United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 09-930**
	)	**Issued: November 24, 2009**
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Yakima, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2009 appellant filed a timely appeal from a schedule award decision of the Office of Workers' Compensation Programs dated November 25, 2008 and a January 16, 2009 decision that denied his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he is entitled to a schedule award for the right upper extremity greater than the 43 percent awarded; and (2) whether the Office properly denied his request for a review of the written record. On appeal he contends that the schedule award was not calculated correctly, that he is entitled to a whole person impairment and that his request for written review was improperly denied, because he was out of town due to a family emergency and did not receive it until December 10, 2008.

FACTUAL HISTORY

On September 29, 2003 appellant, then a 52-year-old utility man, filed a Form CA-1, traumatic injury claim, alleging that he injured his right hand and wrist when he fell going up steps. He stopped worked on September 29, 2003. On October 30, 2003 the Office accepted that appellant sustained an injury to the right median nerve and wrist, a right fracture of the carpal bone and a right wrist sprain and strain. Appellant briefly returned to light duty in March 2004 and had surgical procedures on his right wrist on May 7, July 16 and October 29, 2004. He returned to limited duty in February 2005 and stopped on February 9, 2006.[1] At that time appellant's weekly pay rate was $844.03. He did not return and was placed on the periodic rolls, with compensation based on a weekly pay rate of $844.03. Appellant was removed from the employing establishment effective June 24, 2007 on the grounds that he could not physically perform the duties of utility man.

On March 11, 2008 appellant filed a schedule award claim and submitted a February 26, 2008 report in which Dr. Robert Kite, a family practitioner, noted appellant's complaint of intermittent right wrist pain, ongoing immobility and difficulty with full function of the right wrist. Dr. Kite advised that appellant had a 43 percent right upper extremity impairment, which he converted to a 24 percent impairment of the whole person. By report dated April 15, 2008, an Office medical adviser noted his review of the medical record, including Dr. Kite's reports, explaining that the rating confirmed in Dr. Kite's February 26, 2008 report was based on a comprehensive rating examination performed by him on July 26, 2005.[2] The medical adviser opined that appellant reached maximum medical improvement on July 26, 2005. He provided an impairment analysis in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)[3] and agreed that appellant had a 43 percent right upper extremity impairment.[4] On September 15, 2008 appellant elected to receive civil service retirement benefits, effective June 26, 2007.

By decision dated November 25, 2008, appellant was granted a schedule award for a 43 percent impairment of the right upper extremity, for 134 weeks, to run from November 1, 2008 to May 29, 2011, based on a weekly pay rate of $844.03.[5] On December 27, 2008 he requested a review of the written record. The request from appellant, whose address of record is in Yakima, Washington, noted that he had a second address in Yuma, Arizona. In a letter dated

[1] The employing establishment indicated that he could no longer do his light-duty work.

[2] In the July 26, 2005 report, Dr. Kite provided wrist and forearm range of motion findings and advised that range of motion of the fingers revealed no restrictions. He diagnosed triangular fibrocartilage complex tear and scapholunate ligament tear. In a September 19, 2006 report, Dr. Kite noted the examination findings of July 26, 2005 and advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant was entitled to a 43 percent impairment of the right upper extremity or a 24 percent impairment of the whole person.

[3] A.M.A., *Guides* (5th ed. 2001).

[4] The record indicates that appellant also has a claim for a right knee condition. On April 21, 2008 he underwent right total knee arthroscopy.

[5] By decision dated November 26, 2008, the Office approved an attorney's fee request in the amount of $8,621.00. Appellant has not filed an appeal of that decision with the Board.

December 27, 2008, received by the Office on January 7, 2009, he requested that he be allowed additional time to request a review of the writing record, stating that he had received the schedule award decision on or about December 10, 2008 when his mail was forwarded to Arizona where he had been temporarily residing as a result of his mother's death on November 21, 2008. Appellant noted that he had sent e-mail to the Office requesting information on the correctness of the schedule award calculations, which demonstrated his intent to appeal the decision before the 30-day period had expired. He attached a copy of an e-mail sent on December 11, 2008 to the Department of Labor webmaster.

By decision dated January 16, 2009, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed.[6]

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[7] and section 10.404 of the implementing federal regulations,[8] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[9] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[10]

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[11] Office procedures provide that to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred ("date of maximum medical improvement"), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*.

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the

[6] On July 23, 2009 appellant accepted a lump-sum payment for the balance of his schedule award.

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] A.M.A., *Guides*, *supra* note 3.

[10] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[11] *Tammy L. Meehan*, 53 ECAB 229 (2001).

figures and tables found in the A.M.A., *Guides*. However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.[12] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides the framework for assessing upper extremity impairments.[13]

The Act does not authorize schedule awards for permanent impairment of "the whole person." The Act authorizes schedule awards for only those members, organs and functions of the body that are specified in the Act and in the implementing regulations. Amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member.[14]

Office procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.[15]

Under the Act, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.[16] Section 8101(4) provides that "monthly pay" means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[17] The compensation rate for schedule awards is the same as compensation for wage loss.[18]

[12] *Robert V. Disalvatore*, 54 ECAB 351 (2003).

[13] A.M.A., *Guides*, *supra* note 3 at 433-521.

[14] *D.H.*, 58 ECAB ____ (Docket No. 06-2160, issued February 12, 2007).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b-d) (August 2002).

[16] *See* 5 U.S.C. § 8105, 8106, 8107.

[17] 5 U.S.C. § 8101(4).

