U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIE H. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Orlando, FL

Docket No. 98-879; Submitted on the Record;
Issued October 8, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to a schedule award; (2) whether the Office properly denied appellant's request for a hearing.

The Office accepted appellant's claim for a fracture of the left lower radius/ulna closed and carpal tunnel syndrome. On November 8, 1989 appellant, then a 52-year-old flat sorter operator, broke her arm at work on November 8, 1989. Appellant worked light duty until she was released to full duty on July 15, 1991. On an undated Form CA-7, received by the Office on July 26, 1990, appellant filed for a schedule award. On July 15, 1991 appellant filed another claim for a schedule award.

By letter dated August 14, 1990, Dr. Charles W. Heard, appellant's treating physician and a Board-certified orthopedic surgeon, stated that he treated appellant on June 25, 1990 and that she had not reached maximum medical improvement. On September 26, 1990 Dr. Heard stated that appellant could return to work with no lifting more than 20 pounds. On a form dated July 24, 1991, in response to the Office's request for him to rate appellant's fracture of the left radius, Dr. Heard stated that appellant had not reached maximum medical improvement.

In progress notes dated October 9, 1991, Dr. Heard stated that appellant had almost full motion of the left wrist compared with the right. He stated that she had good strength, a good pulse, and no neurological deficits. Dr. Heard stated that appellant's post fracture of the left wrist which resulted in carpal tunnel syndrome had resolved and appellant could continue to work without restrictions. He stated that appellant did not require surgery for her carpal tunnel syndrome or further work-up and that she had reached maximum medical improvement.

In a report dated November 21, 1991, Dr. Heard stated that appellant reached maximum medical improvement on October 9, 1991 and had a zero percent impairment.

In a report dated December 17, 1991, Dr. Heard reiterated that appellant had a zero percent impairment rating but told appellant who had come in to question her impairment rating that he would review the x-rays to ascertain whether there was an intra-articular extension of the fracture. In progress notes dated January 7, 1992, he stated that he reviewed all of appellant's x-rays of the left wrist and they showed no evidence of intra-articular extension of the fracture. Dr. Heard reiterated that using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a zero percent impairment.

By letter dated March 30, 1992, the district medical adviser stated that he agreed with Dr. Heard that appellant had no permanent impairment.

In a report dated April 6, 1992, Dr. Raymond E. Gilmer, a Board-certified orthopedic surgeon, to whom Dr. Heard referred appellant, considered appellant's history of injury, performed a physical examination and reviewed x-rays. On physical examination Dr. Gilmer noted that appellant had full range of motion in the left wrist as compared to the right, that she had a negative wrist flexion test, a negative Tinel's sign and no intrinsic muscle atrophy. He diagnosed that appellant had a healed fracture of the left distal radius. Dr. Gilmer stated that appellant had no permanent impairment as related to her previous fracture and required no restrictions.

An unsigned medical report from the Jewett Orthopedic Clinic which was received by the Office on April 8, 1993 stated that, based on appellant's history, a physical examination dated February 4, 1993 and x-rays taken on that date, appellant had status post fracture of the left radius. Further, the report stated that appellant reached maximum medical improvement and had a one percent permanent impairment "of the left wrist of her body as a whole" resulting from her loss of grip strength.

By letter dated April 5, 1993, appellant's attorney stated that he was enclosing a report from Dr. George White, a Board-certified orthopedic and hand surgeon, who indicated that appellant had a permanent impairment as a result of her November 8, 1989 employment injury but that he could not rate appellant's carpal tunnel syndrome. That report, however, is not attached to the letter. It appears, however, that appellant's attorney is referring to the unsigned medical report received by the Office on April 8, 1993.

By letter dated May 13, 1993, the district medical adviser stated that appellant had no objective evidence of impairment including loss of grip strength. He stated that no atrophy had occurred to confirm the alleged weakness and that there was no explanation of how the weakness could occur with appellant's fracture.

In a report dated November 16, 1993, Dr. James K. Shea, a Board-certified physiatrist and a second opinion physician, considered appellant's history of injury, performed a physical examination, reviewed electromyograms of appellant's left upper extremity dated May 5, 1990 and July 30, 1992, a bone scan of appellant's wrists dated August 24, 1992 and nerve conduction studies. Dr. Shea diagnosed left carpal tunnel syndrome and stated that based on the A.M.A., *Guides* (3rd ed.), p. 20, Table 3, appellant had a 4 percent impairment to the upper extremity and a 2 percent whole person impairment. He stated that since her November 8, 1989 fracture, appellant continued to have left arm, wrist and hand pain with numbness.

