under 5 U.S.C. § 8107.

The Board further finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary... 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."[9] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[10]

In the present case the Office issued its decision on June 19, 1995. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was postmarked October 5, 1995, and thus it is outside the 30 day statutory limitation for the decision. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[11] In the present case the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated June 19, 1995 and January 2, 1996 are affirmed.

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[9] 5 U.S.C. § 8124(b)(1).

[10] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

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

Dated, Washington, D.C.
June 15, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member