U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK E. JOHNSON and DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, Pleasantville, N.J.

Docket No. 97-88; Submitted on the Record;
Issued November 9, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are whether appellant is entitled to more than the seven percent schedule award he received for permanent partial impairment of his left ankle and whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely filed.

On August 26, 1991 appellant, then a 53-year-old maintenance foreman, filed a notice of traumatic injury, claiming that he twisted his ankle when his left foot was caught in a drain grating on August 22, 1996. Based on the report of Dr. Daniel R. DeMeo, a Board-certified orthopedic surgeon, the Office accepted the claim for osteochondritis dissecans[1] of the left ankle.

Subsequently, appellant underwent surgery on March 18, 1992 and, following physical therapy, was released to work on June 25,1992. Dr. DeMeo submitted brief reports over the next three years, noting that after surgery appellant developed complications of reflex sympathetic dystrophy and post-traumatic degenerative arthritis, which resulted in a 20 percent permanent impairment of the left foot.

On September 15, 1995 the Office asked Dr. DeMeo to determine the extent of appellant's impairment according to the 4th edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. DeMeo responded that the date of maximum medical improvement of appellant's injury was October 10, 1995, that appellant could dorsi flex to 30 degrees and plantar flex to 35 degrees, and that appellant could invert from neutral to 5 degrees and evert from neutral to 10 degrees. Dr. DeMeo found a 30 percent impairment of the left lower extremity.

---

[1] Osteochondritis dissecans is defined as inflammation of both bone and cartilage, resulting in the splitting of pieces of cartilage into the joint. *Dorland's Illustrated Medical Dictionary* (27th ed. 1988).

The Office referred Dr. DeMeo's findings to the Office medical adviser, who found a seven percent impairment, based on the 4th edition of the A.M.A., *Guides*.

On December 15, 1995 the Office issued a schedule award for seven percent permanent impairment of appellant's left lower extremity, covering the period October 10, 1995 through February 28, 1996.

On May 13, 1996 appellant requested an oral hearing or review of the record, stating that the seven percent award was too low considering the pain and discomfort he was suffering daily. On July 13, 1996 the Office denied appellant's request on the grounds that it was untimely filed.

The Board finds that appellant is entitled to no more than a seven percent schedule award for loss of use of his left ankle.

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.304 of the implementing federal regulations,[3] schedule awards are payable for the permanent impairment of specified bodily members, functions, and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[4]

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[5] The method used in making such determinations rests in the sound discretion of the Office.[6] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[7]

In this case, the Board finds that the Office medical adviser properly applied the appropriate tables found in the 4th edition of the A.M.A., *Guides*. The date of maximum medical improvement was October 10, 1995, based on Dr. DeMeo's conclusion that appellant's degenerative arthritis stemming from the work injury was about the same as that seen on July 1994 x-rays.

Referring to Table 42, page 78 of the A.M.A., *Guides*, which covers ankle motion impairments, the Office medical adviser found 0 impairment for dorsi and plantar flexion;

---

[2] 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

[4] 5 U.S.C. § 8107(c)(19); *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB ___ (Docket No. 94-837, issued January 30, 1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions.

[5] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[6] *George E. Williams*, 44 ECAB 530, 532 (1993).

[7] *James J. Hjort*, 45 ECAB 595, 599 (1994).

applying Table 43, which covers hind-foot impairments, the Office medical adviser found 5 percent impairment for the 5 degrees inversion, and 2 percent impairment for 10 degrees eversion. These conclusions were based on Dr. DeMeo's findings in his October 10, 1995 report, which revealed no ankylosis or additional impairment due to muscle weakness, atrophy or pain.

In assessing appellant's impairment at 20 and 30 percent, Dr. DeMeo failed to apply the appropriate tables of the A.M.A., *Guides*, as requested by the Office. Inasmuch as it is claimant's burden to provide medical evidence establishing his entitlement to a schedule award, and the medical evidence in this case supports no rating greater than the seven percent schedule award already received by appellant, the Board finds that the Office properly determined that appellant was entitled to no more than a seven percent impairment rating.[8]

The Board also finds that the Office acted within its discretion in denying appellant's request for a hearing as untimely filed.[9]

The Act is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.[10] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[11] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[12]

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.[13] The Board has held that the only limitation on the Office's authority is reasonableness,[14] and that abuse of discretion is

---

[8] *See Lena P. Huntley*, 46 ECAB 643, 646 (1995) (finding that the Office medical adviser's proper application of the A.M.A., *Guides* constituted the weight of the medical evidence).

[9] The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). In this case, appellant filed his notice of appeal on September 20, 1996. Thus, both the December 15, 1995 and the July 13, 1996 decisions are before the Board.

[10] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[11] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[12] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

[13] *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b.(3) (October 1992).

[14] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[15]

In this case, appellant requested a hearing almost six months after the December 15, 1995 decision of the Office providing a schedule award. Attached to that decision was a statement outlining appellant's options regarding appeal and explaining clearly that the request for a hearing must be made within 30 days of the date of the decision. Appellant did not request a hearing until May 13, 1995, well beyond the 30-day limit, and offered no explanation for his delay. Therefore, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.[16] Here, the Office informed appellant in its July 13, 1996 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on whether appellant's disability was greater than the impairment rating awarded could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request which could be found to be an abuse of discretion. Further, appellant was advised that he could request reconsideration and submit evidence in support of his assertion that he was entitled to a greater schedule award.[17] Finally, appellant has offered no argument to justify further discretionary review by the Office.[18] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

[15] *Wilson L. Clow, Jr.*, 44 ECAB 157, 175 (1992).

[16] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[17] The record shows that on September 13, 1996 appellant requested reconsideration and submitted reports dated May 24 and October 10, 1995 from Dr. DeMeo. On December 12, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of its prior decision. The Board and the Office cannot have jurisdiction over the same issue in the same case at the same time. 20 C.F.R. § 501.2(c); *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993). Consequently, while appellant's appeal of the schedule award was before the Board, the Office had no jurisdiction to issue the December 12, 1996 decision; therefore, it is deemed null and void. *Cf. Douglas E. Billings*, 41 ECAB 880, 893 (1990) (finding that the Office had jurisdiction to issue a decision on a matter unrelated to the issue on appeal before the Board).

[18] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

The September 13, 1996 and December 15, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 9, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member