United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 11-1818**
	)	**Issued: March 13, 2012**
DEPARTMENT OF VETERANS AFFAIRS, HINES VETERANS HOSPITAL, Hines, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 2, 2011 appellant filed a timely appeal from the April 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) granting schedule award compensation and the June 29, 2011 nonmerit decision of OWCP denying his hearing request. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 10 percent permanent impairment of his right arm, for which he received a schedule award; and (2) whether OWCP properly denied his request for a hearing under section 8124 of FECA.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on September 20, 2006 appellant, then a 49-year-old lead police officer, sustained right shoulder impingement and de Quervain's disease of his right wrist after heavy objects slid off a truck and struck him. In December 2007, he underwent an arthroplasty of his right shoulder which was authorized by OWCP.

In an August 24, 2009 report, Dr. Joseph G. Thometz, an attending Board-certified orthopedic surgeon, reported findings on physical examination of appellant's right wrist and shoulder, including findings of range of motion testing. He stated that appellant continued to have active signs of tendinitis in his right wrist with mild swelling over the first dorsal compartment. There was no visible atrophy in the hand musculature and symmetric wrist range of motion was observed.

On October 5, 2009 Dr. David H. Garelick, an attending Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed the findings of Dr. Thometz and concluded that appellant had an eight percent permanent impairment of his right arm under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). He determined that, under Table 15-34 of page 477, appellant had a seven percent impairment of his right arm comprised of a three percent impairment due to his 150 degrees of right shoulder flexion and a four percent impairment due to his 40 degrees of right shoulder internal rotation. Dr. Garelick determined that, under Table 15-35 on page 477, appellant's minimal residual complaints meant that his range of motion impairment fell under grade modifier 1 and that, under Table 15-36 on page 477, his functional history did not change the grade modifier 1 value such that the seven percent impairment rating should be adjusted. He indicated that, under Table 15-3 (Wrist Regional Grid) on page 395, appellant had one percent impairment due to the diagnosis of de Quervain's disease of the right wrist. The default value for this diagnosis was one percent and application of the grade modifiers and adjustment grid, found on pages 405 through 412, did not result in any adjustment of this impairment rating. Dr. Garelick used the Combined Values Chart, beginning on page 604, to combine the seven percent impairment related to the right shoulder with the one percent impairment related to the right wrist and concluded that appellant had a total right arm impairment of eight percent.

In a November 3, 2009 decision, OWCP granted appellant a schedule award for an eight percent permanent impairment of his right arm. The award ran for 24.96 weeks from April 28 to October 19, 2009.

In a September 6, 2010 report, Dr. Jacob Salomon, an attending Board-certified surgeon, provided a history of appellant's right wrist and shoulder conditions and reported findings on examination. With respect to right shoulder motion, he applied Table 15-34 of the sixth edition of the A.M.A., *Guides* to the findings. Flexion was 142 degrees (three percent right arm impairment), extension was 40 degrees (one percent impairment), internal rotation was 70 degrees (one percent impairment), external rotation was 62 degrees (no impairment), abduction was 108 degrees (three percent impairment) and adduction was 38 degrees, (one percent impairment). Adding up all range of motion impairments, appellant had a nine percent right arm impairment. Dr. Salomon stated, "He does have a history of right [d]e Quervain's tenosynovitis and these values will be considered at a later date."

On December 6, 2010 Dr. Garelick stated that he had reevaluated appellant's right arm impairment after reviewing the findings of Dr. Salomon. He indicated that while range of motion findings can be somewhat subjective based upon an individual's efforts, Dr. Salomon's findings showed a deterioration of appellant's right shoulder condition. Dr. Garelick stated:

> "In reviewing his report, [Dr. Salomon] has correctly utilized the A.M.A., *Guides* in recommending a total of [nine] percent RUE PPI [right upper extremity permanent partial impairment] based on loss of shoulder motion. Given this is relatively similar to my measurements from October 2009, I suggest [appellant's] award be increased to [nine] percent RUE PPI as it relates to the shoulder.
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> "The 9 percent award for shoulder ROM [range of motion] should be added to the already established 1 percent award for the residual [d]e Quervain's tenosynovitis for a new TOTAL award of 10 percent RUE PPI. The date of MMI [maximum medical improvement] will remain [April 28, 2009]….
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> "Right upper extremity PPI = 10 percent."

In an April 15, 2011 decision, OWCP granted appellant a schedule award for an additional two percent permanent impairment of his right arm. The award ran for 6.24 weeks from October 20 to December 2, 2009. Appellant now had been compensated for a total right arm impairment of 10 percent.

In a letter postmarked June 2, 2011, appellant requested a hearing before an OWCP hearing representative.

In a June 29, 2011 decision, OWCP denied appellant's request for a hearing under section 8124 of FECA noting that the request was untimely. It exercised its discretion with respect to hearing requests 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 case could be resolved by requesting reconsideration and submitting additional medical evidence.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[2] and its implementing regulations[3] 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, FECA 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 regulations as the

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

appropriate standard for evaluating schedule losses.[4] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[5]

