U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FREDERICK A. JONES and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Chesapeake, Va.

*Docket No. 96-1562; Submitted on the Record;*
*Issued May 12, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a two percent permanent impairment of his right upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

On or about February 5, 1984 appellant, then a 33-year-old pipefitter, filed a claim for traumatic injury alleging that on that date he dislocated his thumb when he accidentally struck it against a pipe during the course of his employment. Subsequent to the injury he had recurrent pain and swelling and developed a bony deformity of the joint. On August 10, 1994 appellant struck his thumb on a dresser while at home, aggravating his condition. Appellant underwent surgical metacarpal phalangeal joint fusion on September 23, 1994. The Office subsequently accepted appellant's thumb condition and a September 23, 1994 surgery as employment related.

On February 7, 1995 appellant filed a claim for a schedule award.

By letter dated February 16, 1995, the Office requested that Dr. Glenn R. Carwell, a Board-certified plastic surgeon and appellant's attending physician, provide a permanent partial impairment rating of appellant's right upper extremity, utilizing the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a report dated March 10, 1995, Dr. Carwell stated that appellant continued to have occasional, mild pain at the site of his metacarpal phalangeal joint fusion, and that this pain was expected to be permanent. He added that appellant had complete loss of motion at this joint together with weakness, both in grasp of the right upper extremity and in pinch with thumb index opposition. Dr. Carwell further stated that appellant had ankylosis of his metacarpal phalangeal joint at 0 degrees, which, according to the fourth edition of the A.M.A., *Guides*, equated to 60 percent impairment of the thumb, or a 24 percent impairment of the hand. Dr. Carwell did not reference any specific page numbers, tables or figures in the A.M.A., *Guides*. The physician

concluded that this impairment was permanent and would not be altered by further surgery, therapy or other modalities.

On April 21, 1995 on the advice of the Office medical adviser, the Office informed appellant that it was usual and customary to allow at least one year to elapse subsequent to surgery before determining whether maximum medical improvement had been reached, and that therefore, his claim would be held in abeyance. The Office asked appellant to resubmit an impairment assessment after September 23, 1995.[1]

In a report dated September 24, 1995, Dr. Carwell reiterated his earlier findings.

By report dated December 4, 1995, an Office medical adviser reviewed the figures provided by Dr. Carwell in conjunction with the fourth edition of the A.M.A., *Guides* and, based on the figures provided by Dr. Carwell, determined that pursuant to page 27, Figure 13 of the *Guides*, ankylosis of the metacarpal joint at 0 degrees actually equated to a 6 percent permanent impairment of the thumb, or, applying Table 1 on page 18 of the *Guides*, a 2 percent impairment of the hand.[2]

By decision dated December 7, 1995, the Office granted appellant a schedule award for a 2 percent permanent impairment of the right upper extremity for the period September 23 to October 27, 1995, for a total of 4.88 weeks of compensation.[3]

The Board finds that appellant has no more than a two percent permanent impairment of the right upper extremity.

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.304 of the implementing federal regulations,[5] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimant's seeking schedule awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[6]

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[1] The Office actually asked appellant to resubmit his impairment assessment after September 23, 1994, but this was clearly a typographical error, as this was the date of appellant's surgery.

[2] The Office medical adviser mistakenly stated that pursuant to Table 1 on page 18 of the *Guides*, a 6 percent impairment of the thumb equated to a 2 percent impairment of the thumb. The Office properly noted, however, that Table 1 on page 18 of the Guides converts impairments of the thumb to impairments of the hand.

[3] Pursuant to page 19, Table 2 of the fourth edition of the A.M.A., *Guides*, a 2 percent permanent impairment of the hand equates to a 2 percent permanent impairment of the right upper extremity.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.304.

[6] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John*

In the present case, Dr. Carwell, appellant's attending physician, determined based on the A.M.A., *Guides*, that appellant's ankylosis of the right metacarpal phalangeal joint at 0 degrees equated to a 60 percent permanent impairment of the right thumb, which in turn equates to a 24 percent impairment of the right hand, or a 22 percent impairment of the right upper extremity. As the Office medical adviser properly noted, however, pursuant to the fourth edition of the A.M.A., *Guides*, page 27, Figure 13, ankylosis of the metacarpal phalangeal joint at 0 degrees actually equates to a 6, not 60, percent impairment of the thumb.

The Board has held that when an attending physician's report gives an estimate of permanent impairment but is not based on a proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser if he or she has properly used the A.M.A., *Guides*.[7] The Board concludes that in the present case the Office medical adviser properly applied the A.M.A., *Guides* to the description of the impairment provided by Dr. Carwell. There is no other evidence of record that appellant has greater than a two percent permanent loss of use of his right upper extremity for which he has received a schedule award.

The Board further finds that the Office properly denied appellant's request for a hearing.

Following the Office's December 7, 1995 decision awarding appellant a schedule award for a two percent permanent impairment of his right upper extremity, by letter dated January 6, 1996 and postmarked January 8, 1996, appellant requested an oral hearing before an Office representative.

In a decision dated March 25, 1996, the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration.

By letter received March 27, 1996, appellant again requested an oral hearing, and on May 24, 1996, the Office reiterated its earlier decision.

Section 8124(b) of the Act, concerning entitlement to a hearing before an Office representative states: "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 before a representative of the Secretary."[8]

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 the Office must exercise this discretionary authority in deciding whether to grant

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*Kilcoyne*, 38 ECAB 168, 170 (1986).

[7] *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

[8] 5 U.S.C. § 8124(b)(1).

or deny a hearing. Specifically, the Board has held that the Office 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 the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[9]

In this case, the Office issued its decision granting appellant a two percent schedule award for his right upper extremity on December 7, 1995. Appellant's letter requesting a hearing was postmarked January 8, 1996 which was beyond 30 days from the date that the December 7, 1995 decision was issued.[10] Because appellant did not request a hearing within 30 days of the Office's December 7, 1995 decision, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[11] In this case, the Office advised appellant that it considered this request in relation to the issue involved and the hearing was denied on the basis that the claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[12] There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

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

[10] Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; *see* 20 C.F.R. § 10.131(a).

[11] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

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

The decisions of the Office of Workers' Compensation Programs dated March 25, 1996 and December 7, 1995 are affirmed.

Dated, Washington, D.C.
May 12, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member