

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD OJEDA and DEFENSE LOGISTICS AGENCY,
STOCKTON, Calif.

*Docket No. 97-1489; Submitted on the Record;
Issued February 24, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a 45 percent permanent impairment of the right upper extremity, for which he has received a schedule award; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

The Board has duly reviewed the case record and finds that appellant has not established that he has more than a 45 percent permanent impairment of the right upper extremity.

In the present case, the Office accepted that appellant, a maintenance mechanic, sustained a right wrist ganglion cyst in the performance of his federal employment on or about April 6, 1993. Appellant underwent an excision of the right scaphoid and an intercarpal fusion as a result of his employment injury. On March 21, 1994 the Office granted appellant a schedule award for a 45 percent permanent impairment of the right arm.

On September 11, 1996 the Office requested that appellant's treating physician, Dr. Craig A. Bottke, a Board-certified hand surgeon, evaluate the extent of appellant's permanent partial impairment of the right upper extremity, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, to determine if appellant's impairment of the right upper extremity had increased.

Section 8107 of the Federal Employees' Compensation Act¹ provides that, if there is a permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. For consistent results and to insure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants in the evaluation of permanent physical impairment. The A.M.A., *Guides* has been adopted by the

¹ 5 U.S.C. § 8107.

Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.²

In a report dated November 14, 1996, Dr. Bottke stated that appellant's right wrist injury had been permanent and stationary since December 21, 1993. Dr. Bottke further reported that on examination appellant continued to have diffuse tenderness about the wrist, especially radially. Range of motion of the right wrist showed 35 degrees of dorsiflexion, 10 degrees of palmar flexion, 15 degrees of ulnar deviation and 15 degrees of radial deviation. He indicated that appellant had full pronation and supination of 80 degrees bilaterally and grip strength on the right, during three tries of 30/32/32 kilograms. Dr. Bottke also completed a form wherein he indicated that appellant had a 20 percent impairment of the right upper extremity due to loss of function from decreased strength; 15 percent impairment due to loss of function from sensory deficit, pain or discomfort; and a 16 percent impairment due to loss of function from decreased motion. As Dr. Bottke did not explain how he had utilized the A.M.A., *Guides*, the uniform standards adopted by the Office and approved by the Board, to determine the degree of appellant's impairment, it was proper for an Office medical adviser to apply the A.M.A., *Guides* to the findings reported by Dr. Bottke on examination.³

On February 3, 1997 an Office medical consultant, Dr. Ellen Pichey, a family practitioner, reviewed Dr. Bottke's report and stated that pursuant to the A.M.A., *Guides*, fourth edition, appellant had an impairment due to loss of range of motion for the wrist loss of flexion of 8 percent, loss of extension 4 percent; pursuant to figure 26, page 36, and with loss of radiation deviation of 3 percent and loss of ulnar deviation of 1 percent pursuant to figure 29, page 38, appellant had a total impairment of loss of motion of 16 percent. She stated that appellant also had an impairment due to loss of strength with a grip strength loss index of 68 percent for a 30 percent upper extremity impairment, pursuant to Table 34, page 65. Dr. Pichey indicated that appellant's impairment due to sensory deficit of pain was a grade 3, for a 60 percent grade impairment pursuant to Table 11, page 48. She noted that maximum impairment for sensory loss based on the radial nerve was 5 percent, pursuant to Table 15, page 54. She calculated that 60 percent times 5 percent equaled a 3 percent impairment, for sensory loss. Finally, Dr. Pichey stated that using the Combined Values Chart, page 322, appellant's total impairment of the right upper extremity equaled 43 percent. The Board notes that appellant's right wrist extension of 35 degrees resulted in a 4.5 percent impairment which should have been rounded to a 5 percent impairment. Appellant's impairment for loss of motion therefore totaled 17 percent, which combined with the 30 percent impairment for loss of strength, and 3 percent impairment for sensory deficit, equaled a 44 percent permanent impairment of the upper right extremity, rather than the 43 percent found by Dr. Pichey. There is no medical evidence of record, however, that appellant's right upper extremity impairment exceeded the 45 percent previously granted by the Office.

On February 7, 1997 the Office denied appellant an additional schedule award on the grounds that his current level of right arm impairment was less than previously awarded. As

² James J. Hjort, 45 ECAB 595 (1994).

³ Lena P. Huntley, 46 ECAB 643 (1995).

Dr. Bottke's examination findings supported that appellant's right upper extremity impairment was no greater than 44 percent, the Office properly denied appellant's request for an increased schedule award.

On March 14, 1997, the Office received a request for hearing, which appellant had mailed on March 11, 1997. Section 8124(b)(1) of the Act⁴ provides 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 the issuance of the decision, to a hearing on his claim before an Office representative."

As appellant did not request a hearing within 30 days of the decision which was dated February 7, 1997, the Office properly determined that appellant was not entitled to a hearing as a matter of right. The Office, however, 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. 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.⁵

On April 17, 1997 the Office exercised its discretion and determined that appellant's request for hearing was untimely filed, and the request had been further considered and was denied as the issue in the case could equally well be addressed by requesting reconsideration. The Board finds that the Office did not abuse its discretion in this case in denying appellant's request for hearing.

⁴ 5 U.S.C. § 8124(b)(1)

⁵ *Corlisa L. Sims*, 46 ECAB 172 (1994).

The decisions of the Office of Workers' Compensation Programs dated April 17 and February 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 24, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member