U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GABRIEL GRIEGO and DEPARTMENT OF THE ARMY, PUEBLO ARMY DEPOT, Pueblo, Colo.

Docket No. 97-2332; Submitted on the Record;
Issued June 14, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 31 percent permanent impairment of his right upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

On or about January 7, 1966 appellant, then a 35-year-old waiter employed by the Air Force Academy, filed a claim for traumatic injury alleging that on that date he injured his right hand when he accidentally struck it against a support column during the course of his employment. Appellant received no medical treatment. Subsequent to the injury, appellant left the Air Force Academy and went to work at the Pueblo Army Depot. On July 26, 1978 appellant filed a claim for occupational disease, Form CA-2, stating that his hand, which had bothered him since the original injury, had become swollen and the middle finger had locked. X-rays taken of appellant's finger were negative. Appellant's finger continued to bother him, and his treating physician eventually recommended surgical intervention. On April 10, 1979 appellant filed a claim for a recurrence of disability, Form CA-2a. On April 3, 1980 the Office accepted appellant's claim for aggravation of preexisting arthritis of the metacarpal phalangeal joint of the long finger of the right hand. Appellant underwent surgical tendon release of the right long finger and excision of osteophyte on January 14, 1981. The Office subsequently accepted appellant's surgery as necessitated by ongoing factors of appellant's employment. After a period of medical development, on March 5, 1982 the Office granted appellant a schedule award for a 50 percent permanent impairment of the metacarpal phalangeal joint of his right long finger.

On January 9, 1987 appellant filed a claim for a recurrence of disability alleging that on October 28, 1986 he developed swelling and a weak grip in his right hand. In support of his claim, appellant submitted medical evidence from his treating physicians. On April 22, 1987 the Office accepted appellant's claim for a recurrence of disability.

On March 31, 1989 after a period of medical development, including appellant's referral to a second opinion physician and review of the claim by an Office medical adviser, the Office granted appellant a schedule award for a 31 percent permanent impairment of the right upper extremity, less that amount already paid for the right long finger. The Office expressed the schedule award in terms of impairment to the arm, or upper extremity, because the medical evidence supported involvement of the right wrist, in addition to the right long finger.

On May 8, 1996 the Office authorized silastic metacarpal phalangeal arthroplasty of the right long finger, based on the recommendations of appellant's treating physicians, Drs. R.J. Black-Schultz and Robert J. Foster, both Board-certified orthopedic surgeons. The procedure was performed on June 20, 1996.

In a report dated October 7, 1996, Dr. Foster stated that appellant had reached maximum medical improvement following his silastic interpositional implant arthroplasty. With respect to impairment, the physician stated that based on use of motion, appellant had a five percent impairment of his hand, which equated to five percent of the upper extremity. The physician added that with respect to the surgery itself, based on Table 27, Chapter 3 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition, implant arthroscopy of the metacarpal phalangeal joint of the right long finger equated to a nine percent permanent impairment of that joint. On an accompanying letter, also dated October 7, 1996, Dr. Foster stated that the rating he gave appellant was based solely on the operation that was performed on the right long finger metacarpal phalangeal joint and did not take into consideration other factors. The physician concluded that appellant had previously been rated by Dr. James O'Donnell, the Office second opinion physician, whose rating he felt remained valid.[1]

On November 14, 1996 the Office medical adviser reviewed Dr. Foster's report and stated that because Table 27 of the A.M.A., *Guides* only expressed impairment in terms of the upper extremity, appellant's finger impairment would have to be converted to an upper extremity rating. He concluded that appellant had a total impairment of 14 percent of the right upper extremity when the finger and arthroplasty impairment were combined.

In a decision dated January 3, 1997, the Office denied appellant's claim for an additional schedule award on the grounds that he had already received an award for a 31 percent permanent impairment of the right upper extremity, which was more than the 14 percent impairment of the right upper extremity determined by Dr. Foster and the Office medical adviser.

Subsequent to the Office's decision, appellant submitted medical reports dated January 2 and 23, 1997, from Dr. Black-Schultz. In a January 2, 1997 report, Dr. Black-Schultz stated, in pertinent part, that the range of motion of appellant's third metacarpal joint was 10 to 40 degrees and that range of motion in his right wrist was as follows: dorsiflexion 45 degrees, volar flexion 50 degrees, radial deviation 15 degrees and ulnar deviation 25 degrees. In a report dated January 23, 1997, Dr. Black-Schultz stated that appellant remained very symptomatic and that contrary to the Office's January 3, 1997 decision, there was no evidence that appellant's

[1] Dr. O'Donnell's second opinion examination formed the basis for the Office's March 31, 1989 schedule award of 31 percent permanent impairment of the right upper extremity.

permanent partial impairment had decreased. Dr. Black-Schultz concluded that he had read Dr. Foster's October 7, 1996 letters, and felt that Dr. Foster's rating was in addition to any of appellant's prior ratings.

On February 28, 1997 the Office forwarded Dr. Black-Schultz's reports to the Office medical adviser for review. In his report dated March 3, 1997, the Office medical adviser stated that Dr. Black-Schultz's reports contained no basis for changing his November 14, 1996 opinion.

