U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT TURI, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Austin, TX

Docket No. 01-518; Submitted on the Record;
Issued November 15, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than 16 percent permanent impairment of the left upper extremity for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On October 28, 1993 appellant, then a 40-year-old letter carrier, filed a notice of traumatic injury alleging that he felt a sharp pain in his back when he bent down to pick up a letter in the performance of duty. The Office accepted the claim for a cervical and thoracic strain, microdiscetomy and fusion at C5-6 with removal of instrumentation and a herniated disc at C6-7.

On July 12, 1996 appellant filed a claim for a schedule award.

In a decision dated January 14, 1997, the Office issued a schedule award for 16 percent permanent impairment of the left arm. The period of the award was from August 23, 1995 to August 6, 1996.

On December 23, 1997 appellant sustained another back injury in the performance of duty trying to avoid a dog attack while he was delivering mail. The Office accepted the traumatic injury claim for a lumbar strain and a herniated disc at C6-7.

On April 16, 1998 appellant underwent a C6-7 anterior cervical discectomy and fusion.

Appellant subsequently filed a claim for an additional schedule award on September 1, 1999.

In support of his claim, appellant submitted a June 22, 1999 report from Dr. Eduardo R. Elizondo, a Board-certified physician in physical medicine and rehabilitation, who reported physical findings including range of motion that showed what he characterized as moderate limitations in flexion, extension and side bending. He indicated that appellant showed weakness

in the intrinsics at C8-T1 with mild atrophy of the ulnar and median nerves on the left. Decreased grip and sensation was noted in the left arm. Dr. Elizondo diagnosed a cervical herniated disc with radiculopathy and ulnar neuropathy at the left elbow. He noted that the elbow condition did not appear to be related to appellant's work injury. He concluded that appellant had reached maximum medical improvement and found 25 percent whole person impairment under Chapter 3, Table 73 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a July 23, 1999 report, an Office medical adviser reviewed the June 22, 1999 report from Dr. Elizondo. He stated as follows:

> "Dr. Elizondo correctly performed and reported the cervical spine impairment rating according to the fourth edition [A.M.A., *Guides*]. However, the Office has a unique need for an impairment rating of the extremities that is a result of the job-accepted condition. In this instance, that would be any upper extremity impairment that is the result of spinal nerve root deficit [page, 51, Table 13 of the [A.M.A., *Guides*]. This is particularly difficult because of the concurrent neuropathy (ulnar). Please ask Dr. Elizondo to also submit an impairment rating of the upper extremities that is a result of cervical nerve root deficit from the cervical disc disease. Because of the difficulty of discerning a nerve root lesion from a peripheral neuropathy, please preapprove an electromyogram (EMG)/nerve conduction velocity [NCV] study."

Dr. Elizondo reevaluated appellant again based on the recommendation of the Office medical adviser. In an August 26, 1999 report, he noted that additional electrodiagnostic studies had been performed. Dr. Elizondo stated:

> "This confirms an electrodiagnostically multilevel nerve root involvement. This information is now uti1ized for determination of an upper extremity impairment. Based on the motor and sensory testing done on today's examination, the patient is assigned (according to Table 12) a 10 percent impairment of the C7 nerve root grade and a 20 percent impairment of the C8 nerve root grade. These grades are multiplied times the maximum values of the nerve roots, which according to Table 13 the C7 nerve root correlates to a 35 percent maximum value and a 45 percent maximum value is assigned to the C8 nerve root. When these values are multiplied, the patient exhibits 3.5 or 4 percent upper extremity impairment for motor loss involving the C7 nerve root. In the C8 nerve root the 45 percent maximum value is multiplied times the 20 percent grade and this yields a 9 percent total upper extremity impairment. For the sensory examination, a 5 percent maximum value is assigned for both thc C7 and C8 nerve roots. These are multiplied times the grades according to Table 11 of the fourth edition, [A.M.A., *Guides*]. These grades are assigned as 10 and 20 percent for the C7 and C8 nerve roots, respectively. When the maximum values and grades are multiplied, the patient is issued a one percent sensory deficit of the upper extremity for the C7 nerve root and a one percent sensory deficit for C8. The combined values for motor loss of the C7 nerve root and the sensory loss of the C7 nerve root yields a 5 percent upper extremity deficit. Combining the values

for motor and sensory involving the C8 nerve root, this yields a 10 percent total upper extremity deficit. These values are now combined utilizing the Combined Values Chart for a total of a 15 percent upper extremity deficit involving the left nondominant limb."

The Office forwarded a copy of Dr Elizondo's August 26, 1999 report to an Office medical adviser for review. The Office medical adviser determined in a January 12, 2000 report that Dr. Elizondo's finding of 15 percent impairment of the left upper extremity was in accordance with the fourth edition of the A.M.A., *Guides*. Accordingly, the Office medical adviser concluded that appellant had 15 percent permanent impairment of the left extremity due to his work injuries.

In a May 2, 2000 decision, the Office denied appellant's claim for an additional schedule award. The Office noted that the evidence of record established that appellant had 15 percent impairment of the left upper extremity as a result of his work injuries, however, appellant had already received a schedule award for 16 percent impairment.

In a letter postmarked June 2, 2000, appellant requested an oral hearing.

In a decision dated August 31, 2000, the Office denied appellant's hearing request as untimely filed. The Office further noted that the issue in the case could be equally addressed through the reconsideration process.

The Board finds that appellant failed to establish that he has greater than 16 percent impairment of the left upper extremity for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act (FECA)[1] and its implementing federal regulation,[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] 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.[4]

In this case, appellant's attending physician determined that appellant had 15 percent impairment of the left upper extremity due to his work injuries. That finding was confirmed by an Office medical adviser. Because appellant already received a schedule award for 16 percent

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] 5 U.S.C. § 8107(c)(19).

[4] *See* 20 C.F.R. § 10.404 (1999).

permanent impairment of the left upper extremity, the Office correctly found that he failed to submit sufficient evidence to show that he was entitled to an increase in his previously issued schedule award.

The Board further notes that appellant was not entitled to an increase schedule award based on impairment ratings pertaining solely to his back or whole person impairment. Neither FECA nor its implementing federal regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[5]

The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

The Board finds that the Office properly denied appellant's hearing request as untimely filed.

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.[6] As section 8124(b)(1) in 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.[7]

As appellant's hearing request was postmarked June 2, 2000, more than 30 days after the Office's May 2, 2000 decision, appellant was not entitled to a hearing as a matter of right.[8] The Office further considered appellant's request for a hearing and determined that the issue of the case could be equally well resolved through a request for reconsideration. Accordingly, the Board finds that the Office did not abuse its discretion in its denial of appellant's request for a hearing.

[5] *Terry E. Mills*, 47 ECAB 309 (1996).

[6] *See* 5 U.S.C. § 8124(b).

[7] *See* 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

[8] The postmark date is considered to be the date that the hearing request was sent to or filed with the Office. *See* 20 C.F.R. § 10.616.

The decision of the Office of Workers' Compensation Programs dated May 2, 2000 is hereby affirmed.

Dated, Washington, DC
November 15, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member