[18] *See* 20 C.F.R. § 10.404(b); *K.H.* 59 ECAB ____ (Docket No. 07-2265, issued April 28, 2008).

ANALYSIS -- ISSUE 1

Appellant would not be entitled to a schedule award for a whole person impairment because the Act does not authorize schedule awards for permanent impairment of the whole person.[19] The Board finds that appellant has not established that he is entitled to a schedule award for a right upper extremity impairment greater than the 43 percent awarded.

In concluding that appellant had a 43 percent right upper extremity impairment, the Office medical adviser relied on the reports of appellant's attending physician, Dr. Kite, who also advised that appellant had a 43 percent right upper extremity impairment. In a report dated April 15, 2008, the Office medical adviser properly utilized the range of motion findings provided by Dr. Kite and found that, under Figure 16-28 of the A.M.A., *Guides*, right wrist flexion of 22 degrees yielded a 7 percent impairment and 13 degrees of extension yielded an 8 percent impairment;[20] and that, under Figure 16-31, 7 degrees of radial deviation yielded a 3 percent impairment and 20 degrees of ulnar deviation yielded a 2 percent impairment,[21] for a total 20 percent impairment due to loss of wrist motion. He then determined that, under Figure 16-37, elbow pronation of 41 degrees yielded a three percent impairment and 50 degrees of supination yielded a one percent impairment,[22] for a total four percent impairment due to loss of right elbow motion. The Office medical adviser then properly utilized the Combined Values Chart of the A.M.A., *Guides* and combined the 20 percent loss of wrist motion with the 4 percent loss of elbow motion, for a 23 percent impairment due to loss of motion.[23] He next determined that, in accordance with Table 16-27, impairment of the upper extremity after arthroscopy, appellant was entitled to a 5 percent impairment for styloidectomy, a 20 percent impairment for ulnar arthroplasty and a 10 percent impairment for excision of the distal 1/3 of the scaphoid, for a total 24 percent impairment for his surgical procedures.[24] The Office medical adviser combined the 23 percent impairment for loss of motion with the 24 percent impairment for arthroplasty, to yield a 41 percent right upper extremity impairment. He then noted that, per Dr. Kite's reports, appellant had decreased sensation in the thumb, second and middle fingers which he graded at 4/5 or a 10 percent impairment. The Office medical adviser multiplied this value by the maximum 39, for a 4 percent sensory deficit,[25] which he combined with the previously determined 41 percent impairment, to yield a total 43 percent right upper extremity impairment.[26] As he properly extrapolated Dr. Kite's findings and as there is no additional

[19] *D.H., supra* note 14.

[20] A.M.A., *Guides*, *supra* note 3 at 467.

[21] *Id*. at 469.

[22] *Id*. at 474.

[23] *Id*. at 604-06.

[24] *Id*. at 506. Section 16.7b of the A.M.A., *Guides* provides that motion impairments are to be derived separately and combined with arthroplasty impairments. *Id*. at 505.

[25] Tables 16-10 and 16-15; *id*. at 482, 492.

[26] *Id*. at 604.

medical report of record providing an impairment analysis, the Board finds that the Office medical adviser properly determined that appellant was entitled to a 43 percent impairment of the right upper extremity.[27]

Lastly, the Board finds that the Office properly calculated appellant's schedule award. The Office used the effective pay rate of February 9, 2006, when his recurrent disability began or $844.03, for compensation at the 2/3 nonaugmented rate of $562.68 per week which, with cost-of-living adjustment equaled weekly compensation of $601.00. The Board has held that where the residuals of an injury to a scheduled member of the body extend into an adjoining area of a member also enumerated in the schedule, such as an injury of a finger into a hand or a hand into the arm or of a foot into the leg, the schedule award should be made on the basis of the percentage loss of use of the larger member,[28] which in this case would be the arm. A maximum award for the arm is 312 weeks of compensation[29] and 43 percent of 312 is 134 weeks of compensation, which appellant received. The Office therefore properly calculated appellant's schedule award.

LEGAL PRECEDENT -- ISSUE 2

A 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 or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[30] 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.[31] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[32]

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In a January 16, 2009 decision, it found that he was not, as a matter of right, entitled to a record review as his request, dated December 27, 2008, had not been made within 30 days of the November 25, 2008 Office decision. As appellant's request was dated

[27] *Laura Heyen*, 57 ECAB 435 (2006).

[28] *Dennis R. Stark*, 57 ECAB 306 (2006).

[29] 5 U.S.C. § 8107(c)(a).

[30] *Claudio Vazquez*, 52 ECAB 496 (2001).

[31] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[32] *Claudio Vazquez, supra* note 30.

December 27, 2008, more than 30 days after the date of the November 25, 2008 decision, the Office properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.[33]

The Office also has the discretionary power to grant a request for a record review when a claimant is not entitled to such as a matter of right. In the July 23, 2008 decision, it 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 in this case could be addressed through a reconsideration application. While appellant argues on appeal that his request was late due to a family emergency, 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.[34] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. The Office therefore properly denied his request for review of the written record.[35]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his right upper extremity greater than the 43 percent awarded and that the award was properly calculated. The Board further finds that the Office properly denied his request for a review of the written record.

[33] *Id.*

[34] *See Hubert Jones, Jr.*, 57 ECAB 467 (2006).

[35] *Marilyn F. Wilson, supra* note 31.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 16, 2009 and November 25, 2008 be affirmed.

Issued: November 24, 2009
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