U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA M. BELLAIRE and U.S. POSTAL SERVICE, POST OFFICE, Midflorida, Fla.

Docket No. 97-769; Submitted on the Record; Issued November 6, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a seven percent permanent impairment of her left lower extremity, for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

The Office accepted that on March 9, 1995 appellant sustained left knee strain and a partial tear of the lateral meniscus. Appellant returned to work for four hours per day on July 17, 1995. Appellant returned to full duty on September 5, 1995.

Appellant's treating osteopathic physician, Dr. Michael R. Mikolajczak, opined on May 30, 1996 that appellant had reached maximum medical improvement. He noted that she had occasional periods of pain, swelling and discomfort with certain activities. Dr. Mikolajczak diagnosed "stable postop[erative] left knee athroscopy with lateral meniscectomy with minimal muscle imbalance and pes anserine bursitis. He opined, referring to the Florida Impairment Rating Guide, that she had a four percent permanent impairment of the body as a whole.

By letter dated June 25, 1996, the Office requested that Dr. Mikolajczak provide an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition).

On July 2, 1996 Dr. Mikolajczak recommended a seven percent impairment of the lower extremity, which included a two percent impairment due to weakness, atrophy, pain or discomfort. No impairment was given for loss in range of motion or for ankylosis and Dr. Mikolajczak did not explain for what the other five percent impairment was allowed.

The case was referred to the Office medical adviser who reviewed the record and calculated, according to the A.M.A., *Guides* that appellant had a seven percent impairment of her left lower extremity, which included five percent for mild weakness regarding the femoral nerve and two percent for the partial lateral meniscectomy.

On August 22, 1996 the Office granted appellant a schedule award for a seven percent permanent impairment of her left lower extremity.

By letter dated September 26, 1996, appellant requested an oral hearing and claimed that an attached copy of Dr. Mikolajczak's report indicated that she should receive a nine percent schedule award.

By decision dated October 29, 1996, the Office denied appellant's request for an oral hearing finding that it was not requested within 30 days of August 22, 1996 and that the issue could be equally well addressed through a request for reconsideration accompanied by new evidence submitted to the Office.

The Board finds that appellant has no greater than a seven percent impairment of her left lower extremity, for which she has received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulation,[2] schedule awards are payable for the permanent impairment of specified bodily members, function, 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 Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[3]

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[4]

In the instant case, appellant's treating physician opined that, in accordance with the A.M.A., *Guides*, appellant had a seven percent impairment of her left lower extremity, which included a two percent impairment for weakness, atrophy, pain or discomfort. He did not explain for what he was allowing the other five percent impairment. The Office medical adviser also opined that appellant had a seven percent impairment, but he explained that he was allowing more, five percent, for weakness and two percent for her surgery. As this report is fully explained, hence fully rationalized, it constitutes the weight of the medical opinion evidence.

As all the medical evidence of record supports that appellant has a seven percent impairment of her left lower extremity, she has not proven that she is entitled to a greater schedule award. As the treating physician's breakdown of his impairment rating only explains what two percent is allotted for and leaves five percent unexplained, the Office medical advisers

---

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *See, e.g., Francis John Kilcoyne*, 38 ECAB 168 (1987).

[4] *See Paul A. Toms*, 28 ECAB 403 (1987).

impairment rating, which is fully explained, carries the greater weight as to the appropriate apportionment of the total seven percent impairment.

The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[5]

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and section 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[6]

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] 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 for a hearing,[8] when the request is made after the 30 day period for requesting a hearing[9] and when the request is for a second hearing on the same issue.[10] In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11] The Office's procedures, which require the Office to exercise its discretion to grant or

---

[5] 5 U.S.C. § 8124(b)(1)

[6] 20 C.F.R. § 10.131(a).

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

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

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

[10] *Johnny S. Henderson*, *supra* note 7.

[11] *Id.*; *Rudolph Bermann, supra* note 8.

deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[12]

In the present case, the Office issued its decision denying appellant's claim on August 22, 1996. Appellant requested a hearing in a letter dated September 26, 1996. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[13] Since appellant did not request a hearing within 30 days of the Office's August 22, 1996 decision, she was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its October 29, 1996 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence of greater permanent impairment. An 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 established facts.[14] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated October 29 and August 22, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 6, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

---

[12] *See Herbert C. Holley, supra* note 9.

[13] 20 C.F.R. § 10.131(a).

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