By decision dated June 7, 1993, the Office denied appellant's claim, stating that the medical evidence did not establish that appellant sustained a permanent impairment of the left arm pursuant to the A.M.A., *Guides* (3rd ed. rev. 1990).

By letter dated June 23, 1993, appellant requested an oral hearing before an Office hearing representative which was held on November 8, 1993. At the hearing, appellant described her history of injury and her current symptoms which included weakness and pain in her left wrist, poor grip strength and swollen upper left elbow. Appellant's attorney stated that Dr. White reported that he treated appellant at the Jewitt Orthopedic Clinic.

By decision dated January 31, 1994, the Office's hearing representative affirmed the Office's June 7, 1993 decision.

By letter dated January 5, 1995, appellant requested reconsideration of the decision and requested that the Office consider another report from Dr. White which appellant's attorney stated was attached to the letter although it is not attached in the record.

By decision dated February 14, 1995, the Office denied appellant's request for modification, and found that Dr. White's November 8, 1994 report was not probative.

By letter dated August 29, 1995, appellant requested reconsideration of the Office's decision and submitted a report from Dr. White dated July 18, 1995 in which he stated that he first saw appellant on February 4, 1993 and that her physical examination revealed some mild radial scaphoid irritation. He stated that he rated appellant as one percent impairment for some diminished grip strength and that she returned to all normal activities without restrictions. Dr. White stated that he also saw appellant on November 8, 1994 at which time she had full range of motion, mild tenderness around the radial scaphoid area and slightly diminished grip strength. He stated that the x-rays revealed mild radial scaphoid arthritis. Dr. White stated that appellant underwent an injection of her left wrist and was discharged to a full-duty status. He stated that at the present time appellant did not require surgery and required no further treatment except as on an as needed basis. Appellant's attorney noted that Dr. White was the only doctor in the record who specialized in hand injuries.

By decision dated October 4, 1995, the Office denied appellant's request for modification. As part of appellant's appeal rights, the Office informed appellant that she could request an oral hearing before an Office hearing representative.

By letter dated October 16, 1995, appellant requested an oral hearing before an Office hearing representative.

By decision dated December 13, 1995, the Office Branch of Hearings and Review denied appellant's request for a hearing, stating that section 8124(b)(1) of the Federal Employees' Compensation Act provides for an oral hearing or a review of the written record only before review under section 8128. The Office noted that appellant had previously requested reconsideration under section 8128 and the Office issued its reconsideration decision dated October 4, 1995. The Office stated that since appellant had previously requested reconsideration, she was not, as a matter of right, entitled to an oral hearing with the Branch of

Hearings and Review on the same issue. The Office stated, however, that it had carefully considered appellant's request following reconsideration and was denying it because the issue in the case could equally well be addressed by requesting reconsideration from the district office or from the Board.

Subsequently, appellant submitted a report dated November 6, 1995 from Dr. White in which he stated that appellant's one percent whole body impairment was according to the A.M.A., *Guides* and "was specifically the body as a whole and not just to the left hand." Appellant also submitted the report from Dr. White dated November 8, 1994 in which he diagnosed mild radial scaphoid arthritis based on x-rays and a physical examination and returned appellant to work without restrictions.

By letter dated April 18, 1996, the Office informed appellant that it had issued him the wrong appeal rights with its October 4, 1995 decision and that the case was being assigned to a senior claims examiner for reconsideration.

By decision dated July 11, 1996, the Office denied appellant's request for modification.

On April 5, 1997 appellant filed a claim for an occupational disease, Form CA-2, stating that she sustained carpal tunnel syndrome and arthritis to her left wrist from her November 8, 1989 employment injury.

On April 17, 1997 appellant filed a claim for a schedule award and submitted an attending physician's report dated April 15, 1997 from her treating physician, Dr. Arthur Carrizales, a Board-certified family practitioner with a specialty in aerospace medicine, who diagnosed sprained wrist and carpal tunnel syndrome and checked the "yes" box that appellant's condition was work related. He indicated that the period of appellant's partial disability was undetermined.

