

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERMAN CATALA and DEPARTMENT OF JUSTICE, IMMIGRATION
& NATURALIZATION SERVICE, U.S. BORDER PATROL, RAMEY STATION,
Ramey, P.R.

*Docket No. 97-548; Submitted on the Record;
Issued November 10, 1998*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained greater than a 53 percent permanent impairment of the left fifth finger, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely.

The Office accepted that on August 30, 1994 appellant then a 57-year-old border patrol agent, sustained a fracture of the fifth finger of his left hand while apprehending a suspect.

An August 31, 1994 closed reduction performed by Dr. Luis Acevedo Lazzarini had a poor result. Appellant submitted periodic medical reports through December 1994 noting treatment for the fracture, physical therapy and ongoing symptoms of pain and limited mobility. On November 25, 1994 appellant claimed a schedule award.

In an August 16, 1995 report, Dr. Acevedo opined that appellant reached maximum medical improvement as of July 31, 1995, noting that the proximal interphalangeal joint of the left fifth finger was ankylosed at 45 degrees. He noted a 7 percent impairment due to pain, and recommended a total impairment rating of 60 percent for the left fifth finger.

In a September 31, 1995 report, an Office medical adviser noted reviewing Dr. Acevedo's August 16, 1995 report. Referring to Table 21, page 33 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereinafter, the A.M.A., *Guides*), the medical adviser noted that ankylosis of the proximal interphalangeal (PIP) joint at 45 degrees equaled a 53 percent impairment of the fifth finger.

By decision dated October 18, 1995, the Office awarded appellant a schedule award for a 53 percent permanent impairment of the left fifth finger.¹ Appellant disagreed with this decision

¹ The period of award ran from January 31 to March 27, 1995, equivalent to 7.95 weeks of compensation. The

and requested a review of the written record by a representative of the Office's Branch of Hearings and Review. By decision dated February 1, 1996 and finalized February 2, 1996, the Office hearing representative remanded the case for further development as the Office did not properly consider Dr. Acevedo's additional 7 percent rating due to pain.

In a March 15, 1996 report, an Office medical adviser noted that the additional 7 percent impairment recommended by Dr. Acevedo was not considered as he did not refer to the A.M.A., *Guides* to explain how he arrived at the 60 percent impairment.

By decision dated March 22, 1996, the Office affirmed the October 18, 1995 schedule award. The Office noted that Dr. Acevedo did not refer to Table 11, page 48 of the A.M.A., *Guides*² to explain the impairment rating due to pain.

In an April 3, 1996 report, Dr. Acevedo referred to Table 11 of the A.M.A., *Guides*, to explain his determination of impairment due to pain and weakness. He observed "ankylosis of the PIP [joint] at 45 degrees," a 53 percent impairment according to the A.M.A., *Guides*. "The combined percent of impairment for the small finger is 60 percent. This represents a 6 percent impairment of the left hand, and a 5 percent [impairment of the left] upper extremity...." He noted appellant's "difficulty in closing his hand and making a tight fist due" to overlapping of the fifth finger over the "anular," and pain at the start of "manual activity or when the day is cold or humid."

In a May 31, 1996 report,³ an Office medical adviser reviewed Dr. Acevedo's April 3, 1996 report, noting that according to figure 21 page 33,⁴ ankylosis of the PIP joint at 45 degrees equaled a 53 percent impairment of the fifth finger. He then provided a calculation for impairment due to pain. The medical adviser used figure 45, page 50 to identify the ulnar digital nerve as innervating the fifth finger,⁵ and figure 46, page 52 to identify the fifth finger as being in the C8 dermatome. Using the classifications given in Table 11, page 48, the medical adviser assigned Grade 2, "[d]ecreased sensibility with or without abnormal sensation or pain, which is forgotten during activity," equaling a 25 percent sensory deficit. The medical adviser then referred to Table 15, page 54⁶ and assigned a maximum percentage of upper extremity

Office paid appellant the entire award by lump sum check in the amount of \$4,266.29.

² Table 11, page 48 of the A.M.A., *Guides* is entitled "Determining Impairment of the Upper Extremity Due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders."

³ In a May 31, 1996 file note, a claims examiner requested that the Office medical adviser review Dr. Acevedo's April 3, 1996 report and determine if appellant was due an increased schedule award.

⁴ Figure 21, page 33 of the A.M.A., *Guides* is entitled "Finger Impairments Due to Abnormal Motion at PIP Joint. Relative value of functional use is 80 percent."

