United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 06-1018**
	)	**Issued: January 10, 2007**
DEPARTMENT OF THE AIR FORCE, EGLIN AIR FORCE BASE, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated January 12 and February 13, 2006 finding that he was entitled to schedule awards and a nonmerit decision dated March 3, 2006 denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant has more than a 42 percent impairment of his right leg and an 18 percent impairment of his left arm, for which he received schedule awards; (2) whether appellant is entitled to a schedule award in the amount of $3,500.00 for facial disfigurement; and (3) whether appellant is entitled to an oral hearing before the Branch of Hearings and Review on the above issues.

FACTUAL HISTORY

On July 11, 1963 appellant, then a 48-year-old heavy equipment operator, was injured in the performance of duty while in a forward observation bunker which was struck by several nonexplosive rockets fired by an F-100. The Office accepted appellant's traumatic injury claim for almost complete avulsion of the nose, upper and lower lips. The Office also accepted a large laceration with a skin defect over the ulnar aspect of the lower third of his right forearm with closed fracture, a compound fracture of the right tibia, comminuted fracture of the right patella with disruption of ligamentous support of the right knee and partial amputation extending into the interphalangeal joint of the left thumb. The Office entered appellant on the periodic rolls on November 18, 1963.

On October 16, 1991 appellant underwent an arthrotomy of the right knee with lateral retinacular release, excision of calcium deposition in the infrapatellar and patellar tendon area, lysis of adhesions, release of synovial plica and reefing of the patellar tendon. Dr. Kenneth F. Hill, a Board-certified orthopedic surgeon, performed these surgical procedures as treatment for osteoarthritis, calcific tendinitis, extension contracture and calcific tendinitis of the patella tendon in the right knee.

The most recent medical report addressing appellant's right lower extremity is a report dated October 28, 1996 from Dr. William R. Marshall, a Board-certified orthopedic surgeon. He examined appellant and noted his history of injury. Dr. Marshall stated that appellant sustained an open fracture involving his right proximal tibia and knee and had undergone multiple operative procedures. He noted that appellant developed osteomyelitis and his right knee was drained in 1995. Dr. Marshall stated that appellant had an extensor lag of nearly 30 degrees and flexion of 70 degrees. He found medial laxity in the right knee and atrophy of appellant's right thigh. Dr. Marshall examined x-rays which demonstrated extensive end-stage degenerative arthritis with a healed comminuted proximal tibial shaft fracture with sclerotic markings and osteopenia. He diagnosed post-traumatic degenerative arthritis, with a history of osteomyelitis of the proximal tibia and disruption of the extensor mechanism as well as atherosclerotic calcific peripheral vascular disease. Dr. Marshall cautioned appellant regarding further surgical procedures noting that appellant was at great risk for potential skin slough, vascular compromise, recurrent infection and possible loss of limb.

The Office denied appellant's request for an employment-related loss of hearing and payment for hearing aids by decision dated April 1, 1998. Appellant appealed this decision to the Board. By decision dated November 1, 2000,[1] the Board set aside the Office's April 1, 1998 decision and remanded the case for additional development of the medical evidence on whether appellant sustained an employment-related bilateral hearing loss. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

[1] Docket No. 99-6 (issued November 1, 2000).

Following the Board's November 1, 2000 decision, the Office accepted that appellant sustained an employment-related bilateral loss of hearing. On June 19, 2001 it granted appellant a schedule award for 30 percent bilateral loss of hearing. The period of this award ran from June 17, 2001 to August 10, 2002.

Appellant filed an additional claim for a schedule award on August 29, 2002. The Office medical adviser stated that he reviewed the medical evidence of record and concluded that appellant sustained 42 percent impairment to his right lower extremity due to 25 degrees of flexion[2] and 18 percent impairment of his left upper extremity due to amputation of his left thumb at the interphalangeal joint[3] in accordance with American Medical Association, *Guides to the Evaluation of Permanent Impairment*[4] (A.M.A., *Guides*). The Office medical adviser concluded that appellant reached maximum medical improvement on December 28, 1987 for both his left upper extremity and his right lower extremity.

In a letter dated August 1, 2002, the Office informed appellant that he might be entitled to a schedule award for facial disfigurement.

In support of his claim for permanent impairment, appellant submitted a report dated September 7, 2005 from Dr. Thomas M. Fox, a Board-certified orthopedic surgeon. He examined appellant and concluded that appellant had "a moderate disability of his right knee." Dr. Fox also noted that appellant was prone to frequent falls.

