U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY KNAUB and DEPARMENT OF THE AIR FORCE, OFFUTT AIR FORCE BASE, Omaha, Nebr.

Docket No. 97-2462; Submitted on the Record;
Issued June 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 20 percent permanent impairment of the right arm; and (2) whether appellant has a vision impairment greater than the 100 percent permanent impairment of the left eye for which she received a schedule award; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On January 15, 1991 appellant, then a 35-year-old supervisory inventory management specialist, slipped on an icy parking lot and fell, sustaining two fractures in her right wrist. She subsequently claimed that she sustained a detached retina in the left eye due to the employment injury. The Office accepted appellant's claim for a fractured wrist. In a September 20, 1991 decision, the Office denied appellant's claim for a detached retina on the grounds that the evidence of record failed to establish a causal relationship between the employment incident and the claimed injury. In an April 7, 1993 decision, an Office hearing representative set aside the Office's September 20, 1991 decision, finding that appellant had submitted sufficient new evidence to require further development of her claim for a detached retina. The Office subsequently accepted appellant's claim for a detached retina.

In an October 26, 1995 decision, the Office issued schedule awards for a 25 percent permanent impairment of the left eye and a 20 percent permanent impairment of the right arm. Appellant requested a hearing before an Office hearing representative. In an August 7, 1996 decision, the Office hearing representative found that there existed a conflict in the medical evidence on the extent of permanent impairment of appellant's right arm. He also found that the Office had misread the medical evidence in giving appellant a schedule award for a 25 percent permanent impairment of the left eye when the medical evidence showed that appellant had a 100 percent permanent impairment of the left eye. He, therefore, set aside the October 26, 1995 decision and remanded the case for referral of appellant to an appropriate impartial medical specialist to resolve the conflict in the medical evidence to be followed by a *de novo* decision to supersede the October 26, 1995 decision. In a December 5, 1996 decision, the Office rejected

appellant's claim for an increased schedule award on the grounds that the weight of the medical evidence did not support an increased permanent impairment in the right arm. In a separate December 5, 1996 decision, the Office issued a schedule award for an additional 75 percent permanent impairment of the left eye. In an April 28, 1997 decision, the Office denied appellant's request for a hearing before an Office hearing representative on the grounds that the request was untimely and the Office, in the exercise of its discretion found that the issues of appellant's claim could equally be addressed by requesting reconsideration and submitting additional evidence.

The Board finds that the case is not in posture for decision on the issue of appellant's schedule award for the right arm.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner, in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.[3]

In a March 3, 1994 report, Dr. William M. Price, a Board-certified orthopedic surgeon, indicated that appellant had some loss of grip strength in the right arm when compared to the left arm and some loss of muscle strength in the pronator, supinator and wrist extensor muscles. He noted that appellant's sensation to light touch was intact through the arms. Dr. Price stated that appellant's active range of motion in the arms was within functional limits except for a limitation of flexion of the right wrist to 30 degrees. He reported that right wrist extension, radial deviation and ulnar deviation was within normal limits. Dr. Price concluded that appellant had a 5 percent permanent impairment of the right arm.

The Office referred appellant to Dr. Bruce Schlafly, a Board-certified orthopedic surgeon, for an examination and a second opinion on the extent of his permanent impairment. In a March 8, 1994 report, Dr. Schlafly indicated that appellant, in her right wrist, had 74 degrees of dorsiflexion, 28 degrees of palmar flexion, 11 degrees of radial deviation, and 25 degrees of ulnar deviation, and, in her right elbow, had 75 degrees of pronation, 75 degrees of supination and full flexion and extension. He reported appellant had grip strength of 27 pounds on the right and 40 pounds on the left. Dr. Schlafly stated that appellant's fracture had not healed in the normal, anatomic position which would produce the symptoms of stiffness, pain and weakness that appellant complained of. He stated that appellant had a 7 percent permanent impairment due

[1] 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

[3] *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

to loss of motion in the wrist, 1 percent permanent impairment due to reduced forearm rotation and a 20 percent permanent impairment due to loss of strength. Dr. Schlafly concluded that appellant had a 26 percent permanent impairment of the right arm.

