

**United States Department of Labor
Employees' Compensation Appeals Board**

LESLIE M. SCHOFIELD, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Pensacola, FL, Employer**

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**Docket No. 04-929
Issued: July 15, 2004**

Appearances:
Leslie M. Schofield, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 25, 2004 appellant filed an appeal of a schedule award decision of the Office of Workers' Compensation Programs dated September 3, 2003. He also appealed a December 18, 2003 decision in which the Office denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the September 3, 2003 schedule award decision and over the Office's December 18, 2003 decision denying appellant's hearing request.

ISSUES

The issues are: (1) whether appellant has more than a three percent impairment of the right middle finger, for which he received a schedule award; and (2) whether the Office properly denied his request for a hearing.

FACTUAL HISTORY

On March 30, 2001 appellant, then a 51-year-old locksmith, sustained an employment-related laceration of the right middle finger when he caught his finger in a paper shredder. He did not stop work. The initial medical report at the employing establishment clinic advised that appellant sustained a severe laceration of the right middle finger distal from the interphalangeal joint with the distal half of the nail avulsed and no bone, tendon or nerve visualized. He came under the care of Dr. Michael L. Shawbitz, a Board-certified neurologist, who submitted a report dated October 5, 2001. He noted the history of injury and that appellant felt that he had injured his arm more seriously than originally thought, with complaint of a burning sensation radiating from his shoulders to his fingers. The physician noted decreased light touch sensation over the tuft and distal right long finger and recommended electromyography (EMG) of the right upper extremity to rule out cervical neuropathy.

An EMG was performed on November 29, 2001 and was reported as normal without evidence of ulnar or median pathology and minor left carpal tunnel syndrome.¹ X-ray of the cervical spine dated January 18, 2002, by Dr. Sean J. Kuyper, Board-certified in radiology, demonstrated isolated C6-7 degenerative disc disease with mild bilateral C6-7 neural foraminal narrowing, left worse than right. A February 8, 2002 magnetic resonance imaging (MRI) scan of the cervical spine was reported by Dr. Jeffrey S. Brenner, a Board-certified radiologist, as a technically limited examination with mild cervical spondylosis at C3-4 with a small central disc herniation without spinal stenosis and moderate cervical spondylosis at C6-7 without stenosis.

In a report dated February 11, 2002, Dr. Shawbitz noted the EMG and MRI scan findings and opined that it would be atypical for appellant to develop reflex sympathetic dystrophy from his finger injury. In a report dated March 19, 2002, Dr. Shawbitz advised that appellant had a digital nerve injury but he could not explain appellant's arm complaints, stating that the MRI scan findings were unrelated. He recommended that appellant have his shoulder evaluated by an orthopedic surgeon.

Appellant retired on disability effective May 23, 2002 and on August 16, 2002 filed a claim for a schedule award. The Office requested that Dr. Shawbitz evaluate appellant according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).² In a report dated September 26, 2002, Dr. Shawbitz noted that appellant had numbness in his fingertip as well as additional complaints of numbness in the ulnar distribution of the right hand to the level of the wrist. He concluded that from a sensory standpoint there was a little loss of dexterity of the hand which was permanent and diagnosed digital neuropathy. In a report dated August 11, 2003, an Office medical adviser stated that maximum medical improvement had been reached on September 26, 2002 and determined that, under Table 16-7 of the A.M.A., *Guides*, appellant had a partial sensory loss of the distal 10 percent of the long finger which amounted in a 3 percent permanent impairment.

¹ Appellant also received occupational and physical therapy.

² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

By decision dated September 3, 2003, the Office granted appellant a schedule award for a three percent loss of use of the right middle finger, for a total of 0.9 weeks, to run from September 26 to October 2, 2002. On October 24, 2003 appellant requested a hearing. In a decision dated December 18, 2003, the Office denied appellant's hearing request on the grounds that it was untimely filed.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ 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. 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.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an employment-related laceration of his right middle finger. In an October 5, 2001 report, appellant's attending physician Dr. Shawbitz noted decreased light touch sensation over the tuft and distal right long finger. In a report dated September 26, 2002, Dr. Shawbitz again noted that appellant had numbness in his fingertip. He concluded that from a sensory standpoint there was a little loss of dexterity of the hand which was permanent and diagnosed digital neuropathy. In a report dated August 11, 2003, an Office medical adviser stated that maximum medical improvement had been reached on September 26, 2002 and determined that, under Table 16-7 of the A.M.A., *Guides*, appellant had a partial sensory loss of the distal 10 percent of the long finger which equaled a 3 percent permanent impairment.

Table 16-7 of the A.M.A., *Guides* provides for digit impairment for transverse and longitudinal sensory losses in index, middle and ring fingers based on the percentage of the digit length involved.⁶ The table indicates that a partial transverse loss of 10 percent of the digit length for both ulnar and radial digital nerves equals 3 percent impairment. The Board finds that it was reasonable for the Office medical adviser to base his determination on this finding. Section 8107(c)(9) of the Act provides that a 100 percent loss of the second (or middle) finger is equal to 30 weeks compensation. A 3 percent loss would equal 0.9 weeks, as awarded appellant. It is appellant's burden to submit sufficient evidence to establish entitlement to a schedule award.⁷ In the instant case, in light of the above medical reports and the fact that a

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.404.

⁵ *Ronald R. Kraynak*, 53 ECAB ____ (Docket No. 00-1541, issued October 2, 2001).

⁶ A.M.A., *Guides*, *supra* note 2 at 448.

⁷ *See Annette M. Dent*, 44 ECAB 403 (1993).

November 29, 2001 EMG of the right upper extremity was reported as normal without evidence of ulnar or median pathology, the Board finds that appellant has no more than an three percent impairment of his right second finger for which he received a schedule award.⁸

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁹ The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its December 18, 2003 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since his request, postmarked October 24, 2003, had not been made within 30 days of its September 3, 2003 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application. The Board therefore finds that as appellant's request for a hearing was postmarked October 24, 2003 and was thus made more than 30 days after the date of issuance of the Office's prior decision dated September 3, 2003, the Office was correct in stating in its December 18, 2003 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 request when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 18, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether he was entitled to a greater schedule award could be addressed through a reconsideration application. 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.¹¹ In the present case, the evidence of record does not

⁸ The Board notes that appellant retains the right to request an increased schedule award based on medical evidence indicating a progression in his employment-related condition. *Linda T. Brown*, 51 ECAB 115 (1999).

⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁰ *Id.*

¹¹ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

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

CONCLUSION

The Board finds that appellant has not established that he is entitled to greater than a three percent impairment of the right middle finger and that the Office properly denied his request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 18 and September 3, 2003 are affirmed.

Issued: July 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member