By decision dated January 12, 2006, the Office granted appellant schedule awards for a 42 percent impairment of his right leg and an 18 percent impairment of his left arm. The payment of the awards began on December 25, 2005. The Office noted that appellant reached maximum medical improvement on December 28, 1987 and had received wage-loss compensation covering that period.

The district medical director reviewed appellant's photographs in order to determine the extent of his facial disfigurement on January 9, 2006. He stated that appellant had reached maximum medical improvement of this condition on August 20, 2002. The district medical director opined that appellant was entitled to the maximum amount for facial impairment of $3,500.00.

Appellant requested an oral hearing of his schedule award decisions on January 23, 2006. By decision dated March 3, 2006, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that his injury occurred on July 11, 1963. The Branch of Hearings and Review noted that the Federal Employees' Compensation Act did not provide for oral hearings until the July 4, 1966 amendments. The Branch of Hearings and Review exercised its discretion and determined that the issues in appellant's case could be addressed equally well through the reconsideration process.

[2] A.M.A., *Guides*, 537, Table 17-10.

[3] A.M.A., *Guides*, 443, Figure 16-4; 438, Table 16-1; 439, Table 16-2.

[4] A.M.A., *Guides*, 5th ed. (2000).

On February 13, 2006 the Office granted appellant a schedule award for facial disfigurement in the amount of $3,500.00.

LEGAL PRECEDENT -- ISSUE 1

At the time of appellant's injury in July 1963, the Act provided that, in cases of permanent disability, which involved solely the loss of use of an enumerated member or function of the body, compensation for such permanent impairment should be paid for a period specific in the schedule and be in lieu of compensation for permanent disability.[5] An award pursuant to the schedule is mandatory and is the maximum compensation payable under the Act unless there is a change in the degree of impairment.[6] The Act provided that no wage-loss compensation was authorized after receipt of compensation as authorized by the scheduled provisions of the Act.[7] The only payment of wage-loss compensation was for periods of temporary disability, which occurred prior to the date of maximum medical improvement and the commencement of the schedule award.[8] The Act provided that in cases of loss of or loss of use of more than one member or parts of more than one member, the awards should run consecutively.[9]

It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. The Board has defined maximum medical improvement as meaning "that the physical condition of the injury member of the body has stabilized and will not improve further." The Board has also noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement of the selection of a retroactive date of maximum medical improvement.[10]

The schedule award provision of the Act 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

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[5] *Stanley F. Stuczynski*, 12 ECAB 159 (1960). The 1966 amendments do not apply to injuries which occurred prior to July 4, 1966. Public Law 89-488; *Pitzer R. Bradley*, 31 ECAB 736 (1980).

[6] 5 U.S.C. § 5(a) (1960).

[7] *Paul Meier*, 24 ECAB 276 (1973); *Otha L. Frizzell*, 24 ECAB 58 (1972).

[8] *James O. Myers*, 27 ECAB 221 (1975).

[9] *Stuczynski*, *supra* note 5.

[10] *James E. Earle*, 51 ECAB 567 (2000).

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[11]

ANALYSIS -- ISSUE 1

The Office medical adviser properly applied the A.M.A., *Guides* in reaching his determination that appellant had an 18 percent impairment of his left upper extremity due to amputation of the intraphalangeal joint of appellant's thumb.[12] However, as to appellant's schedule awards for his right lower extremity and left upper extremity, the Board finds that the case is not in posture for a decision. On December 22, 2005 the Office medical adviser settled upon the date of December 28, 1987 as the date of maximum medical improvement for both of these conditions. However, the Office medical adviser did not offer any explanation for his conclusion regarding the date of maximum medical improvement regarding these two schedule awards. This is necessary as the Board requires persuasive proof of maximum medical improvement in the selection of a retroactive date of maximum medical improvement. The Office medical adviser selected a retroactive date of maximum medical improvement, more than 18 years before the date of the award and before the 1991 surgery on appellant's right lower extremity. He did not offer any explanation of how he reached his decision. The case will be remanded to the Office for further development of this issue, as it pertains to the right leg and left arm.

In regard to appellant's right leg, the Office medical adviser did not utilize the most recent medical evidence in determining that appellant had 42 percent impairment. He found that appellant retained only 25 degrees of flexion and based his impairment rating solely on loss of range of motion.[13]

The most recent medical report in the record addressing appellant's right lower extremity dated October 28, 1996 from Dr. Marshall, a Board-certified orthopedic surgeon, identified an extensor lag of nearly 30 degrees and flexion of 70 degrees. Dr. Marshall found medial laxity in the right knee and atrophy of appellant's right thigh. He examined x-rays which demonstrated extensive end-stage degenerative arthritis with a healed comminuted proximal tibial shaft fracture with sclerotic markings and osteopenia. Dr. Marshall diagnosed post-traumatic degenerative arthritis, with a history of osteomyelitis of the proximal tibia and disruption of the extensor mechanism as well as atherosclerotic calcific peripheral vascular disease. He cautioned

[11] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[12] A.M.A., *Guides*, 443, Table 16-4; 438, Table 16-1 and 439, Table 16-2.