⁵ Figure 45, page 50 of the A.M.A., *Guides* is entitled "Cutaneous Innervation of Upper Extremity and Related Peripheral Nerves and Roots."

⁶ Table 15, page 54 of the A.M.A., *Guides* is entitled "Maximum Upper Extremity Impairments Due to Unilateral Sensory or Motor Deficits or Combined Deficits of the Major Peripheral Nerves."

impairment of 3 percent each for the ulnar palmar digital and radial palmar digital nerves. Then, using Table 11, page 48, he multiplied the severity of the sensory deficit of 3 percent for the ulnar digital and radial digital nerves by the maximum impairment value of 25 percent, resulting in a 0 percent impairment due to pain for the involved peripheral nerves. The medical adviser concluded that appellant had no greater than a 53 percent permanent impairment of the left fifth finger, as there was no additional impairment due to pain.

In a June 3, 1996 letter,⁷ the Office noted reviewing Dr. Acevedo's April 3, 1996 report, and that appellant had not established that he sustained greater than a 53 percent permanent impairment of the left fifth finger.

In an August 17, 1996 letter, appellant requested an oral hearing, alleging that the Office did not consider Dr. Acevedo's April 3, 1996 report.

By decision dated September 5, 1996, the Office denied appellant's request for a hearing as untimely. Appellant's request was postmarked August 17, 1996, more than 30 days from the Office's March 22, 1996 decision. The Office noted considering the matter in relation to the issue involved and determined that the case could be resolved equally well through submission of additional medical evidence on reconsideration.

Regarding the first issue, the Board finds that appellant has not established that he sustained greater than a 53 percent impairment of the left fifth finger, for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act⁸ and section 10.304 of the implementing regulations⁹ provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment, and the Board has concurred in such adoptions.¹⁰ Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants.

The procedure set forth by the A.M.A., *Guides* for using Table 11, page 48, "Determining Impairment of the Upper Extremity Due to Pain or Sensory Deficit Resulting from Peripheral Nerve Disorders," involves first identifying the area of involvement using the dermatome charts of figure 45, page 50 and figure 46, page 52, then grading the severity of pain using the classifications given in Table 11, finding the maximum impairment of the upper extremity due to pain for the appropriate neural structure, and finally multiplying the severity of

⁷ The Board notes that the June 3, 1996 letter is not a decision. No appeal rights were issued with or included in the text of the letter. Also, the Office in its September 5, 1996 decision notes that the previous decision of the Office was issued on March 22, 1996, not June 3, 1996.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.304.

¹⁰ *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

the sensory deficit by the maximum impairment value for each neural structure involved (spinal nerves, brachial plexus, major peripheral nerves).

In the present case, the Office medical adviser followed this procedure in determining that appellant had a zero percent permanent impairment of the left upper extremity due to pain. In his May 31, 1996 report, the Office medical adviser identified involvement of the ulnar digital nerve using figure 45, page 50 and figure 46, page 52, with a Grade 2 pain level according to Table 11, page 48, equaling a 25 percent sensory deficit. Referring to Table 15, page 54, he assigned a maximum percentage of upper extremity impairment of 3 percent each for the ulnar palmar digital and radial palmar digital nerves. Then, using Table 11, page 48, the medical adviser multiplied 3 percent, the severity of the sensory deficit for the ulnar digital and radial digital nerves, by the maximum impairment value of 25 percent, resulting in a 0 percent impairment due to pain for the involved peripheral nerves.

Thus, appellant has not established that he sustained greater than a 53 percent impairment of the left fifth finger, as he did not present sufficient medical evidence substantiating a greater percentage of impairment due to pain as he alleged.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for a hearing on the grounds that it was untimely.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹ 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 a hearing.¹² 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.¹³

In this case, appellant's request for a hearing was postmarked August 17, 1996, more than 30 days from issuance of the Office's March 22, 1996 decision. The Office's September 5, 1996 decision was therefore correct in finding appellant's request untimely. The Office then exercised its discretion, determining that the medical issue involved could be resolved equally

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 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.

¹³ *Henry Moreno*, 39 ECAB 475 (1988).

well through submission of additional medical evidence on reconsideration. Thus, the Office's denial of appellant's request for a hearing was proper.

The decision of the Office of Workers' Compensation Programs dated September 5 and March 22, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 10, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member