

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN E. SIMMONS and DEPARTMENT OF THE NAVY,
MEDICAL CENTER, San Diego, Calif.

*Docket No. 97-1597; Submitted on the Record;
Issued March 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she is entitled to more than the 20 percent schedule award she received for permanent partial impairment of her left upper extremity; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a written review as untimely filed.

Appellant, then a 45-year-old licensed vocational nurse, filed a notice of occupational disease on July 7, 1994, which the Office accepted for bilateral carpal tunnel syndrome. Appellant underwent release surgery on July 19, 1994 and resigned from the employing establishment, effective September 15, 1994.

On February 2, 1995 the Office informed appellant that her claim for wage-loss compensation from September 15, 1994 to January 19, 1995 lacked supporting medical evidence. On May 23, 1995 the Office denied appellant's claim, and she requested an oral hearing.

The hearing representative remanded the case on January 25, 1996, finding that the Office failed to substantiate that appellant had resigned from suitable employment without medical documentation. She directed that compensation be paid from September 17, 1994 until February 8, 1995, when appellant was discharged from treatment,¹ and ordered the Office to develop the claim for a schedule award.

Appellant filed a CA-7 form on March 18, 1996, and was evaluated by Dr. Gregory R. Mack, a Board-certified orthopedic surgeon, who stated in his March 22, 1996 report that appellant's left carpal tunnel syndrome was permanent and stationary, and by Dr. B.S. Thomas, a general practitioner, who completed the rating factors form.

¹ On May 8, 1996 the Office authorized a compensation check for \$8,172.23 to cover the period September 17, 1994 to February 8, 1995.

On August 26, 1996 the Office issued a schedule award for 20 percent permanent impairment of appellant's left upper extremity, based on the calculations provided by the Office medical adviser. The award ran from March 22, 1996 to June 1, 1997 for a total of 436.8 days.

In a letter dated August 30, 1996, appellant disagreed with the amount of the award, pointing out that Dr. Thomas had found 80 percent disability of her left hand. On December 10, 1996 appellant asked the Office if her August 30, 1996 request for a written review had been considered. On January 13, 1997 the Office denied appellant's request for a written review as untimely.

The Board finds that appellant is entitled to no more than a 20 percent schedule award for loss of use of her left upper extremity.

Under section 8107 of the Federal Employees' Compensation Act² and section 10.304 of the implementing federal regulations,³ schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.⁵ The method used in making such determinations rests in the sound discretion of the Office.⁶ For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.⁷

In this case, the Board finds that the Office medical adviser properly applied the appropriate tables found in the 4th edition of the A.M.A., *Guides*. The date of maximum medical improvement of appellant's left carpal tunnel syndrome was March 22, 1996, as found by Dr. Mack, and this date was used as the starting point of appellant's award. Based on the measurements provided by Dr. Thomas and referring to Table 16, page 57 of the A.M.A.,

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107(c)(19); *William Edwin Muir*, 27 ECAB 579, 581 (1976); see *Terry E. Mills*, 47 ECAB 309 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

⁵ *A. George Lampo*, 45 ECAB 441, 443 (1994).

⁶ *George E. Williams*, 44 ECAB 530, 532 (1993).

⁷ *James J. Hjort*, 45 ECAB 595, 599 (1994).

Guides, the Office medical adviser found moderate or 20 percent impairment due to entrapment neuropathy of the median nerve at the wrist.⁸ This conclusion is consistent with Dr. Thomas' findings that appellant had no loss of sensation or atrophy but was unable to open jars or lift and push.⁹

Appellant contended that she had an 80 percent disability, but Dr. Thomas merely referred to an estimated 80 percent disability and reported on the ratings form that appellant's left hand grip strength was 80 percent weaker than her right, not that her left upper extremity was 80 percent disabled. Appellant also argued that her disability was permanent and that she should be paid compensation for the rest of her life. However, appellant has submitted no medical evidence supporting any greater percentage of permanent impairment of her left upper extremity.

Inasmuch as it is the claimant's burden to provide medical evidence establishing her entitlement to a schedule award, and the medical evidence in this case supports no rating greater than the 20 percent schedule award already received by appellant, the Board finds that the Office properly determined that appellant was entitled to no more than a 20 percent impairment rating.

The Board also finds that the Office acted within its discretion in denying appellant's request for a written review of the record as untimely filed.¹⁰

The Act is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.¹¹ The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.¹² Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.¹³

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a

⁸ See FECA Bulletin No. 96-17, issued September 20, 1996, discussing various issues relating to the Office medical adviser's calculation of schedule awards from an examining physician's findings.

⁹ See *Lena P. Huntley*, 46 ECAB 643, 646 (1995) (finding that the Office medical adviser's proper application of the A.M.A., *Guides* constituted the weight of the medical evidence).

¹⁰ The Board's scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2). In this case, appellant filed her notice of appeal on February 26, 1997. Thus, both the January 13, 1997 and August 26, 1996 decisions are before the Board.

¹¹ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ____ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

¹² *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

¹³ *William F. Osborne*, 46 ECAB 198, 202 (1994).

discretionary hearing, the claimant will be advised of the reasons.¹⁴ The Board has held that the only limitation on the Office's authority is reasonableness,¹⁵ and that 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.¹⁶

In this case, appellant claimed in her December 10, 1996 letter to the Office that she had requested a written review in her August letter. However, a review of the August 30, 1996 letter reveals no mention of a request for either an oral hearing or a written review of the record. Only in her December 10, 1996 letter did appellant indicate that she wanted a written review. Attached to the Office's August 26, 1996 schedule award decision was a statement outlining appellant's options regarding an appeal and explaining clearly that the request for a hearing or written review of the record must be made within 30 days of the date of the decision. Appellant did not request a written review until December 10, 1996, well beyond the 30-day limit. Therefore, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.¹⁷ Here, the Office informed appellant in its January 13, 1997 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on whether appellant's disability was greater than the impairment rating awarded could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's request for written review which could be found to be an abuse of discretion. Further, appellant was advised that she could request reconsideration and submit evidence in support of her assertion that she was entitled to a greater schedule award. Finally, appellant has offered no argument to justify further discretionary review by the Office. Thus, the Board finds that the Office properly denied appellant's request for written review.

¹⁴ *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁵ *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

¹⁶ *Wilson L. Clow, Jr.*, 44 ECAB 157, 175 (1992).

¹⁷ *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

The January 13, 1997 and August 26, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
March 22, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member