[13] A.M.A., *Guides*, 537, Table 17-10.

appellant regarding further surgical procedures noting that appellant was at great risk for potential skin slough, vascular compromise, recurrent infection and possible loss of limb.

The Office medical adviser did not address any of the physical findings made by Dr. Marshall and did not offer any reasoning for selecting loss of range of motion as the most appropriate method for rating appellant's right lower extremity impairment. As he did not identify the report upon which he based his impairment rating, the Board is unable to reconstruct this rating. On remand, the Office should develop the medical evidence, as appropriate, to determine the impairment of appellant's right lower extremity and the date of maximum medical improvement.

LEGAL PRECEDENT -- ISSUE 2

At the time of appellant's employment injury on July 12, 1963, the Act provided, "Proper and equitable compensation not to exceed $3,500.00 shall, in addition to any other compensation payable under this schedule, be awarded for serious disfigurement of the face, head or neck, if of a character likely to handicap a person in securing or maintaining employment."[14] The Board held that, in determining what constitutes proper and equitable compensation for disfigurement, sound judgment must be exercised as to the likely economic effect of the disfigurement on the employee in securing and maintaining employment.[15]

Office's procedures require that the district medical adviser review disfigurement claims and evaluation the employee's disfigurement. The district medical adviser will determine if maximum medical improvement has been reached and review photographs submitted along with medical evidence of record. The concurrence of the district director or the assistant district director must be obtained.[16]

ANALYSIS -- ISSUE 2

The Office properly followed procedures in determining that appellant was entitled to the maximum payment for facial disfigurement. The district medical adviser reviewed appellant's photographs and the district director concurred with the award of $3,500.00. The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.[17] Appellant has received the maximum award available for facial disfigurement and is not entitled to any additional sum for this impairment.

[14] 5 U.S.C. § 755(a)(21) (1960). The Board notes that under the current provision of the Act relating to facial disfigurement, 5 U.S.C. § 8107(c)(21), the compensation is also limited to $3,500.00.

[15] *Alfred N. Luciano,* 17 ECAB 461 (1966).

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.5 (August 2002).

[17] *Wayne B. Kovacs (Cynthia A. Kovacs),* 55 ECAB 133, 137 (2003).

LEGAL PRECEDENT -- ISSUE 3

There is no right to a hearing under the Act except as specifically provided by Congress. Thus, it is well established that for an injury occurring prior to the effective date of the 1966 amendments to the Act, a claimant is not entitled to a hearing, as a matter of right.[18] 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 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. Office procedures which require the Office to exercise its discretion to grant or deny a hearing are a proper interpretation of the Act and Board precedent.[19]

ANALYSIS -- ISSUE 3

Appellant requested an oral hearing on January 23, 2006. By decision dated March 3, 2006, the Branch of Hearings and Review denied appellant's request on the grounds that his injury occurred prior to the hearing provisions of the Act on July 4, 1966. He is not entitled to an oral hearing as a matter of right as his injury was sustained prior to the 1966 amendments to the Act providing the right to an oral hearing.[20] However, the Board finds that the Branch of Hearings and Review properly exercised its discretion and reviewed appellant's claim and determined that his claim could be addressed through the reconsideration process. The Board finds that the decision of the Branch of Hearings and Review was proper.

CONCLUSION

The Board finds that there is insufficient evidence to establish the date of maximum medical improvement regarding appellant's right lower extremity and left upper extremity. The Board further finds that additional development of the medical evidence is necessary to determine the extent of the impairment of appellant's right lower extremity. In regard to appellant's schedule award for facial disfigurement, the Office properly followed procedures and granted appellant the maximum award available under the Act. Finally, the Board finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

[18] *Rudolf Bermann*, 26 ECAB 354 (1975).

[19] *Steven A. Anderson*, 53 ECAB 367, 369-70 (2002).

[20] *See* 20 C.F.R. § 10.616(a).

ORDER

IT IS HEREBY ORDERED THAT the March 3 and February 13, 2006 decisions of the Office of Workers' Compensation Programs are affirmed. The January 12, 2006 decision is set aside for further development with this decision of the Board.

Issued: January 10, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board