By letter dated April 19, 1997, appellant requested surgery on her left wrist.

By letter dated May 20, 1997, the Office requested additional medical information from appellant including the percentage of impairment from her treating physician using the A.M.A., *Guides*.

In a report dated June 11, 1997, Dr. Lawrence S. Halperin, a referral physician and a Board-certified orthopedic surgeon with a specialty in hand surgery, considered appellant's history of injury, performed a physical examination, reviewed x-rays and diagnosed left carpal tunnel syndrome, left flexor carpi radials tendinitis and de Quervain's disease of the left wrist. Dr. Halperin stated that appellant had not yet reached maximum medical improvement. He recommended a steroid injection and if the symptoms were significant and did not improve, he recommended de Quervain's release. Dr. Halperin suggested that a carpal tunnel release might significantly help alleviate appellant's symptoms of carpal tunnel syndrome and tendinitis. He stated that appellant had a zero percent impairment rating per the Florida Guidelines and a five to six percent impairment of the whole person.

In a report dated May 22, 1997, Dr. Carrizales stated that appellant could return to light duty indefinitely until she underwent orthopedic surgery.

In a report dated July 18, 1997, the district medical adviser noted that portion of Dr. Halperin's June 11, 1997 report in which he stated that he did not believe appellant had reached maximum medical improvement and a carpal tunnel release might significantly alleviate appellant's symptoms. The district medical adviser stated that based on Dr. Halperin's report, it was inappropriate at the time to calculate the impairment because appellant had not reached maximum medical improvement.

By decision dated July 22, 1997, the Office denied appellant's claim for a schedule award, stating that the medical evidence established that appellant had not reached maximum medical improvement, and that appellant must reach maximum medical improvement to receive an impairment rating and a schedule award.

Appellant submitted additional medical evidence from Dr. Carrizales including progress notes dated April 15, 1997 and a report dated May 22, 1997. In the progress notes, Dr. Carrizales performed a physical examination and diagnosed recurring sprain of the left wrist and left carpal tunnel. He restricted appellant from lifting more than 10 pounds for the next three weeks. In his May 22, 1997 report, Dr. Carrizales noted positive Tinel's and Phalen's signs, decreased grip strength in the left wrist and diagnosed carpal tunnel syndrome.

In an undated letter received on September 8, 1997, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 12, 1997, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's request for a hearing was postmarked September 4, 1997, more than 30 days after the Office issued the July 22, 1997 decision and that, therefore, appellant's request was untimely. The Office informed appellant that she could request reconsideration by the Office and submit additional evidence.

By letter dated September 4, 1997, which the Office stated it received on December 9, 1997 appellant requested reconsideration of the Office's decision.

By decision dated January 7, 1998, the Office denied appellant's reconsideration request.

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

Section 8124(b)(1) of the 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

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.131.

claimant has a choice of requesting an 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 regulations[3] 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 hearing,[5] when the request is made after the 30-day period for requesting a hearing,[6] and when the request is for a second hearing on the same issue.[7]

In the present case, the record does not contain the envelope which contained appellant's request for a hearing. The date the Office stamped appellant's hearing request "received" on September 8, 1997, more than 30 days after the Office's July 22, 1997 decision. Therefore the Office was correct in stating in its November 12, 1997 decision that appellant was not entitled to a hearing as a matter of right. The Office informed appellant that she could submit additional evidence through a request for reconsideration. The Office exercised its discretion in denying appellant's request for a hearing.

The Board finds that the Office properly determined that appellant was not entitled to a schedule award.

The schedule award provision of the Act[8] provides for 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

[3] 20 C.F.R. § 10.131(a).

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

[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).

that there may be uniform standards applicable to all claimants.[10] A doctor's opinion assessing the degree of appellant's permanent partial impairment is of diminished probative value if he or she does not use the A.M.A., *Guides* in making the impairment rating or does not use the A.M.A., *Guides* properly.[11]

Moreover, the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.[12] Maximum medical improvement means when the physical condition of the injured member of the body has stabilized and will not improve further.[13]

In the present case, Dr. Heard, appellant's treating physician, opined that appellant reached maximum medical improvement on October 9, 1991 and stated that appellant had no permanent impairment. In his June 9, 1991 report, he stated that appellant required no restrictions and that her carpal tunnel syndrome had resolved. In his October 13, 1991 report, he stated that appellant did not require further surgery. In his December 17, 1991 report, Dr. Heard stated that using the A.M.A., *Guides*, appellant had a zero impairment. His opinion is not probative, however, because he did not explain specifically how he used the A.M.A., *Guides* to arrive at his conclusion.[14]

In his April 6, 1992 report, Dr. Gilmer, a second opinion physician, stated that appellant's fracture of the left distal radius had healed, that appellant had no permanent impairment as related to her previous fracture and required no restrictions. He did not address, however, whether appellant's carpal tunnel syndrome had resolved, and therefore his opinion is not complete.