By letter dated March 14, 1997, the Office notified appellant that, based on the Office medical adviser's determination that appellant has no additional impairment, the January 3, 1997 decision remained valid.

In a letter dated March 31, 1997, appellant requested an oral hearing before an Office representative. In a decision dated April 25, 1997, the Office denied appellant's request on the grounds that, as appellant's request for a hearing was received more than 30 days after the January 3, 1997 decision, it was untimely. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration.

The Board finds that appellant has no more than a 31 percent permanent impairment of the right upper extremity.

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 permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimant's 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.[4]

In the present case, in his report dated January 2, 1997, Dr. Black-Schultz, appellant's attending physician, stated that appellant's range of motion in his long finger metacarpal phalangeal joint was 10 to 40 degrees, which, based on Figure 23, page 34 of the fourth edition of the A.M.A., *Guides*, equates to a 27 percent permanent impairment of the finger, or a 5 percent

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

[4] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

permanent impairment of the right upper extremity.[5] Appellant's most recent range of motion measurements for the wrist, as expressed in Dr. Black-Schultz January 2, 1997 report, pursuant to Figures 26 and 29 on pages 36 and 38 of the A.M.A., *Guides*, respectively, equate to a total permanent impairment of the hand of seven percent, or six percent of the upper extremity.[6] When combined with the upper extremity rating based on appellant's finger impairment, appellant has a total impairment of the right upper extremity of 11 percent.[7] As the Office medical adviser properly noted, therefore, Dr. Black-Schultz's January 2 and 23, 1997 medical reports provide no basis for a schedule award in addition to the 31 percent for the right upper extremity previously awarded to appellant.

The Board has held that when an attending physician's report gives an estimate of permanent impairment but is not based on a proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser if he or she has properly used the A.M.A., *Guides*.[8] The Board concludes that in the present case, the Office medical adviser properly applied the A.M.A., *Guides* to the description of impairment provided by Dr. Black-Schultz. There is no other evidence of record that appellant has greater than a 31 percent permanent loss of use of his right upper extremity for which he has received a schedule award.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

As noted above, in a letter dated March 14, 1997, the Office notified appellant that it had received the new medical evidence submitted by him and had the reports reviewed by the Office medical adviser, who determined that appellant has no additional impairment. The Office informed appellant that, therefore, the January 3, 1997 formal denial of his claim for an additional schedule award remained valid. By letter received April 4, 1997, appellant requested an oral hearing and in a decision dated April 25, 1997, the Office denied appellant's request for a hearing on the grounds that the request was not made within 30 days of the Office's January 3, 1997 decision.

Section 8124(b) of the Act, concerning entitlement to a hearing before an Office representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled on request made within

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[5] Table 1, p. 18; Table 2, p. 19. Appellant previously received a schedule award calculated pursuant to a previous edition of the A.M.A., *Guides*, however, appellant's claim for an increased schedule award, filed after November 1, 1993, is properly calculated pursuant to the fourth edition of the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(4); (March 1995) *see* FECA Bulletin No. 94-4 (issued November 1, 1993).

[6] Dorsiflexion of 45 degrees equates to a 3 percent impairment; palmar flexion, or extension, to 50 degrees equates to a 2 percent impairment; radial deviation to 15 degrees equates to 1 percent impairment; and ulnar 5 deviation to 25 degrees equates to 1 percent impairment. Seven percent impairment of the hand equates to six percent permanent impairment of the right upper extremity pursuant to Table 2, p. 19 of the A.M.A., *Guides*, fourth edition.

[7] A.M.A., *Guides*, fourth edition, p. 322.

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

30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9]

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.[10]

In this case, the Board finds that the context of the Office's March 14, 1997 letter, indicates that the Office reconsidered the merits of appellant's claim. The Office specifically stated that it had reviewed the newly submitted medical evidence and had further had the evidence reviewed by the Office medical director before finding the evidence insufficient to establish additional entitlement to a schedule award. Therefore, this letter was, in effect, a merit decision issued after reconsideration pursuant to section 8128(a).[11] As appellant's request for an oral hearing was made within 30 days of this decision, the Office improperly denied appellant's request on the grounds that it was untimely filed. This error is harmless, however, as appellant's April 4, 1997 hearing request was made after he had requested reconsideration in connection with his claim, and, therefore, appellant was not entitled to a hearing as a matter of right. Hence the Office was correct in the ultimate determination in its April 25, 1997 decision, that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its April 25, 1994 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical evidence to establish that appellant has an increase of permanent partial loss of use of his right arm beyond the 31 percent previously awarded. The Board has held that, as 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.[12] In the present case, the evidence of record does not indicate that the Office

[9] 5 U.S.C. § 8124(b)(1).

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

[11] *See Joseph L. Cabral*, 44 ECAB 152 (1992) (stating that whether appellant has submitted sufficient evidence to establish a claim is the standard used when conducting a merit review).

[12] *Janice Kirby*, 47 ECAB 220 (1995).

committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, although the Office relied in part on improper grounds, the Office's ultimate denial of appellant's request for a hearing was proper.

The decision of the Office of Workers' Compensation Programs dated April 25, 1997 is affirmed as modified. The decisions of the Office dated March 14 and January 3, 1997 are affirmed.

Dated, Washington, D.C.
June 14, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member