U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD W. AVIDANO and U.S. POSTAL SERVICE,
POST OFFICE, Roanoke, VA

Docket No. 97-1879; Submitted on the Record;
Issued December 10, 1999

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a 12 percent permanent impairment of his left knee, for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing under 5 U.S.C. § 8124(b)(1).

Appellant, then a 31-year-old clerk, filed a claim alleging that he sustained a left knee injury on July 1, 1975. He returned to regular duty on August 4, 1975. The Office accepted that appellant sustained a left knee sprain and subluxation of the left patella. Thereafter, appellant claimed a recurrence in November 1975, which was accepted and he was subsequently granted a schedule award for a 12 percent permanent impairment of his left lower extremity for the period May 26, 1978 to January 22, 1979. Appellant underwent several arthroscopic surgeries after his injury and had a left knee lateral release performed in 1989. He stopped work again on November 7, 1989 and filed a claim for another recurrence of disability. His most recent arthroscopic surgery was performed on January 25, 1994 where medial joint destruction was found and it was opined that he was not a candidate for anything other than total knee replacement. A recurrence of disability was accepted commencing January 25, 1994.

On February 2, 1994 Dr. E.L. Clements, Jr., a Board-certified orthopedic surgeon, reported that appellant had a 20 percent impairment of his left leg. By report dated February 17, 1994, Dr. Clements noted that after discussion with Dr. Charles M. James, a Board-certified orthopedic surgeon, Dr. James felt very strongly that the present disability should reflect the absolute current need for total knee replacement and that, therefore, they felt that appellant's present disability should be 30 percent instead of 20 and that this would not change once appellant agreed to undergo the replacement. By report dated May 18, 1995, Dr. Michael K. Kyles, a Board-certified orthopedic surgeon and Office second opinion specialist, opined that appellant had significant knee problems to the point that a total knee replacement had been recommended. He opined that he did not disagree with Dr. Clements' estimation of a 30 percent impairment of the knee "as based on the knee for a total knee replacement." By report dated

November 10, 1994, Dr. Clements opined that appellant had reached maximum medical improvement and stated that a previous disability rating had been entered. In an October 7, 1995 impairment rating report, Dr. Kyles opined that appellant had a 37 percent permanent impairment based upon a total knee replacement including unicondylar replacement with satisfactory surgical outcome.

On December 7, 1995 an Office medical adviser noted that he was grossly misinformed by two physician's offices. He indicated that this case should get a knee replacement because of the progressive degenerative changes and that because of the progressive changes, the case was not in posture for a permanent impairment rating at that time.

By letter to appellant dated February 5, 1996, concerning appellant's Congressional inquiry, the Office advised that the medical evidence of record failed to establish that appellant had reached maximum medical improvement and that if surgery was being recommended he had not reached maximum medical improvement. Appellant's appeal rights were attached to the letter.

On July 17, 1996 appellant requested an oral hearing. By decision dated September 16, 1996, the Branch of Hearings and Review noted appellant's request finding that it was untimely requested and denied the request finding that the issue in the case could equally well be addressed by requesting reconsideration from the Office and by submitted new and relevant evidence.

By letter dated January 30, 1997, appellant requested reconsideration of his case. He submitted multiple previously submitted reports and a new report from Dr. Clements dated July 22, 1996, which stated: "It is my impression that total knee replacement will not significantly effect [appellant's] degree of disability, but will serve only to reduce his pain."

By decision dated February 14, 1997, the Office denied modification of the February 5, 1996 decision, finding that Dr. Kyles had erroneously based his impairment rating on the assumption that appellant had undergone a total knee replacement and that although Dr. Clements stated that appellant had reached maximum medical improvement, that a total knee replacement would not effect the degree of appellant's disability and that appellant agreed to forsake a total knee replacement, he had not based his impairment rating on the A.M.A., *Guides*, Fourth Edition (1993) such that it was not probative.[1]

By letter dated May 8, 1997, appellant requested an appeal before the Board on his case. The Board docketed the case and took jurisdiction on May 12, 1997. An AB-1 form was then sent to appellant for his completion, but was not returned. On October 30, 1998 another AB-1 form was sent to appellant, which he completed on November 13, 1998 indicating that he was appealing the February 14, 1997 Office decision.

