United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 10-716**
	)	**Issued: January 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Washington, DC 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 25, 2010 appellant filed a timely appeal from a September 16, 2009 merit decision of the Office of Workers' Compensation Programs denying his schedule award claim. The Board also has jurisdiction over the January 6, 2010 decision denying appellant's hearing request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish employment-related permanent impairment, thereby entitling him to a schedule award; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On June 18, 2001 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that his left arm and wrists conditions were related to his work duties of gripping, grabbing and pulling mail and parcels. The Office accepted the claim for left lateral epicondylitis and left carpal tunnel syndrome. It authorized left carpal tunnel release, which

appellant underwent on May 14, 2002. The Office paid benefits and he returned to work following a period of disability. Appellant underwent a right carpal tunnel release on December 2, 2004, which the Office approved. It is unclear from the record whether he returned to work.[1]

On February 2, 2009 appellant filed a claim for a schedule award. In a March 23, 2009 report, Dr. Peter S. Trent, a Board-certified orthopedic surgeon, noted that the findings of a January 7, 2008 electromyogram (EMG) revealed delayed bilateral distal motor latencies and bilateral distal median sensory latencies across both wrists. On examination, he found decreased strength and sensory deficit, pain and discomfort in the left hand. Dr. Trent opined that appellant had 14 percent impairment for loss of function due to decreased strength and 9 percent impairment for loss of function from sensory deficit, pain or discomfort. In a separate March 23, 2009 report, he advised that appellant reached maximum medical improvement on March 23, 2009. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), Dr. Trent assigned 14 percent permanent impairment of the upper extremity due to decreased strength and 9 percent permanent impairment of the left hand due to loss of function from sensory deficit, pain or discomfort.[2]

In an April 11, 2009 report, an Office medical adviser noted the claim was accepted for left lateral epicondylitis and left carpal tunnel syndrome, for which appellant underwent left carpal tunnel release. He reviewed Dr. Trent's March 23, 2009 report and advised more information was required to make an appropriate impairment rating, as no medical rationale or physical findings support the impairment ratings of Dr. Trent. In a June 6, 2009 report, the Office medical adviser reviewed the record, including the March 23, 2009 report from Dr. Trent, and noted no tables or figures from the sixth edition of the A.M.A., *Guides* were discussed. He again advised additional information from appellant's treating physician was needed to assess impairment or the Office could arrange a second opinion evaluation for impairment rating.

In an August 17, 2009 letter, the Office requested that Dr. Trent provide additional information as to impairment ratings. No response was received from Dr. Trent.

By decision dated September 16, 2009, the Office denied appellant's claim for a schedule award.

On November 9, 2009 the Office received an October 26, 2009 report from Dr. Trent, which noted findings on physical examination.

[1] In File No. xxxxxxx406, the Office accepted that appellant's April 7, 1999 injury resulted in temporary aggravation of lumbar radiculopathy, herniated disc at L4-5, aggravation of degenerative disc disease, and permanent aggravation of herniated nucleus pulpous at L5 on the left. In an April 8, 2004 decision, the Board found the Office properly reduced appellant's compensation to reflect his capacity to earn wages in the constructed position of budget officer. It further found that he had not met his burden of proof to establish that his migraine headaches were caused or aggravated by his April 7, 1999 employment injury. 55 ECAB 465 (2004).

[2] A.M.A., *Guides* (6th ed. 2008).

On November 24, 2009 appellant requested an oral hearing. The request was postmarked November 25, 2009. A copy of Dr. Trent's October 26, 2009 report was provided with a handwritten notation which stated: "sent paper work from Dr. Trent to London, KY for additional evidence before 30 days."

By decision dated January 6, 2010, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was untimely filed. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that he sustained a greater percentage of impairment than what was previously awarded.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[5] 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 regulations as the appropriate standard for evaluating schedule losses.[6] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7]

Under the sixth edition of the A.M.A., *Guides*, impairments of the upper extremities are covered by Chapter 15. Entrapment neuropathy, such as carpal tunnel syndrome, is addressed at section 15-4f.[8] Having established the diagnosis of carpal tunnel syndrome, the next step in the rating process is to consult Table 15-23, entitled Entrapment/Compression Neuropathy Impairment.[9] The table provides a series of grade modifiers from zero to four and a range of corresponding upper extremity impairments from zero to nine percent. Grade modifiers are

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.404.

