U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR GILROY and DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL FACILITIES, Watervliet, N.Y.

Docket No. 95-1621; Submitted on the Record;
Issued March 17, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he has more than a 16 percent permanent impairment of the left upper extremity for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b).

The Board has duly reviewed the evidence of record in this appeal and finds that appellant has failed to establish that he has more than a 16 percent permanent impairment of the left upper extremity for which he has received a schedule award.

On December 28, 1988 appellant, then an accounting technician, filed a claim for an occupational disease (Form CA-2) assigned claim number A2-0595415 alleging that he first became aware that his left elbow condition was caused or aggravated by factors of his employment on December 16, 1988.[1]

By letter dated February 7, 1989, the Office advised appellant to submit factual and medical evidence supportive of his claim. In response, appellant submitted narrative statements and medical evidence.

By decision dated May 3, 1989, the Office found the evidence of record insufficient to establish that appellant's left elbow condition was causally related to factors of his federal employment.

[1] On February 3, 1989 appellant filed a claim for a schedule award assigned number A2-553788 for a right elbow injury sustained on January 21, 1986. On October 4, 1989 the Office awarded appellant a schedule award for an eight percent permanent loss of use of the right upper extremity for the period August 29, 1989 through February 19, 1990.

In an April 27, 1990 letter, appellant requested a review of the Office's decision accompanied by medical evidence.

By letter dated June 5, 1990, the Office advised appellant to specifically state which appeal process he wished to pursue.

In a June 11, 1990 response, appellant requested reconsideration of the Office's May 3, 1989 decision.

By decision dated July 1, 1991, the Office vacated the May 3, 1989 decision finding the evidence of record sufficient to establish that appellant had left lateral epicondylitis and that there was a causal relationship between appellant's left elbow condition and factors of his federal employment as a painter.[2]

The Office received the April 26, 1993 medical report of Dr. Donald B. Symanowicz, a Board-certified orthopedic surgeon and appellant's treating physician, revealing that appellant had a 75 percent loss of use of the left upper extremity.

On August 25, 1993 appellant filed a claim for a schedule award (Form CA-7).

By letter dated September 2, 1993, the Office advised appellant to submit a detailed narrative medical opinion determining the extent of any permanent impairment based on the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* from his treating physician. The Office noted that Dr. Symanowicz's April 26, 1993 report did not explain how he determined that appellant had a 75 percent impairment in accordance with the A.M.A., *Guides*. The Office received Dr. Symanowicz's October 7, 1993 medical report revealing his range of motion findings.

On January 12, 1994 the Office referred a statement of accepted facts and Dr. Symanowicz's October 7, 1993 medical report to an Office medical adviser to determine whether appellant had more than an eight percent permanent impairment of the right upper extremity for which he had received a schedule award and whether appellant had any impairment of the left elbow based on the 4th edition of the A.M.A., *Guides*.

On January 20, 1994 the Office medical adviser determined that appellant had a zero percent permanent impairment of the right upper extremity and thus, concluded that appellant had no more than an eight percent permanent impairment of the right upper extremity for which he had received a schedule award. The Office medical adviser also determined that appellant had a 16 percent impairment of the left upper extremity.

On March 22, 1994 the Office granted appellant a schedule award for a 16 percent permanent loss of use of the left upper extremity for the period February 14, 1993 through January 29, 1994 based on the Office medical adviser's determination.

[2] Prior to appellant's right elbow employment injury and subsequent surgery, he worked as a carpenter which required painting. As a result of this employment injury, appellant was assigned light-duty work as an accounting technician.

In a letter dated April 29, 1994, appellant requested an oral hearing before an Office representative.

By decision dated June 15, 1994, the Office denied appellant's request for an oral hearing as untimely because his request was not received within 30 days of the decision. The Office further denied appellant's request for the reason that the issue involved could be equally well resolved by requesting reconsideration from the district Office and by submitting evidence which established that he sustained more than a 16 percent permanent impairment of the left upper extremity.

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[5] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[6]

With respect to permanent impairment of the extremities, the standards for evaluating percentage of impairment under the A.M.A., *Guides* are based primarily on loss of range of motion.[7] Other factors of impairment, including pain, atrophy, or loss of strength, are considered together with loss of motion, when determining the degree of permanent loss of use for schedule award purposes.[8]

In this case, Dr. Symanowicz determined that flexion was 120 degrees, extension was 75 degrees, pronation was 60 degrees and supination was 60 degrees based on the 4th edition of the A.M.A., *Guides* in an October 7, 1993 medical report. Dr. Symanowicz stated that appellant complained of severe pain in the entire lower arm and that he had no way to quantify this element. Dr. Symanowicz also stated that appellant had loss of motion and decreased sensation. Dr. Symanowicz further stated that all of appellant's muscle groups had atrophy in the left forearm and especially in the extensors, and that appellant possibly had causalgia. Additionally,

[3] 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.304.

[5] 5 U.S.C. § 8107(c)(19).

[6] *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[7] *James E. Jenkins*, 39 ECAB 860 (1988).

[8] *See Harold T. Nelson*, 42 ECAB 763 (1991). The A.M.A., *Guides* provide guidelines, including figures and tables, which correlate measurements of loss of motion and assessments of loss of strength, to percentages of impairment; *see* A.M.A., *Guides* at 35-37, 42, 46.

Dr. Symanowicz stated that appellant reached maximum medical improvement on February 14, 1993. The Office medical adviser determined that appellant had a three percent loss for atrophy. The Office medical adviser then determined that based on this finding, as well as, Dr. Symanowicz's findings, that appellant had a 16 percent permanent impairment of the upper left extremity pursuant to the 4th edition of the A.M.A., *Guides*. The Board has reviewed the Office medical adviser's calculations of the left upper extremity and concludes that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant has no more than a 16 percent permanent impairment of the upper left extremity for which he has received a schedule award.[9]

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

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."[10] 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.[11]

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 the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[12]

In this case, the Office issued its decision awarding appellant a schedule award for a 16 percent permanent impairment of the left upper extremity on March 22, 1994. Appellant's request for an oral hearing was dated April 29, 1994 and postmarked May 2, 1994. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[13] Because appellant did not request a hearing within 30 days of the Office's March 22, 1994 decision, he was not entitled to a hearing under section 8124 as a matter of right.

[9] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[10] 5 U.S.C. § 8124(b)(1).

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

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

[13] 20 C.F.R. § 10.131(a).

The Office, in its discretion, considered appellant's hearing request in its June 15, 1994 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence regarding the issue whether he had sustained greater than a 16 percent permanent impairment of the left upper extremity. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken prejudice, partiality, intentional wrong or action against logic.[14] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request. Consequently, the Office properly denied appellant's hearing request.

The June 15 and March 22, 1994 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
March 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *See Sherwood Brown*, 32 ECAB 1847 (1981) and cases cited therein.