After filing his request for an appeal, on August 8, 1997 appellant submitted further medical evidence to the Office and requested reconsideration based upon the new evidence. On

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Fourth Edition (1993).

September 8, 1997 the Office medical adviser opined that based upon the new evidence, appellant had a 20 percent permanent impairment. By letter dated September 26, 1997, the Office denied appellant's request for a reconsideration finding the information submitted insufficient. This decision is null and void for lack of jurisdiction, as the Board had taken jurisdiction in May 1997 and the Office and the Board cannot have simultaneous jurisdiction.[2] By decision dated October 14, 1997, the Office initially denied modification of the prior decision but then modified the decision to grant appellant an additional 8 percent impairment for a total schedule award of 20 percent permanent impairment of the left lower extremity. That same date the Office issued appellant a schedule award for an additional eight percent permanent impairment. These decisions are null and void for lack of jurisdiction.[3]

The Board finds that appellant has no greater than a 12 percent permanent impairment of his left lower extremity for which he has received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.304 of the implementing federal regulation,[5] 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 to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[6]

Dr. Kyles, the Office second opinion specialist, used the A.M.A., *Guides* in determining appellant's permanent diagnosis-based impairment; however, he based his opinion on the assumption that appellant had undergone a total knee replacement. As Dr. Kyles issued no impairment opinion after the one based upon an inaccurate history, his impairment rating is not probative.

Dr. Clements related his findings on physical examination, but he did not evaluate appellant according to the protocols described in appropriate sections of the A.M.A., *Guides*. Dr. Clements variously opined that appellant had a 20 percent permanent impairment, a 30 percent impairment making an allowance for his need for a total need replacement and a 30 percent impairment as his condition would not change substantially from a total knee replacement. However, nowhere did Dr. Clements refer to the A.M.A., *Guides* or explain how he arrived at these permanent impairment determinations. Consequently, Dr. Clements' impairment ratings are not probative.

[2] *Jimmy W. Galetka*, 43 ECAB 432 (1992).

[3] *Id.*

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. 10.304.

[6] *See, e.g., Francis John Kilcoyne*, 38 ECAB 168 (1987); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

As no probative medical evidence was submitted following the 1978 to 1979 schedule award for a 12 percent permanent impairment and prior to the February 14, 1997 decision, appellant has failed to establish that he is entitled to a greater impairment rating.[7]

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

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."[8]

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 § 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."[9]

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.[10] 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,[11] when the request is made after the 30-day period for requesting a hearing[12] and when the request is for a second hearing on the same issue.[13] In these instances, the Office will

[7] The evidence submitted by appellant subsequent to the February 14, 1997 decision is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.131(a).

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

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

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

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

determine whether a discretionary hearing should be granted of, if not, will so advise the claimant with reasons.[14] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[15]

In the present case, the Office issued its most recent merit decision denying appellant's claim for an additional schedule award on February 5, 1996. Appellant requested a hearing in a letter dated July 17, 1996. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[16] Since appellant did not request a hearing within 30 days of the Office's February 5, 1996 decision, he was not entitled to a hearing under section 8124 as a matter of right. Further, as appellant had previously requested and received reconsideration under section 8128, he was additionally not entitled to a hearing under section 8124 on the issue of an increased schedule award as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its September 16, 1996 decision, found that appellant had previously requested and received reconsideration on the issue in question and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence supporting that he had an additional degree of permanent impairment since 1979.

As the only limitation on the Office'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 deductions from known facts.[17] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

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

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

[16] 20 C.F.R. § 10.131(a).

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

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 14, 1997 and September 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
December 10, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member