

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARL WHITE and U.S. POSTAL SERVICE,  
FLEET OPERATIONS, Washington, D.C.

*Docket No. 98-1657; Oral Argument Held January 4, 2000;  
Issued March 23, 2000*

Appearances: *Carl White, pro se; Sheldon G. Turley, Jr., Esq.*, for the Director,  
Office of Workers' Compensation Programs.

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has more than a five percent permanent impairment of the left leg.

On October 28, 1988 appellant, then a 40-year-old vehicle operator, filed a claim for pain in his lower back which he related to his work as a driver of tractor-trailers for the employing establishment. He submitted an October 9, 1987 magnetic resonance imaging (MRI) scan which showed a small herniated disc at L5-S1 on the left side, possibly affecting the left nerve root. On January 15, 1988 appellant underwent a laminectomy for the herniated disc. The Office accepted appellant's claim for a lumbosacral strain and paid compensation for intermittent periods of temporary total disability compensation.

In a September 9, 1993 report, Dr. Hugo V. Rizzoli, a Board-certified neurosurgeon, indicated that appellant had intermittent numbness in the left leg primarily along the S1 nerve root with intermittent pain that could be incapacitating in colder weather. He stated that maximum medical improvement occurred as of September 25, 1992. Dr. Rizzoli estimated that appellant had a 20 percent permanent impairment of the left leg due to pain but no impairment due to loss of strength.

In an October 14, 1993 memorandum, an Office medical adviser indicated that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* the maximum loss of function for a sensory deficit was five percent. The medical adviser stated that Dr. Rizzoli did not calculate appellant's permanent impairment in accordance with the A.M.A., *Guides*. The medical adviser concluded that the proper grading for appellant's impairment was four percent for minor causalgia which may present activity.

In a November 19, 1993 decision, the Office issued a schedule award for a four percent permanent impairment of the left leg.

On March 4, 1996 appellant underwent surgery for recurrent L5-S1 disc herniation of the left with discectomy and posterior S1 nerve root decompression. On December 11, 1996 he filed a claim for an increased schedule award. Appellant submitted a December 3, 1996 report from Dr. John K. Starr, an orthopedic surgeon, who indicated that appellant, under the revised third edition of the A.M.A., *Guides* had a 10 percent permanent impairment of the whole person due to his initial back surgery with an additional 2 percent permanent impairment for the second back surgery.<sup>1</sup> In a March 11, 1997 report, Dr. Starr repeated his finding of a 12 percent permanent impairment of the whole body, passed on the fourth edition of the A.M.A., *Guides*.<sup>2</sup>

In a May 29, 1997 memorandum, an Office medical adviser indicated that appellant only had residual pain with no motor weakness and no sensory deficit. He concluded that appellant had a five percent permanent impairment of the left leg for a unilateral nerve impairment of the L5 nerve root.<sup>3</sup>

In an October 30, 1997 decision, the Office issued a schedule award for an additional one percent permanent impairment of the left leg.

In a January 12, 1998 letter, appellant requested a hearing before an Office hearing representative. In a March 5, 1998 decision, the Office denied appellant's request for a hearing on the grounds that he was not entitled to a hearing as a matter of right because he had not requested a hearing within 30 days of the Office's October 30, 1997 decision. The Office considered the matter further and denied appellant's request on its own motion on the grounds that the request would be equally well addressed by a request for reconsideration and submission of new evidence on the issue of appellant's permanent impairment of the left leg.

The Board finds that appellant has no more than a five percent permanent impairment of the left leg.

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

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<sup>1</sup> A.M.A., *Guides*, page 80, Table 53 (3<sup>d</sup> ed. rev., 1990)

<sup>2</sup> *Id.*, page 113, Table 75 (4<sup>th</sup> ed. 1993).

<sup>3</sup> *Id.*, page 130, Table 83.

<sup>4</sup> 5 U.S.C. § 8107(c).

<sup>5</sup> 20 C.F.R. § 10.304.

<sup>6</sup> *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

Dr. Starr stated that appellant had a 12 percent permanent impairment of the whole person due to the two operations on his back. However, the Act specifically excludes the brain, heart and back from coverage by schedule awards.<sup>7</sup> Appellant therefore is not entitled to a schedule award for the effects of the surgery on his back. He is only entitled to a schedule award for the effects of the employment injury and the subsequent back operations on members of the body that fall within the coverage of payment of compensation under a schedule award. A schedule award is not payable for the loss, or loss of use, of a member, function or organ of the body not specifically enumerated in the Act or its regulations.<sup>8</sup> More specifically, a whole body impairment is not compensable by a schedule award under the Act.<sup>9</sup> The Office medical adviser, on the basis of Dr. Starr's report, found that appellant had an impairment involving the S1 nerve root without sensory deficit or loss of strength or motor function. He properly used the A.M.A., *Guides* to determine that appellant had a maximum five percent permanent impairment of the left leg based on the S1 nerve impairment. The Office, therefore, properly determined that appellant was entitled to only one percent additional impairment for the left leg, for which appellant had previously received four percent.

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

Section 8124(b)(1) of the Act<sup>10</sup> 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 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."<sup>11</sup> The Office's decision in this case was October 30, 1997. Appellant did not request a hearing until his January 12, 1998 letter. His request for a hearing was, therefore, untimely as it was made more than 30 days after the Office's decision.

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. In this case, the Office exercised its discretion by finding that appellant was not entitled to a hearing because he

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<sup>7</sup> 5 U.S.C. §§ 8101(20); 8107(c)(22).

<sup>8</sup> *Billie Sue Barnes*, 47 ECAB 478 (1996).

<sup>9</sup> *Terry E. Mills*, 47 ECAB 309 (1996).

<sup>10</sup> 5 U.S.C. § 8124(b)(1).

<sup>11</sup> *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

could have his case reviewed equally well by requesting reconsideration and submitting relevant medical evidence. As the only limitation on the Office's authority is reasonableness, 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.<sup>12</sup> There is no evidence of record that would show the Office abused its discretion in denying appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated March 5, 1998 and October 30, 1997 are hereby affirmed.

Dated, Washington, D.C.  
March 23, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>12</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).