

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. KYDD and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

*Docket No. 98-1108; Submitted on the Record;
Issued December 15, 1999*

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained greater than a 23 percent permanent impairment of the right lower extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

The Office accepted appellant's claim for right shoulder strain, right knee strain, tendinitis of the right foot and right knee arthroscopy. On June 22, 1992 the Office awarded appellant a schedule award for a 23 percent loss of the right lower extremity from March 11, 1992 to July 26, 1993. On August 12, 1993 the Office awarded appellant a schedule award for a 26 percent loss of use of the right upper extremity from July 27, 1993 to February 14, 1995.

In a report dated May 29, 1997, Dr. Joseph H. Gaines, a Board-certified orthopedic surgeon, noted that regarding appellant's flexion measurements, appellant was reluctant to bend her knee and totally inconsistent in measurements. He stated that appellant had maximum flexion of 80 degrees, at another time 110 degrees and then another couple of times of 90 to 94 degrees. Dr. Gaines stated that the motion of voluntary flexion was invalid by all measurements. In an impairment report dated June 5, 1997, using Table 64, page 85, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed. 1989), he determined that based on appellant's illegible word medial meniscus and partial meniscectomy, appellant had a two percent impairment. Using Table 35, page 61, Dr. Gaines determined that appellant's right knee flexion of 108 degrees resulted in a 0 percent impairment.

In a report dated August 19, 1997, Dr. Jim W. Czewski, an osteopath, considered appellant's history of injury, performed a physical examination and reviewed x-rays and a magnetic resonance imaging scan. He diagnosed a post-surgical right knee tear of the medial meniscus, chondromalacia of the right knee and partial right knee tear of the lateral meniscus. After a thorough analysis of appellant's condition pursuant to the A.M.A., *Guides* (4th ed. 1994), he determined that using Table 41, page 78, the measurement of 65 degrees for flexion on the right for the knee was 8 percent of the whole person and a 20 percent impairment of the lower extremity. Using Table 64, pages 85 and 86, Dr. Czewski determined that the partial medial meniscectomy was rated at one percent of the whole person impairment or a two percent lower

extremity impairment. He concluded that appellant reached maximum medical improvement on July 21, 1997 and had a 22 percent lower extremity impairment.

In a report dated September 22, 1997, the district medical adviser reviewed Dr. Gaines' report and using Table 64, page 85, of the A.M.A., *Guides* (4th ed.), determined that appellant's partial meniscectomy resulted in a two percent permanent impairment.

By decision dated September 23, 1997, the Office determined that appellant was not entitled to an additional schedule award for her right lower extremity.

By letter dated and postmarked October 24, 1997, appellant requested a written review of the Office's decision before an Office hearing representative.

By decision dated November 22, 1997, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked October 24, 1997, more than 30 days after the Office issued the September 23, 1997 decision and that, therefore, appellant's request was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."¹ Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall *be* afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.² Thus, a claimant has a choice of requesting a oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations³ provides in pertinent part that "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."

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 for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁴ 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

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131(a).

³ 20 C.F.R. § 10.131(a).

⁴ *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,⁵ when the request is made after the 30-day period for requesting a hearing⁶ and when the request is for a second hearing on the same issue.⁷

In the present case, appellant's October 24, 1997 hearing request, which was postmarked October 24, 1997, was made more than 30 days after the date of the Office's issuance of the September 23, 1997 decision and therefore, the Branch was correct in stating in its November 22, 1997 decision that appellant was not entitled to a hearing. The Branch exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The Board also finds that the Office properly determined that appellant had no greater than a 23 percent permanent impairment of the right lower extremity.

The schedule award provision of the Act⁸ provides compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.⁹ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.¹⁰

In his May 29, 1997 report, Dr. Gaines used Table 64, page 85, of the A.M.A., *Guides* (3rd ed. 1989), to determine that appellant's meniscectomy resulted in a 2 percent impairment to the right knee, and used Table 35, page 61, to determine that appellant's knee flexion of 108 degrees equaled a 0 percent impairment.

In his August 19, 1997 report, Dr. Czewski used Table 41, page 78, of the A.M.A., *Guides* to determine that appellant had a 20 percent impairment of the lower extremity based on appellant's flexion of 65 degrees and used Table 64, pages 85 and 86, to determine that appellant had a 2 percent impairment to her lower extremity based on appellant's partial medial meniscectomy.

In his June 5, 1997 report, Dr. Gaines' use of Table 64, page 85, does not correspond to the pages and tables in the A.M.A., *Guides* (3rd ed. 1989), although it does correspond to the

⁵ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁶ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁷ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁸ 5 U.S.C. § 8107 *et seq.*

⁹ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

¹⁰ *Arthur E. Anderson*, *supra* note 9 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

A.M.A., *Guides* (4th ed. 1994). His calculation of appellant's partial meniscectomy therefore pursuant to the A.M.A., *Guides* (4th ed. 1994) to determine that appellant had a two percent impairment to her right lower extremity is proper. His use of Table 35, page 61, of the A.M.A., *Guides* (3rd ed. 1989) to determine that appellant's knee flexion of 108 degrees equals a 0 percent impairment does not make sense as Table 35 indicates that flexion of 100 to 110 degrees of the knee results in a 14 to an 18 percent impairment of the lower extremity. Using the A.M.A., *Guides*, (4th ed. 1994) in his September 22, 1997 report, the district medical adviser reviewed Dr. Gaines' report and, using Table 64, page 85, properly determined that appellant's meniscectomy resulted in a two percent permanent impairment. He did not determine if the flexion of appellant's knee resulted in an impairment to the right lower extremity.

In his August 19, 1997 report, Dr. Czewski properly used the A.M.A., *Guides*, (4th ed. 1994), using Table 41, page 78, to determine that appellant's flexion of 65 degrees resulted in a 20 percent impairment of the lower extremity and, using Table 64, pages 85 and 86, to determine that appellant's medial meniscectomy resulted in a 2 percent impairment or a total impairment to her right lower extremity of 22 percent. His total impairment rating of 22 percent, however, does not exceed appellant's previously issued schedule award of 23 percent. Thus, appellant has presented no evidence in the record to show that she is entitled to greater than a 23 percent impairment to her right lower extremity.

The decisions of the Office of Workers' Compensation Programs dated November 22 and September 23, 1997 are hereby affirmed.

Dated, Washington, D.C.
December 15, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member