With respect to the shoulder, reference is first made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. A class of diagnosis (CDX) may be determined from the Shoulder Regional Grid (including identification of a default grade value).[6] Table 15-5 also provides that, if motion loss is present for a claimant who has undergone a shoulder arthroplasty, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis impairment.[7] Impairment ratings for limited shoulder motion are derived from Table 15-34 on page 475.[8] Under Table 15-35 on page 477, a grade modifier value is assigned to the impairment ratings calculated from Table 15-35. Table 15-36 on page 477 provides standards for adjusting the grade modifier value based on a claimant's functional history.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that on September 20, 2006 appellant sustained right shoulder impingement and de Quervain's disease of his right wrist. In December 2007, he underwent an OWCP-authorized arthroplasty of his right shoulder. In a November 3, 2009 decision, OWCP granted appellant a schedule award for an eight percent permanent impairment of his right arm. On April 15, 2011 it granted him a schedule award for an additional 2 percent permanent impairment of his right arm, meaning that he had been compensated for a total right arm impairment of 10 percent. This award was based on a September 6, 2010 report of Dr. Salomon, an attending Board-certified surgeon, and a December 6, 2010 report of Dr. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser.[10]

In his September 6, 2010 report, Dr. Salomon evaluated appellant's impairment due to limited right shoulder motion under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides*. Flexion was 142 degrees (three percent right arm impairment), extension was 40 degrees (one percent impairment), internal rotation was 70 degrees (one percent impairment), external rotation was 62 degrees (zero percent impairment), abduction was 108 degrees (three percent impairment) and adduction was 38 degrees, (one percent impairment). Adding up all range of motion impairments, Dr. Salomon determined that appellant had a nine percent right

[4] *Id*.

[5] FECA Bulletin No. 09-03 (issued March 15, 2009).

[6] *See* A.M.A., *Guides* (6th ed. 2009) 401-11.

[7] *Id.* at 405, 475-78.

[8] *Id.* at 475, Table 15-34.

[9] *Id.* at 477, Table 15-35 and Table 15-36.

[10] Dr. Salomon examined appellant's right arm, reported findings on examination and provided an impairment rating for his right arm. Dr. Garelick reviewed the evidence of record, including Dr. Salomon's report and provided an impairment rating for appellant's right arm.

arm impairment due to limited right shoulder motion. In his December 6, 2010 report, Dr. Garelick indicated that he agreed with Dr. Salomon's impairment rating due to limited right shoulder motion.[11]

The Board notes that Dr. Salomon and Dr. Garelick properly evaluated appellant's right arm impairment due to limited right shoulder motion with the exception that, under Table 15-34, appellant had a two percent impairment due to his 70 degrees of internal rotation, rather than a one percent impairment.[12] Therefore, appellant has a 10 percent permanent impairment of his right arm due to limited right shoulder motion.

Dr. Salomon did not provide an assessment of appellant's right arm impairment due to his right wrist condition. However, Dr. Garelick properly determined that, under Table 15-3 (Wrist Regional Grid) on page 395, appellant had a one percent impairment due to the diagnosis of de Quervain's disease of the right wrist.[13]

Using the Combined Values Chart, beginning on page 604, combining appellant's 10 percent impairment related to the right shoulder with the 1 percent impairment related to the right wrist shows that appellant has a total right arm impairment of 11 percent.[14] He has not submitted any medical evidence showing entitlement to a greater level of schedule award compensation. As appellant has been compensated for a 10 percent permanent impairment of his right arm, he would now be entitled to receive a schedule award for an additional 1 percent permanent impairment of his right arm.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "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 30 days after the date of the issuance of the decision, to a hearing on his claim

[11] Dr. Salomon and Dr. Garelick both felt that application of the standards of section 15.7 of the A.M.A., *Guides* was an appropriate alternative to a diagnosis-based analysis. In the present case, appellant had undergone a right shoulder arthroplasty and had limited right shoulder motion. *See supra* note 7. Both Dr. Salomon and Dr. Garelick determined that appellant's right shoulder condition did not warrant, under Table 15-35 and Table 15-36, any adjustment from the finding of a nine percent right arm impairment due to limited right shoulder motion. *See supra* note 9.

[12] *See supra* note 8.

[13] *Id.* at 395, Table 15-3. The default value for the diagnosis of de Quervain's disease of the right wrist was one percent and application of the grade modifiers and adjustment grid, found on pages 405 through 412, would not result in any adjustment of this impairment rating. *Id.* at 395, 405-12.

[14] *Id.* at 604, Combined Values Chart.

before a representative of the Secretary."[15] As section 8124(b)(1) is 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.[16] The date of filing is fixed by postmark or other carrier's date marking.[17]

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[18] Specifically, the Board has held that OWCP 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 FECA which provided the right to a hearing,[19] when the request is made after the 30-day period for requesting a hearing,[20] and when the request is for a second hearing on the same issue.[21]

ANALYSIS -- ISSUE 2

Appellant's June 2, 2011 hearing request was made more than 30 days after the date of issuance of OWCP's prior decision dated April 15, 2011 and, thus, he was not entitled to a hearing as a matter of right. He requested a hearing before an OWCP representative in a document sent in an envelope postmarked June 3, 2011. Hence, OWCP was correct in stating in its June 29, 2011 decision that appellant was not entitled to a hearing as a matter of right because his June 3, 2011 hearing request was not made within 30 days of OWCP's April 15, 2011 decision.

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its June 29, 2011 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 case could be resolved by requesting reconsideration and submitting additional medical evidence. The Board has held that as the only limitation on OWCP'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.[22] The evidence does not establish that OWCP abused its discretion in denying the hearing request.

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[15] 5 U.S.C. § 8124(b)(1).

[16] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[17] *See* 20 C.F.R. § 10.616(a).

[18] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[19] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[20] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[21] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[22] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that appellant has an 11 percent permanent impairment of his right arm. The Board further finds that OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed as modified to reflect that appellant has an 11 percent permanent impairment of his right arm. The June 29, 2011 decision of OWCP is affirmed.

Issued: March 13, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board