In a May 18, 1994 memorandum, an Office medical adviser, based on Dr. Schlafly's report, indicated that appellant had no permanent impairment for 74 degrees of dorsiflexion, 5 percent permanent impairment for 28 degrees of palmar flexion, 2 percent permanent impairment for 11 degrees of radial deviation, 1 percent permanent impairment for 25 degrees of ulnar deviation and no permanent impairment for his pronation and supination. He commented that since grip strength was only a single assessment in a single hand position, the value should not be considered reliable. He noted, however, that a loss of grip strength would be expected with such an injury. He concluded that appellant had a 10 percent permanent impairment due to loss of strength and a 3 percent permanent impairment for pain in the distribution of the radial nerve below the elbow. He concluded that appellant had a 20 percent permanent impairment of the right arm due to the employment injury. The Office hearing representative found a conflict in the medical evidence between the Office medical adviser and Dr. Schlafly on one hand and Dr. Price on the other hand. He, therefore, ordered that appellant be referred to an appropriate impartial medical specialist.

In a September 24, 1996 report, Dr. Robert E. Tucker, a Board-certified orthopedic surgeon, indicated that appellant had 45 degrees of volar flexion and 60 degrees of dorsiflexion in the right wrist. He reported that appellant had full supination and pronation bilaterally. Dr. Tucker indicated that x-rays showed a healed fracture with a slight shortening and slight dorsiflexion with an increase in the scapholunate angle to nearly 80 degrees. He concluded that appellant had a 4 percent permanent impairment due to loss of mobility and a 12 percent permanent impairment as a result of carpal instability. Dr. Tucker's report is inadequate, however, to resolve the conflict in the medical evidence. He did not make any reference to the A.M.A., *Guides* in explaining how he calculated that appellant had a 4 percent permanent impairment of the arm due to loss of motion. Dr. Tucker did not measure appellant's motion in radial and ulnar deviation as had the other physicians of record. He did not explain how he arrived at the calculation of 12 percent permanent impairment for carpal instability under the A.M.A., *Guides*. He did not cite the A.M.A., *Guides* in support of his review of appellant claim. As Dr. Tucker did not use the A.M.A., *Guides* appropriately, his opinion on the extent of appellant's permanent impairment, his report is of diminished probative value and is insufficient to resolve the conflict in the medical evidence. When the Office secures an opinion from an impartial specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, if the impartial specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue in question.[4] The case must, therefore, be remanded for the Office to request from Dr. Tucker a clarification of his report. After such further development as it may find necessary the Office should issue a *de novo* decision on appellant's permanent impairment of the right arm.

[4] *Harold Travis*, 30 ECAB 1071 (1979).

The Board finds that the Office properly determined that appellant had a 100 percent permanent impairment of the left eye.

In his April 25, 1994 report, Dr. Fred C. Chu, a Board-certified ophthalmologist, indicated that appellant had lost vision in the left eye completely. He noted that appellant had 20/20 vision in the right eye. Dr. Chu indicated that appellant had multiple scars in the right retina for laser treatment of her diabetic retinopathy. He concluded that the left eye was totally impaired. He stated that the right eye had fine central vision but appellant had peripheral field constriction from her underlying diabetes and subsequent treatment. Appellant's left eye condition was causally related to the employment injury. However, her right eye condition was due solely to a preexisting, underlying condition which was unrelated to the employment injury. The Office, therefore, appropriately limited appellant's schedule award to the left eye as that was the only eye affected by the employment injury.

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

Section 8124(b)(1) of the Act[5] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings…."[6] Appellant's request for a hearing was made on January 28, 1997 which was more than 30 days after the December 5, 1995 decision. She, therefore, was not entitled to a hearing as a matter of right. 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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. 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.[7] The Office exercised its discretion in this case and found that appellant's case could be equally well considered with the submission of new medical evidence and a request for reconsideration. 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

[5] 5 U.S.C. § 8124(b)(1).

[6] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[7] *Henry Moreno*, 39 ECAB 475 (1988).

logic and probable deductions from known facts.[8] There is no evidence that the Office abused its discretion in this case.

The decisions of the Office of Workers' Compensation Programs, dated April 28, 1997 and December 5, 1996, relating to appellant's schedule award for the left eye, are hereby affirmed. The decision of the Office dated December 5, 1996, relating to appellant's schedule award for the right arm, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
June 1, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

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