[5] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[6] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims , *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010); *see also* Part 3 -- Medical , *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[8] A.M.A., *Guides*, *supra* note 2 at 432.

[9] *Id*. at 448-49.

assigned based on a combination of factors including test findings, history and physical findings.[10]

The Office's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*. The Office medical adviser is to provide rationale for the percentage of impairment specified.[11]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left lateral epicondylitis and left carpal tunnel syndrome. It authorized carpal tunnel surgeries. Appellant filed a claim for a schedule award. In reports dated March 23, 2009, Dr. Trent assigned 14 percent impairment of the left upper extremity due to decreased strength and nine percent permanent impairment due to loss of function from sensory deficit, pain or discomfort. An Office medical adviser reviewed Dr. Trent's reports but found that Dr. Trent did not address how he rated impairment under the A.M.A., *Guides*. In a June 6, 2009 report, he reiterated the deficiencies in Dr. Trent's reports and recommended that he be asked to provide further explanation. Dr. Trent did not respond to the Office's August 17, 2009 letter requesting additional rationale for the impairment rating.

The Board finds that Dr. Trent did not provide a sufficient explanation of his impairment rating. The A.M.A., *Guides* explain that, to rate focal nerve compromise under Table 15-23, the appropriate grade modifier for test findings, history and physical findings is to be determined.[12] Dr. Trent did not address the test findings, history or physical findings but merely advised that appellant had 14 percent permanent impairment of the left upper extremity due to decreased strength and nine percent permanent impairment due to sensory deficit, pain or discomfort. He did not adequately explain his impairment rating pursuant to the A.M.A., *Guides*, despite the Office's August 17, 2009 request. Consequently, Dr. Trent's opinion is of diminished probative value.[13]

Appellant has the burden of proof to show entitlement to a schedule award.[14] He did not submit a comprehensive medical report from which the impairment of his left arm could be determined. The Board finds that he did not met his burden of proof. The Board will affirm the Office's September 16, 2009 decision denying his claim for a schedule award.

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[10] Additional grade modifications are permitted using the *Quick*DASH (Disabilities of the Arm, Shoulder and Hand) functional assessment tool.

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[12] A.M.A., *Guides*, *supra* note 2 at 448.

[13] *See J.G.*, 61 ECAB ___ (Docket No. 09-1128, issued December 7, 2009) (an attending physician's report is of little probative value where the A.M.A., *Guides* are not properly followed).

[14] *Tammy L. Meehan*, 53 ECAB 229 (2001).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act[15] provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.[16] Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[17] If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[18]

ANALYSIS -- ISSUE 2

By decision dated September 16, 2009, the Office denied appellant's claim for a schedule award on the basis evidence was not sufficient to establish that he sustained permanent impairment to a scheduled member due to his accepted work injury. Appellant's November 24, 2009 request for a hearing was made more than 30 days after the September 16, 2009 decision. Therefore, it was not timely and he was not entitled to an oral hearing as a matter of right.[19]

The Office has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of rights. In a January 6, 2010 decision, it properly exercised its discretion. The Office considered the issue involved and denied appellant's request for an oral hearing on the basis that his claim on the issue of whether he was entitled to a schedule award could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[20] In the present case, the Office did not abuse its discretion in denying a discretionary hearing.

On appeal, appellant stated that he provided the Office with all the documentation it requested from Dr. Trent. As noted, however, the medical evidence of record is not sufficient to

[15] 5 U.S.C. §§ 8101-8193.

[16] *Id.* at § 8124(b)(1).

[17] 20 C.F.R. § 10.616(a); *Id*.

[18] *Teresa Valle*, 57 ECAB 542 (2006).

[19] *See supra* note 17.

[20] *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

establish permanent impairment of his left arm.[21] Appellant's request for an oral hearing was not timely and the Office did not abuse its discretion in denying his request.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award as he failed to submit sufficient evidence to establish the extent of permanent impairment It also properly denied his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2010 and September 16, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] Regarding new evidence submitted on appeal and new medical evidence received subsequent to the Office's April 22, 2009 decision, the Board notes that it has no jurisdiction to consider such evidence on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office and request reconsideration under 5 U.S.C. § 8128.