

This is the third appeal in this case. On July 11, 1963 appellant, then a 48-year-old heavy equipment operator, was injured in the performance of duty while in a forward observation bunker which was struck by several nonexplosive rockets fired by an F-100. The Office

accepted his claim for almost complete avulsion of the nose, upper and lower lips. Appellant also sustained a large laceration with a skin defect over the ulnar aspect of the lower third of his right forearm with closed fracture, a compound fracture of the right tibia, a comminuted fracture of the right patella with disruption of ligamentous support of the right knee and a partial amputation extending into the interphalangeal joint of the left thumb.

The Office denied appellant's request for a schedule award due to loss of hearing by decision dated April 1, 1998. Appellant appealed this decision to the Board. By decision dated November 1, 2000,<sup>1</sup> the Board remanded the case to the Office for additional development of the medical evidence to determine whether he had sustained an employment-related bilateral hearing loss. On June 19, 2001 the Office granted appellant a schedule award for 30 percent bilateral loss of hearing.

The Office granted appellant schedule awards for 42 percent impairment of his right leg and 18 percent impairment of his left arm on January 12, 2006. By decision dated February 13, 2006, appellant received a schedule award for facial disfigurement in the amount of \$3,500.00. Appellant requested review by the Board.

In its January 10, 2007 decision,<sup>2</sup> the Board affirmed the Office's finding that appellant had 18 percent impairment of his left arm and was entitled to a schedule award of \$3,500.00 for facial disfigurement. The Board remanded the claim for the Office to develop the medical evidence addressing the permanent impairment of his right lower extremity as well as the date of maximum medical improvement. The Board found that the district medical adviser had not considered the most recent medical report in the record addressing appellant's right lower extremity, a report dated October 28, 1996 from Dr. William R. Marshall, a Board-certified orthopedic surgeon, who examined appellant and noted his history of injury. Dr. Marshall stated that appellant sustained an open fracture involving his right proximal tibia and knee and had undergone multiple operative procedures. He noted that appellant developed osteomyelitis and his right knee was draining in 1995. Dr. Marshall stated that appellant had an extensor lag of nearly 30 degrees and flexion of 70 degrees. He found medial laxity in the right knee and atrophy of appellant's right thigh. Dr. Marshall examined x-rays which demonstrated extensive end-stage degenerative arthritis with a healed comminuted proximal tibial shaft fracture with sclerotic markings and osteopenia. He diagnosed post-traumatic degenerative arthritis, with a history of osteomyelitis of the proximal tibia and disruption of the extensor mechanism as well as atherosclerotic calcific peripheral vascular disease. Dr. Marshall cautioned appellant regarding further surgical procedures noting that appellant was at great risk for potential skin slough, vascular compromise, recurrent infection and possible loss of limb. Finally, the Board concluded that as appellant's injury occurred before July 4, 1966 he was not entitled to an oral hearing on these issues. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Following the Board's January 10, 2007 decision, the Office requested that the district medical adviser reviewed Dr. Marshall's report and explained and determined the permanent

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<sup>1</sup> Docket No. 99-6 (issued November 1, 2000).

<sup>2</sup> Docket No. 06-1018 (issued January 10, 2007).

impairment of appellant's right lower extremity. The district medical adviser, Dr. James W. Dyer, a Board-certified orthopedic surgeon, responded on April 24, 2007 and stated that upon reviewing Dr. Marshall's report and assessment of appellant's x-rays as demonstrating extensive end-stage degenerative arthritis that an impairment rating for arthritis would be most appropriate<sup>3</sup> and result in an additional 8 percent impairment of the right lower extremity beyond the 42 percent already received due to a cartilage interval of zero millimeters. In a separate report dated May 1, 2007, Dr. Dyer stated that due to appellant's arthritic processes the date of Dr. Marshall's October 28, 1996 examination was the appropriate date of maximum medical improvement.

By decision dated June 29, 2007, the Office granted appellant a schedule award for an additional 8 percent impairment of his right lower extremity for a total of 50 percent impairment to that scheduled member. It listed the date of maximum medical improvement as October 28, 1996.<sup>4</sup>

Appellant requested a review of the written record by the Branch of Hearings and Review on July 3, 2007. By decision dated November 16, 2007, the Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that his injury occurred on July 11, 2003 and he was not entitled to review by the Branch of Hearings and Review as a matter of right. The Branch of Hearings and Review further considered appellant's request and found that his case could be equally well addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> and its implementing regulation<sup>6</sup> 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. 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>7</sup> Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>8</sup>

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<sup>3</sup> A.M.A., *Guides* 544, Table 17-31.

<sup>4</sup> Following the Office's June 29, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

### **ANALYSIS -- ISSUE 1**

The Board remanded appellant's claim for the district medical adviser, Dr. Dyer, a Board-certified orthopedic surgeon, to consider the findings of Dr. Marshall, a Board-certified orthopedic surgeon, in determining appellant's permanent impairment for schedule award purposes. Dr. Marshall reported findings of loss of range of motion and extensive end-stage degenerative arthritis based on x-rays in appellant's right lower extremity. Dr. Dyer explicitly reviewed this report on April 24, 2007 and found that appellant was entitled to an additional impairment rating of eight percent when his impairment rating was based on arthritic changes rather than loss of range of motion. He cited to the appropriate section of the A.M.A., *Guides*<sup>9</sup> and found that based on Dr. Marshall's report that appellant had a no cartilage interval in the right knee, appellant was entitled to 50 percent impairment or an additional 8 percent impairment of the lower extremity beyond that already awarded. As appellant's various impairment ratings cannot be combined, he is entitled to only the greater of the two evaluation methods.<sup>10</sup> Dr. Dyer properly found that appellant would be entitled to an additional eight percent impairment based on arthritis rather than loss of range of motion.<sup>11</sup> There is no medical evidence in the record establishing that appellant has more than 50 percent impairment of his right lower extremity for which he has received a schedule award.

### **LEGAL PRECEDENT -- ISSUE 2**

There is no right to a hearing under the Act except as specifically provided by Congress. Thus it is well established that for an injury occurring prior to the effective date of the 1966 amendments to the Act, a claimant is not entitled to a hearing or a review of the written record by the Branch of Hearings and Review, as a matter of right.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested a review of the written record on July 3, 2007. By decision dated November 16, 2007, Branch of Hearings and Review denied appellant's request on the grounds that his injury occurred prior to the hearing provisions of the Act on July 4, 1966. The Branch of Hearings and Review also reviewed appellant's claim and determined that his claim could be addressed through the reconsideration process. As appellant was not entitled to an oral hearing or a review of the written record as a matter of right, the Branch of Hearings and Review properly denied his request.

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<sup>9</sup> A.M.A., *Guides* 544, Table 17-31.

<sup>10</sup> *Juantia L. Spencer*, 56 ECAB 611, 615 (2005).

<sup>11</sup> A.M.A., *Guides* 526, Table 17-2. This table indicates that impairment ratings for loss of range of motion and arthritis cannot be combined.

<sup>12</sup> *Rudolf Bermann*, 26 ECAB 354 (1975).

**CONCLUSION**

The Board finds that appellant has no more than 50 percent impairment of his right lower extremity for which he has received a schedule award. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for a review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 16 and June 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 3, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board