U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD IPPOLITO and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, New York, N.Y.

Docket No. 97-690; Submitted on the Record;
Issued November 20, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a written review of the record as untimely filed and whether appellant established his entitlement to a schedule award greater than the three percent he received for permanent impairment of his left upper extremity.

On December 17, 1993 appellant, then a 42-year-old New York City detective, filed a claim seeking a schedule award for injuries sustained in a vehicular accident on January 25, 1991 while on duty with the employing establishment.[1] On February 17, 1994 the Office requested that appellant submit a narrative medical report from his physician and enclosed a three-page form for showing permanent impairment of an extremity.

On April 15, 1994 the Office informed appellant that his claim could not be processed because his physician, Dr. Ralph Parisi, a Board-certified orthopedic surgeon, stated that appellant's left shoulder would not reach maximum medical improvement without surgery. Appellant then underwent extensive physical therapy.

On July 15, 1996 the Office issued a schedule award for a three percent impairment of the left upper extremity.[2] The award ran from March 15 through May 19, 1994 and was based on the March 17, 1994 report of Dr. Parisi.

---

[1] Appellant was assigned to an FBI federal task force on organized crime and drug enforcement for eight years. Appellant did not file a claim for lost wages because the New York City Police Department had an unlimited sick leave policy. Appellant continued on restricted duty until December 23, 1994 when he stopped work and retired on disability.

[2] The decision states that the award is for the "right" upper extremity, but the medical evidence supports impairment of the left upper extremity. The mistake stems from the Office medical adviser's use of the word right, instead of left.

In a letter dated September 12, 1996, appellant requested a review of the written record, noting that his first request for such review had been made on July 28, 1996. On October 29, 1996 the Office denied appellant's request as untimely filed. The Office noted that the issue of entitlement to a greater schedule award could be equally well addressed by requesting reconsideration and submitting medical evidence not previously considered.

The Board finds that appellant's request for a written review of the record was untimely filed.

The Federal Employees' Compensation Act[3] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing before a representative of the Office.[4] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[5] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[6]

The regulation implementing section 8124(b)(1) provides that a claimant may request a review of the written record in lieu of the oral hearing, but the same rules apply.[7] The regulation is clear that a claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[8] Section 10.131(b) is equally clear that the date on which the request is deemed "made" should be "determined by the postmark of the request," rather than any other date.[9]

In this case, appellant sent his request for a written review of the record by certified mail postmarked September 18, 1996. In the accompanying letter dated September 12, 1996 appellant stated that his original request was made on July 28, 1996. In a letter dated November 25, 1996, responding to the Office's October 29, 1996 decision, appellant stated that he had made his request "well within" the time frame. Appellant added that when he received no response, he contacted the Office and was told to resubmit his evidence and state that the initial request was made on July 28, 1996.

A detailed review of the record reveals no documents pertaining to the alleged July 28, 1996 request for a written review of the record. There is a July 26, 1996 report from a physician,

[3] 5 U.S.C. §§ 8101-8193 (1974).

[4] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[5] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[6] *William F. Osborne*, 46 ECAB 198, 202 (1994).

[7] 20 C.F.R. § 10.131(b).

[8] *Coral Falcon*, 43 ECAB 915, 918 (1992).

[9] *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

but this document was perforated as received by the Office on September 19, 1996. There is also a claims examiner's handwritten notation dated August 8, 1996 stating that he called appellant and told him his new address had been entered into the Office computer. Inasmuch as appellant's September 18, 1996 request was submitted more than 30 days after the July 15, 1996 decision and there is no evidence of any earlier request, the Board finds that appellant's request was properly denied as untimely filed.

Nonetheless, even when the request for a written review is not timely, the Office has the discretion to grant such review, and must exercise that discretion.[10] Here, the Office informed appellant in its July 15, 1996 decision that it had considered the matter in relation to the issue involved and denied a written review on the basis that appellant could request reconsideration and submit evidence in support of his claim for a greater schedule award.

The Board has held that the only limitation on the Office's authority is reasonableness,[11] and that 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 deductions from known facts.[12]

In this case, nothing in the record indicates that the Office committed any abuse of discretion in denying appellant's request for a review of the record. Appellant was fully advised that he could request reconsideration and submit evidence in support, and appellant has offered no argument to justify further discretionary review by the Office.[13] Thus, the Board finds that the Office properly denied appellant's request for a written review of the record.

The Board finds that appellant is entitled to no more than the three percent schedule award issued for permanent impairment of his left upper extremity.

Under section 8107 of the Act[14] and section 10.304 of the implementing federal regulations,[15] schedule awards are payable for the permanent impairment of specified bodily members, functions, and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[16]

[10] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[11] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[12] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[13] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

[14] 5 U.S.C. § 8107.

[15] 20 C.F.R. § 10.304.

[16] 5 U.S.C. § 8107(c)(19).

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[17] The method used in making such determinations rests in the sound discretion of the Office.[18] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[19]

In this case, appellant's treating physician, Dr. Parisi, found a three percent impairment of the left upper extremity according to the third edition of the A.M.A., *Guides*. Dr. Parisi noted crepitus and painful abduction and based his rating on appellant's impingement syndrome resulting from the 1991 work injury. After reviewing Dr. Parisi's March 17, 1994 report, the Office medical adviser applied Tables 18 and 19 of the third edition of the A.M.A., *Guides* regarding range of motion and found 10 percent impairment for mild crepitation and 25 percent impairment for acromioclavicular motion. Taken together, these amounted to a 2.5 percent impairment, which was rounded up to 3 percent.

Appellant argues that he has lost 75 percent of the use of his left arm since the 1991 accident, but there is no medical evidence supporting this amount of impairment. Appellant states that Dr. Parisi's rating was not accurate and that his left arm has gotten considerably worse, but again appellant has provided no evidence establishing either of these allegations. The June 26, 1995 report from Dr. Donald I. Goldman, an orthopedic practitioner, noted that appellant had more than 40 percent functional restriction of motion in his left shoulder but failed to address the issue of a schedule award.[20]

Appellant also disputes the period covered by the schedule award. March 15, 1994 was chosen as the date of maximum medical improvement because Dr. Parisi stated that appellant had refused to undergo decompression arthroplasty, which was the "only solution" to provide some relief from pain. Thus, the Office properly found March 15, 1994 to be the appropriate date to begin the period of the schedule award.[21]

Inasmuch as it is claimant's burden to provide medical evidence establishing his entitlement to a schedule award, and the medical evidence in this case supports no rating greater

[17] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[18] *George E. Williams*, 44 ECAB 530, 532 (1993).

[19] *James J. Hjort*, 45 ECAB 595, 599 (1994).

[20] Appellant submitted three medical reports dated July 26 and October 3 and 21, 1996 in support of his appeal. The Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *William A. Couch*, 41 ECAB 548, 553 (1990). Thus, the new evidence cannot be considered by the Board because it postdates the Office's final decision dated July 19, 1996.

[21] The Board notes that appellant may apply for an additional schedule award and submit medical evidence showing that his impairment has worsened. However, as the Office pointed out, the medical evidence must properly apply the appropriate edition of the A.M.A., *Guides.* The Board notes that the medical evidence submitted by appellant subsequent to the July 15, 1996 schedule award did not apply the proper criteria.

than the three percent schedule award already received by appellant, the Board finds that the Office properly determined that appellant was entitled to no more than a three percent impairment rating.[22]

The October 29 and July 15, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 20, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

[22] *See Lena P. Huntley*, 46 ECAB 643, 646 (1995) (finding that the Office medical adviser's proper application of the A.M.A., *Guides* constituted the weight of the medical evidence).