In his November 16, 1993 report, Dr. Shea, a second opinion physician, diagnosed left carpal tunnel syndrome and, using the A.M.A., *Guides* (3rd ed.), p. 20, Table 3, stated that appellant had an impairment of 4 percent to the upper extremity and 2 percent of the whole person. A schedule award, however, is not payable under the Act for an impairment of the whole person.[15] That Dr. Shea's rating of a four percent impairment to the upper extremity conflicts with Drs. Halperin and Carrizales' reports in 1997, discussed *infra*, that appellant had not yet reached maximum medical improvement.

In his reports dated from approximately February 4, 1993 through November 6, 1995, Dr. White consistently stated that appellant had a one percent impairment "to the body as a whole and not just to the left hand" using the A.M.A., *Guides*. In his November 8, 1994 and

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

[11] *See Paul R. Evans*, 44 ECAB 646, 651 (1993); *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

[12] *Joseph R. Waples*, 44 ECAB 936, 940 (1993).

[13] *Id*; *Maries J. Born*, 27 ECAB 623, 629 (1993).

[14] *See Paul R. Evans*, *supra* note 11 at 651.

[15] *Gordon G. McNeill*, 42 ECAB 140, 145 (1990); *Rozella L. Skinner*, 37 ECAB 398 (1986).

July 18, 1995 reports, Dr. White diagnosed mild radial scaphoid arthritis and appellant could return to all normal activities without restrictions. In his reports, however, Dr. White did not specifically state how he used the A.M.A., *Guides*, *i.e.*, with reference to the page and table or formula, and therefore his opinion is not probative.[16] Further, his diagnosis of scaphoid arthritis is not an accepted condition.

In his June 11, 1997 report, Dr. Halperin, a second opinion physician, diagnosed left carpal tunnel syndrome, left flexor carpi radials tendinitis and de Quervain's disease of the left wrist. He stated that appellant had not reached maximum medical improvement, that a steroid injection might be helpful, but if that did not work, de Quervain's release or a carpal tunnel release would be helpful. He stated that appellant had a zero percent impairment rating per the Florida Guidelines and a five to six percent impairment of the whole person. Because Dr. Halperin opined that appellant did not reach maximum medical improvement, it was not appropriate for him to assess appellant's degree of impairment. In any event, he did not use the A.M.A., *Guides* in rating appellant and therefore his rating of appellant is not probative.[17]

In his April 17 and May 22, 1997 reports and his April 15, 1997 progress notes, Dr. Carrizales, appellant's treating physician, diagnosed wrist sprain and carpal tunnel syndrome and restricted appellant from heavy lifting. In his May 22, 1997 report, he stated that appellant could return to light duty indefinitely until she underwent orthopedic surgery.

The fact that in their 1997 reports, which are the most recent reports of record, Dr. Carrizales and Dr. Halperin opined that appellant had carpal tunnel syndrome shows that appellant's carpal tunnel syndrome had not resolved. Further, Dr. Halperin opined that appellant had not reached maximum medical improvement and the district medical adviser, in his July 18, 1997 report, agreed with Dr. Halperin. Drs. Carrizales and Halperin opined that a carpal tunnel release might significantly help appellant's carpal tunnel syndrome. On April 29, 1997 appellant requested authorization for surgery on her left wrist although there is no indication that the Office granted appellant's request or that appellant was actually going to undergo the surgery. Because, however, the record suggests appellant might undergo surgery, her condition has not stabilized. Thus, the most recent evidence shows that appellant had not reached maximum medical improvement and therefore is not entitled to a schedule award.

The decisions of the Office of Workers' Compensation Programs dated January 7, 1998, November 12 and July 22, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 8, 1999

[16] *Id.*

[17] *Id.*

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member