

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALAN C. HOOPS and U.S. POSTAL SERVICE,
NEWARK FIELD DIVISION, Newark, NJ

*Docket No. 99-1189; Submitted on the Record;
Issued July 5, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a two percent permanent impairment of his left lower extremity for which he received a schedule award; and (2) whether the Branch of Hearings and Review abused its discretion by denying appellant's request for an oral hearing.

The Board has duly reviewed the case on appeal and finds that appellant has no more than a two percent permanent impairment of his left lower extremity.

Appellant, a maintenance mechanic, filed a claim on October 8, 1996 alleging that on October 7, 1996 he injured his left knee in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for tear of the lateral meniscus left knee and authorized an arthrogram and arthroscopy. Appellant requested a schedule award on May 29, 1998. By decision dated August 27, 1998, the Office granted appellant a schedule award for a two percent permanent impairment of the left lower extremity. Appellant requested an oral hearing on October 6, 1998 and by decision dated December 8, 1998, the Branch of Hearings and Review denied appellant's request as untimely.

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 American Medical

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

Association, *Guides to the Evaluation of Permanent Impairment*³ as a standard for determining the percentage of impairment, and the Board has concurred in such adoption.⁴

In this case, appellant's attending physician, Dr. Gregory S. Gallick, a Board-certified orthopedic surgeon, completed a report and indicated that appellant reached maximum medical improvement on April 22, 1998. Dr. Gallick found that appellant had flexion of the left knee from 0 to 125 degrees. He stated that appellant had a meniscectomy in 1996. Dr. Gallick stated that appellant's left knee locked or caught and that he had a small effusion.

As Dr. Gallick did not correlate his findings with the A.M.A., *Guides*, the Office properly referred the medical evidence of record to the Office medical adviser. The Office medical adviser reviewed the report on August 26, 1998 and found that 125 degrees of flexion was not a ratable impairment under the A.M.A., *Guides*.⁵ He further found that appellant underwent a partial lateral meniscectomy and that the A.M.A., *Guides* provided a two percent impairment for this procedure.⁶

As there was no medical evidence in the record addressing any additional permanent impairment under the A.M.A., *Guides* such as arthritis, pain, or gait derangement, the Office properly found that appellant had no more than a two percent permanent impairment of his left lower extremity.

The Board further finds that the Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing as untimely.

Section 8124(b) of the Act,⁷ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁸

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if

³ A.M.A., *Guides* (4th ed. 1993).

⁴ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ A.M.A., *Guides* at 78, Table 3.

⁶ A.M.A., *Guides* at 85, Table 64.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(b)(1).

the request is filed within the requisite 30 days.⁹ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing, and must exercise this discretion.¹⁰

In the instant case, the Office properly determined that appellant's October 6, 1998 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's August 26, 1998 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence addressing additional permanent impairment in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The December 8 and August 27, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹⁰ *Id.*