

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY E. HARRIS and U.S. POSTAL SERVICE,
POST OFFICE, Sacramento, CA

*Docket No. 98-1958; Submitted on the Record;
Issued March 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant had more than a three percent permanent impairment to her right upper extremity for which she received a schedule award; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for merit review on March 27, 1998; and (3) whether the Office properly denied appellant's request for a review of the written record on the grounds that she had requested reconsideration first.

This case has been on appeal previously.¹ To briefly reiterate the facts, on April 25, 1990, appellant, then a 39-year-old postal clerk (letter sorting machine operator) and manual distribution clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained pain in her right shoulder and elbow that had been diagnosed as tennis elbow, as a result of her employment. In a decision dated October 31, 1990, the Office denied appellant's claim, finding that she failed to establish a fact of injury. In an August 16, 1991 decision, the Board, affirming the decision of the Office, noted that appellant failed to establish that she sustained an injury in the performance of duty.

After the denial of the claim, appellant submitted other medical notes from Dr. Mark N. Taylor, a Board-certified physical medicine and rehabilitation specialist, in which he noted that appellant suffered from chronic overuse strain/tendinitis to her right elbow as a result of her work injuries, *see, e.g.*, Dr. Taylor's November 20, 1991 medical report, March 31, 1992 report and May 29, 1992 report and periodically noted work restrictions.

On April 30, 1996 appellant filed a second notice of occupational disease and claim for compensation (Form CA-2) alleging that she had suffered from tendinitis of the right elbow for the past six years.

¹ Docket No. 91-423 (issued August 16, 1991). The history of the case is contained in the prior decision and is incorporated by reference.

In response to the Office's December 5, 1996 request for further information, appellant submitted a statement dated December 18, 1996, wherein she noted that she cleaned her house and did aerobic exercise and that she had filed her claim before.

The Office accepted appellant's claim for right elbow tendinitis on March 27, 1997.

On June 4, 1997 and again on June 10, 1997 appellant filed claims for compensation on account of traumatic injury or occupational disease (Form CA-7). The former was for lost wages for the period March 13, 1991 through May 9, 1997 and the latter 2 were for scheduled awards.

On July 1, 1997 the Office informed appellant that it needed further information regarding permanency. In response, appellant submitted a June 6, 1997 report from Dr. Taylor indicating that the right elbow was permanent and stationary as of this date; Dr. Taylor further noted permanent restrictions of, *inter alia*, lifting no more than 35 pounds and a maximum of 2 hours per day keying.

Appellant submitted various attending physician's reports by Dr. Taylor dated August 1995 through August 1997 in further support of her claim. In his August 3, 1995 report, he noted stable chronic right elbow lateral epicondylitis. On June 6, 1997 Dr. Taylor noted that this condition was permanent and stable, at least from a practical standpoint. On August 6, 1997 he noted that in addition to her injury to her right elbow, appellant suffered from chronic myofasical pain/strain in upper back. Dr. Taylor's note of November 6, 1997 also noted that appellant's left arm was more painful, that appellant's pain in her left arm began in 1990, eased up and began again mid-year 1996. In a second report of the same date, he noted that appellant was not in distribution; that she desired to continue working; and that she reported no restrictions.

In a document dated September 17, 1997 and received by the Office on November 14, 1997, Dr. Taylor answered various questions set forth by the Office, noting that appellant's pain to her right elbow at rest was "minimal to slight" and that with careful use the pain level increased to moderate thereby causing appellant to cease the activity. He noted that appellant had localized pain and tenderness at her right elbow, lateral epicondyle and radial head -- but no specific nerve and no sensory loss. Dr. Taylor stated that appellant was "not able to participate in forceful or repetitive actions or activities." Dr. Taylor comparing the affected right elbow to the opposite side or left elbow, found flexion at 145 degrees as compared with 150 degrees, extension at zero degrees on both sides and forearm pronation and supination 75 degrees as compared with 80 degrees. He also tested appellant's grip strength on her right side using a Jamar dynamometer, which affected 70, 75 and 80 pounds and found that she had a gradual reduction of strength and a rapid increase in the level of pain and that this was consistent with her description of inability to perform forcefully repeatedly. Finally, Dr. Taylor noted that appellant reached maximal medical improvement in January 1993.

By letter dated January 15, 1998, the Office requested that the Office medical adviser review appellant's claim for schedule award purposes and "indicate the permanent functional loss of use of the right knee and the date that maximal medical improvement was obtained."

In a February 3, 1998 report, the Office medical adviser determined that according to the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*

the total impairment for the right upper extremity was three percent. The medical adviser determined that figure as follows:

"Impairment due to pain: Level of symptoms as Grade 3, 60 percent (Table 11, page 48). Maximum impairment based on the radial nerve is 5 percent (Table 15, page 54). 60 percent x 5 percent = 3 percent.

"The total impairment for the right upper extremity equals three percent."

The Office medical adviser also noted that the date of maximum medical improvement as January 31, 1993.

By an award of compensation dated March 4, 1998, the Office granted appellant a schedule award based on a three percent loss of use of the right upper extremity, which amounted to 9.36 weeks of compensation, or \$4,427.51, for the period January 31 to April 6, 1993.

By letter dated March 17, 1998, received March 20, 1998, appellant requested reconsideration. In her request, appellant noted that her injury affected certain areas of her life, including self-care, physical activities, sleep and routine activities. Appellant also submitted further medical reports by Dr. Taylor from a February 24, 1998 examination, which noted, *inter alia*, another onset of left elbow pain. He listed restrictions of limited grasping, pushing, pulling, lifting, carrying and repetitive hand and wrist use.

By decision dated March 27, 1998, the Office denied appellant's request for reconsideration. The Office declined to review the case on the merits on the grounds that the evidence that appellant submitted was irrelevant and immaterial to her entitlement for a schedule award.

By letter dated March 18, 1998 and received by the Office's Branch of Hearings and Review on March 23, 1998, appellant requested a review of the written record by an Office hearing representative. In support thereof, appellant resubmitted certain medical records by Dr. Taylor and submitted an occupational activity status report dated February 24, 1998, also prepared by Dr. Taylor, which indicated that appellant suffered from tendinitis in both elbows and that appellant had "no restriction for her current duty assignment."

By decision dated May 8, 1998, the Office denied appellant's request for a written review of the record on the grounds that as she previously requested reconsideration, she was not, as a matter of right, entitled to one. The Office exercised its discretion and further denied the claim, finding that appellant's case "can be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which establishes that the schedule award issued is incorrect.

. The Board finds that appellant had no more than a three percent permanent impairment to her right upper extremity, for which she received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act² and section 10.304 of the implementing federal regulations,³ schedule awards are payable for permanent impairment of specified body members, functions or organs. The schedule award provisions of the Act set forth the number of weeks of compensation to be paid for permanent loss of the use of the members of the body listed in the schedule.⁴ 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*⁵ as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁶

In the present case, the Office accepted that appellant sustained right elbow lateral tendinitis as a result of her federal employment. By decision dated March 4, 1998, appellant was awarded 9.36 weeks of compensation based upon a three percent loss of use of the right upper extremity.

A review of the A.M.A., *Guides* reveals that impairment of the upper extremity due to a sensory deficit is calculated by multiplying the maximum impairment value of the upper extremity impairment by the estimated grade of severity of the sensory loss.⁷

Basing her determination on Dr. Taylor's report of September 17, 1997, which showed normal ranges of motion and that appellant experienced pain, the Office medical adviser properly determined that appellant had a "Grade 3 impairment due to pain." Grade 3 is defined by the A.M.A., *Guides* as "decreased sensibility with or without abnormal sensation of pain, which interferes with activity."⁸ Pursuant to the A.M.A., *Guides*, a Grade 3 classification may be awarded from 25 percent to 60 percent sensory deficit and the Office medical adviser gave appellant the benefit of the maximum rating, *i.e.*, 60 percent. The Office medical examiner's classification is consistent with Dr. Taylor's description that appellant's pain in her right elbow was "minimal to slight," and that appellant had no specific nerve or sensory loss.

To determine the maximum upper extremity impairment due to unilateral sensory deficits, the Office medical examiner correctly noted that the maximum impairment based on the radial nerve pursuant to the A.M.A., *Guides* was five percent.⁹ Multiplying the two together, the

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107; *see also James A. England*, 47 ECAB 115, 117 (1995).

⁵ A.M.A., *Guides*, (fourth edition 1993).

⁶ *Thomas L. Iverson*, 50 ECAB ____ (Docket No. 98-446, issued August 5, 1999); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁷ A.M.A., *Guides*, 46.

⁸ A.M.A., *Guides*, 48, Table 11.

⁹ A.M.A., *Guides*, 54, Table 15.

Office medical examiner determined that appellant suffered a three percent impairment for the right upper extremity.

The Board finds that as the Office medical adviser used appropriate rating procedures pursuant to the A.M.A., *Guides* and appellant has submitted no further medical evidence indicating that she had a greater degree of right upper extremity impairment, appellant has not established that she has more than a three percent permanent impairment of her right upper extremity.

The Board further finds that the Office did not, by its March 27, 1998 decision, abuse its discretion by refusing to reopen appellant's case for a review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,¹⁰ which provide that a claimant may obtain review of the merits of the claim by:

- “(i) Showing that the Office erroneously applied or interpreted a point of law, or
- “(ii) Advancing a point of law or a fact not previously considered by the Office, or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹¹

In support of his reconsideration request, appellant submitted a statement listing various areas of her life that were affected by her injury, including self-care, sleep and social and recreational activities. Appellant's statements that she was incapable of engaging in various activities does not demonstrate that the Office erred in granting of her schedule award, as schedule awards are based on the provision in the Act, which specify the specific number of weeks of compensation to be paid for permanent loss of use of various parts of the body. Appellant also submitted medical reports from Dr. Taylor, dated February 24, 1998, as well as medical reports previously of record. In the medical report, Dr. Taylor did not address the issue of whether appellant had more than a three percent permanent impairment to the right upper extremity, for which she received a schedule award. With regard to the resubmitted reports of Dr. Taylor, the Board finds that as these reports were previously submitted and reviewed by the Office, they do not constitute a basis for reopening a case. As the Board has held, material which is repetitious or duplicative of that already in the case record has no evidentiary value in

¹⁰ 20 C.F.R. § 10.138(b)(1).

¹¹ 20 C.F.R. § 10.138(b)(2).

establishing a claim and does not constitute a basis for reopening a case.¹² Accordingly, the Office properly denied reconsideration on the merits.

The Board also finds that the Office properly denied appellant's request for a review on the written record on the grounds that she previously requested reconsideration.

Section 8124(b)(1) of the Act provides that "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."¹³ Section 10.138 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.¹⁴ However, the implementing regulations provide that appellant is not entitled to a review of the written record if a request for reconsideration of the decision has been made prior to requesting review of the written record.¹⁵ Therefore, appellant has a choice of requesting reconsideration or requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and implementing regulations.

In *James W. Croake*,¹⁶ the Board found that the Office did not abuse its discretion in denying the employee's hearing request as the request for a hearing under section 8124 was not made until after the employee had sought reconsideration of his claim under section 8128. It was noted that the employee was not entitled to a hearing as a matter of right under section 8128. The Board also held that the Office did not abuse its discretionary authority by denying appellant's request for an oral hearing.

The circumstances of this case are similar to those in *Croake*. By letter dated March 17, 1998, appellant requested reconsideration. By letter dated March 18, 1998, appellant requested a review of the written record by the Office hearing representative. In its March 27, 1998 decision, the Office denied appellant's request for reconsideration. Thereafter, by decision dated May 8, 1998, the Office denied appellant's request for a written review of the record on the grounds that as appellant had previously requested reconsideration, she was not, as a matter of right, entitled to one.

In its March 4, 1998 decision, the Office advised appellant of her appeal rights, noting that "appellant may not request two forms of appeal at the same time" and that "if you have not requested reconsideration, you may instead request an examination of the written record by a hearing representative." Appellant chose to pursue reconsideration on March 17, 1998 instead of requesting a review of the written record. As appellant had been apprised of the appeal sequence

¹² *James A. England*, *supra* note 4 at 119.

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ 20 C.F.R. § 10.138.

¹⁵ 20 C.F.R. § 10.138(b).

¹⁶ 37 ECAB 219 (1985).

to follow if she desired a review of the written record and did not follow this sequence, it was not an abuse of discretion for the Office to refuse to grant a hearing.¹⁷

The Office acknowledged that as appellant had already requested reconsideration, there was no entitlement to a review on the written record, it could grant one within its discretion. The Office refused to grant such a review, reasoning that this case could equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered which establishes that the schedule award issued is incorrect. An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of the kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong, or action against logic.¹⁸ There is no evidence in the case record to establish the Office abused its discretion in refusing to grant a hearing.

The decisions of the Office of Workers' Compensation Programs dated May 8, March 27 and March 4, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 13, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

¹⁷ *Croake* at 223.

¹⁸ *Croake* at 223