U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUBEN M. VASQUEZ and DEPARTMENT OF THE AIR FORCE, SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, TX

Docket No. 99-853; Submitted on the Record;
Issued June 1, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he has more than a nine percent permanent impairment of the lower left extremity for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a written review of the record as untimely filed.

On February 14, 1997 appellant, then a 54-year-old electrician/lineman, filed a claim for traumatic injury alleging that in April 1996 he sustained a recurrence of disability of his February 1972 work-related injury. On May 28, 1997 the Office accepted appellant's claim for a left medial meniscus tear and authorized left knee arthroscopy. On August 30, 1997 Dr. Peter F. Holmes, appellant's treating physician Board-certified in orthopedic surgery, stated that on August 29, 1997 he had performed a partial left knee medial menisectomy. On January 27, 1998 appellant filed a claim for a schedule award for his left knee condition.

On January 13, 1998 Dr. Holmes stated that appellant had a 10 percent permanent impairment of the left lower extremity based on his left lateral meniscus condition. On February 3, 1998 the Office requested that Dr. Holmes provide an impairment rating for appellant's left lower extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). On February 11, 1998 Dr. Holmes stated that he no longer performed impairment ratings and urged that it refer appellant to another physician who performed such ratings.

On June 23, 1998 the Office referred appellant, a copy of his medical records and a statement of accepted facts to Dr. David R. Willhoite, Board-certified in orthopedic surgery, for a second opinion to determine appellant's date of maximum medical improvement and an impairment rating for his work-related injury. On July 13, 1998 Dr. Willhoite stated that he had examined appellant, reviewed the medical records and found that appellant had a well-healed excision scar, and that his range of motion of the left knee was 130 degrees in comparison to the right knee which was also 130 degrees. He noted that based on the A.M.A., *Guides* he rated

appellant with a seven percent impairment based on his left knee arthritis (a three millimeter cartilage interval) and a seven percent impairment based on his left knee meniscectomy. Dr. Willhoite then stated that based on the Combined Values Chart appellant had a 14 percent permanent impairment of the left lower extremity.

On July 21, 1998 the Office referred appellant to Dr. Ronald H. Blum, an Office medical consultant and a Board-certified orthopedic surgeon, to determine appellant's date of maximum medical improvement and an impairment rating for his work-related injury.

In a medical report dated July 22, 1998, Dr. Blum stated that he had reviewed appellant's medical records including Dr. Willhoite's and Dr. Holmes' reports. He noted that, based on Dr. Holmes' report, the doctor had performed a partial menisectomy on appellant's left knee, his impairment rating for that procedure was two percent based on the A.M.A., *Guides*. He also noted that appellant's arthritis entitled him to a seven percent permanent impairment. Based on the Combined Values Chart, Dr. Blum recommended an impairment rating of nine percent.[1]

By decision dated July 30, 1998, the Office granted appellant a schedule award for a nine percent permanent disability of his lower left extremity.

On September 1, 1998 appellant requested a review of the written record. On October 30, 1998 the Office denied appellant's request as untimely filed. The Office noted that the issue of entitlement to a greater schedule award could be equally well addressed by requesting reconsideration and submitting medical evidence not previously considered.

The Board finds that appellant has no greater than a nine percent permanent disability of his lower left extremity for which he received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.304 of the implementing federal regulations,[3] 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 under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

Dr. Blum properly relied on Dr. Holmes' report that he had performed a partial menisectomy on appellant's left knee as well as Dr. Willhoite's finding that appellant had work-related arthritis in the left knee. Dr. Blum then relied on the A.M.A., *Guides* to calculate

[1] The Board notes that Dr. Blum referred to a medical report from a Dr. Crow. However, a careful review of the record failed to reveal such a report.

[2] 5 U.S.C. § 8107 *et seq.*

[3] 20 C.F.R. § 10.304.

[4] *Andrew Aaron, Jr.*, 48 ECAB 141 (1996).

appellant's impairment of two percent based on a partial left knee menisectomy,[5] an impairment rating of seven percent based on appellant's arthritis,[6] which, when based on the Combined Values Chart, resulted in a total impairment rating of nine percent.[7]

Accordingly, the Board finds that the Office medical consultant correctly applied the A.M.A., *Guides* in determining that appellant had no more than a nine percent impairment of the left lower extremity, for which he had received a schedule award.

The Board finds that appellant's request for a written review of the record was untimely filed.

The Act[8] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing before a representative of the Office.[9] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[10] 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.[11]

The regulation implementing section 8124(b)(1) provides that a claimant may request a review of the written record in lieu of the oral hearing, but the same rules apply.[12] The regulation is clear that a claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[13] Section 10.131(b) is equally clear that the date on which the request is deemed "made" should be "determined by the postmark of the request," rather than any other date.[14]

In this case, appellant sent his request for a written review of the record postmarked September 1, 1998. Inasmuch as appellant's September 1, 1998 request was submitted more than 30 days after the July 30, 1998 decision, the Board finds that appellant's request was properly denied as untimely filed.

---

[5] A.M.A., *Guides* 85, Table 64.

[6] *Id*. at 83, Table 62.

[7] *Id*. at 322.

[8] *Supra* note 2.

[9] *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

[10] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994).

[11] *William F. Osborne*, 46 ECAB 198, 202 (1994).

[12] 20 C.F.R. § 10.131(b).

[13] *Coral Falcon supra* note 9 at 918.

[14] *Leo F. Barrett*, 40 ECAB 892, 895 (1989).

Nonetheless, even when the request for a written review is not timely, the Office has the discretion to grant such review, and must exercise that discretion.[15] Here, the Office informed appellant in its October 30, 1998 decision that it had considered the matter in relation to the issue involved and denied a written review on the basis that appellant could request reconsideration and submit evidence in support of his claim for a greater schedule award.

The Board has held that the only limitation on the Office's authority is reasonableness,[16] 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 known facts.[17]

In this case, nothing in the record indicates that the Office committed any abuse of discretion in denying appellant's request for a review of the record. Appellant was fully advised that he could request reconsideration and submit evidence in support, and appellant has offered no argument to justify further discretionary review by the Office.[18] Thus, the Board finds that the Office properly denied appellant's request for a written review of the record.

[15] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[16] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[17] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[18] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

The October 30 and July 30, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
June 1, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member