

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA C. WALKER and DEPARTMENT OF DEFENSE,
DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

*Docket No. 98-998; Submitted on the Record;
Issued October 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a 26 percent permanent impairment of her right hand for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On May 9, 1996 appellant, then a 51-year-old contract specialist, filed a claim alleging that on April 23, 1996 she sustained a fracture to the middle finger of her right hand. The Office accepted appellant's claim for fractured right middle finger and authorized physical therapy. Appellant subsequently underwent a right middle finger synovectomy procedure and the Office accepted the condition of synovitis of the metacarpophalangeal (MP) joint of the right middle finger.

In an April 24, 1997 report, Dr. Stephen J. Leibovic, a Board-certified orthopedic surgeon, provided a history of injury and the treatment appellant received. On examination, Dr. Leibovic reported that appellant had limited range of motion of the MP joint with extension to 20 degrees and flexion to 80 degrees, stiffness throughout the hand. Dr. Leibovic reported that wrist range of motion was also somewhat affected, though this seemed due to reluctance on appellant's part. She had dorsiflexion to 30 degrees and palmar flexion to 65 degrees. He noted that appellant had positive tests for carpal tunnel syndrome, including positive median nerve compression test, positive Phalen's test. Dr. Leibovic concluded that appellant had joint space narrowing, some significant synovitis and scarring around the MP joint. He stated that the cause of this was not completely clear.

In a June 11, 1997 report, Dr. Bernard A. Lublin, a Board-certified orthopedic surgeon, opined that appellant has developed Secretan's disease of the right hand as a result of the work-related injury of April 23, 1996. He stated that this was manifest by proliferative changes causing

restriction of motion. Dr. Lublin utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (fourth edition) and concluded, as follows:

“(1) The index finger DIP [distal interphalangeal] joint has measured range of motion from full extension to 55 degrees flexion, therefore having eight percent impairment. The proximal interphalangeal joint has range of motion from full extension to 90 degrees flexion, thereby having 6 percent impairment. MP joint has range of motion from full extension to 45 degree flexion, thereby having 25 degrees impairment. Determination of total finger impairment is not a summation of these three measurements, but is identified with respect to the Combined Values Chart on page 322 of the [A.M.A.,] *Guides*. With respect to the index finger, total impairment is 35 percent.

“(2) With respect to the right middle finger, measurements on April 10, 1997 disclosed the distal interphalangeal joint range of motion from full extension to 40 degrees flexion, yielding 15 percent impairment. The PIP [proximal interphalangeal] range of motion was from full extension to 60 degrees flexion, yielding 24 percent impairment. The MP range of motion was from 30 degrees flexion to 45 degrees flexion, yielding impairment of 12 percent for extensor loss and 25 percent for flexion loss, for a total MP impairment of 37 percent. The total impairment of the right middle finger is 60 percent.

“(3) With respect to the right ring finger, the DIP motion was from full extension to 70 degrees flexion, resulting in no impairment. The PIP motion was from full extension to 85 degrees flexion, resulting in 9 percent impairment. The MP motion was from full extension to 35 degrees flexion, resulting in 30 percent impairment. Total impairment of the right ring finger of 36 percent.

“(4) With respect to the right small finger, the DIP range of motion was from full extension to 50 degrees flexion, yielding a 10 percent impairment. The PIP motion was from full extension to 90 degrees flexion, yielding 6 percent impairment. The MP range was from full extension to 55 degrees flexion, yielding a 20 percent impairment. Total impairment of the right small finger is 32 percent.”

Dr. Lublin referred to Table 1, page 18 of the A.M.A., *Guides* to determine that 35 percent impairment of the index finger represented a 7 percent hand impairment, 60 percent impairment of the middle finger represented a 12 percent hand impairment, 36 percent impairment of the ring finger represented a 4 percent hand impairment and 32 percent impairment of the small finger represented a 3 percent hand impairment. Total hand impairment was determined by Dr. Lublin to represent 26 percent of the hand.

On August 8, 1997 the Office referred the case file to an Office medical adviser with a statement of accepted facts for an opinion regarding appellant's entitlement to a schedule award. In a medical report dated August 12, 1997, the Office medical adviser reviewed Dr. Lubin's report and concurred that appellant has developed Secretan's disease of hand as a result of the

accepted work-related injury. The Office medical adviser agreed with Dr. Lublin's rating of a 26 percent impairment of the right hand.

On September 2, 1997 the Office granted appellant a schedule award for a 26 percent permanent impairment for the right hand.

On October 23, 1997 appellant requested an oral hearing before an Office representative and submitted additional evidence.

By decision dated November 18, 1997, the Office denied appellant's request for a hearing as untimely.

The Board finds that appellant has no more than a 26 percent impairment of the right hand for which she received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner, in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.³

In this case, the Office medical adviser applied the A.M.A., *Guides*, the physical findings of Dr. Lublin to find that appellant had a 26 percent impairment of the right hand. Appellant's treating physician, Dr. Lublin, a Board-certified orthopedic surgeon, also found 26 percent impairment based on his April 10, 1997 report of appellant's measurements taken by the hand management specialists.⁴ By applying the standards found in the A.M.A., *Guides*, (fourth edition 1993), both Dr. Lublin and the Office medical adviser show how they rated the right index, middle, ring and small fingers with regards to loss of motion. Their findings are in accordance with Figures 19, page 32; Figure 21, page 33; and Figure 23, page 34, of the *Guides*.⁵ The specific range of motion losses were combined to find a 35 percent impairment for the index finger, a 58 percent for the middle finger; a 36 percent for the ring finger and a 32 percent for the little finger. Table 1 at page 18 of the A.M.A., *Guides* was applied to find that 35 percent of the index finger amounts to a 7 percent impairment of the hand; 58 percent of the middle finger amounts to a 12 percent impairment of the hand; 36 percent for the ring finger amounts to a 4

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁴ The Office procedures direct the use of the fourth edition, issued in 1993, for schedule awards determined on and after November 1, 1993; see FECA Bulletins 94-4 (commencing use of the fourth edition); see also, Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 exh. 4, 4 (October 1995).

⁵ A.M.A., *Guides*, 32, Figure 19; 33, Figure 21 and 34, Figure 23.

percent impairment of the hand; and 32 percent for the little finger amounts to a 3 percent impairment of the hand.⁶ Adding the total of appellant's hand impairment contributed by each of these fingers, Dr. Lublin and the medical adviser agreed that appellant sustained a total impairment rating of 26 percent of the right hand. The Board finds that appellant has presented no other probative medical evidence to establish that her right hand impairment is greater than the 26 percent awarded.⁷

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

Section 8124(b)(1) of the Act⁸ 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 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." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."⁹ In this case, appellant's request for a hearing was postmarked October 23, 1997, which is more than 30 days after the Office's September 2, 1997 decision and therefore was untimely. 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.¹⁰

The Office exercised its discretion in this case by noting that appellant could seek further review of the case by submitting additional evidence and seeking reconsideration. The Office did not abuse its discretion in denying appellant's request for a hearing.

⁶ Table 1, page 18.

⁷ On appeal, appellant submitted new medical evidence which may not be reviewed for the first time by the Board on appeal; *see* 20 C.F.R. § 501.2(c).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁰ *Henry Moreno*, 39 ECAB 475 (1988).

The decisions of the of Workers' Compensation Programs dated November 18 and September 2, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 21, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member