

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHANDRA R. WARE-WILSON and U.S. POSTAL SERVICE,
NORA BRANCH POST OFFICE, Indianapolis, IN

*Docket No. 99-576; Submitted on the Record;
Issued May 24, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant established that she had a recurrence of disability beginning September 18, 1997 causally related to her accepted injury-related conditions; (2) whether appellant has more than a 10 percent permanent impairment of each arm; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On February 2, 1996 appellant, then a 33-year-old letter carrier, filed a claim for pain, numbness and tingling in both hands. In an April 20, 1996 statement, appellant indicated that she constantly cased mail or delivered mail and developed pain and numbness while performing these activities. In a March 29, 1996 report, Dr. Lewis R. Kinkead, a Board-certified plastic surgeon, diagnosed bilateral carpal tunnel syndrome and de Quervain's disease. He related appellant's conditions to her work as a letter carrier. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and de Quervain's disease. Appellant underwent surgery on her right arm on June 20, 1996 and on her left arm on November 14, 1996. Appellant stopped working on June 20, 1996 and returned to limited-duty work on August 1, 1996. She stopped again on November 14, 1996 and returned to limited-duty work on December 19, 1996. She received temporary total disability compensation for portions of those periods not covered by sick leave.

On October 7, 1997 appellant filed a claim for recurrence of disability effective September 18, 1997, the date she stopped working. In a November 28, 1997 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant was disabled beginning September 18, 1997 as a result of the accepted condition. In a July 17, 1998 decision, the Office issued a schedule award for a 10 percent permanent impairment of each arm for a total 20 percent bilateral permanent impairment of the arms. In an August 24, 1998 letter, appellant requested a hearing before an Office hearing representative. In a September 23, 1998 decision, the Office found that appellant was not entitled to a hearing as a matter of right because she had not requested a hearing within 30 days of the Office's decision.

The Office reviewed appellant's request on its own discretion and denied her request for a hearing on the grounds that the issue in her case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

The Board finds that appellant has not established that she had a recurrence of disability effective September 18, 1997.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

When appellant returned to work on December 19, 1996 her work restrictions were intermittent lifting and carrying of up to three pounds, no reaching above her shoulder or operating a motor vehicle, no overtime and a limitation of repetitive motion of the right elbow and left hand. On January 12, 1997, based on Dr. Kinkead's duty status report, appellant's restrictions were changed to sitting, standing and walking eight hours a day, with duties of answering the telephone and writing telephone notes. In a May 2, 1997 report, Dr. Robert S. Flint, II, a neurologist, indicated that appellant could lift less than five pounds, could not perform repetitive motions with her wrists and hands, could not perform repetitive reaching and should always use wrist splints while working. In a July 3, 1997 letter, the employing establishment indicated that appellant's work restrictions had been altered to be walking, standing and sitting eight hours a day. In a November 19, 1997 letter, appellant stated that her work activities after she returned to work in December 1996 consisted of answering the telephone, taking mail to another postal station, writing up certified mail and second notices of delivery attempts, writing messages for the letter carriers and supervisors, occasionally helping the window clerks and clearing the letter carriers when they returned to the station at the end of their deliveries. She contended that these activities were beyond her restrictions but she did them because she did not want to be considered a lazy employee. She stated that her pain became worse during this period.

Even though appellant contends that the nature of her limited duty changed to a point where the duties exceeded her limitations, appellant must establish through reliable, probative, substantive medical evidence that her recurrence of disability was due to the original employment injury, as affected by the change in her duties. In several progress reports from March 12 to September 15, 1997, Dr. Flint indicated that appellant continued to have pain, which he attributed to compression neuropathies in the arms. In an August 15, 1997 report, Dr. Daniel F. Cooper, a Board-certified neurosurgeon, indicated that an electromyogram (EMG) showed a mild compression neuropathy of the median nerve at the carpal tunnel bilaterally. In a September 18, 1997 duty status report, Dr. Flint stated that appellant was totally disabled because she could not use her hands in any occupation. He, however, did not give a rationalized,

¹ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

narrative report explaining how appellant's recurrence of disability was related to her original injury or was affected by any changes in her duties by the employing establishment. His reports, therefore, had limited probative value and are not sufficient to establish that appellant's recurrence of disability was causally related to her initial employment injury.

The Board also finds that appellant has no more than a 10 percent permanent impairment of each arm.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

In a March 27, 1998 report, Dr. Flint stated that appellant had a 13 percent permanent impairment. He indicated that he used tables from the A.M.A., *Guides* relating to grading of pain and loss of strength as applied to a table for permanent impairment of the arm due to sensory or motor deficits of the peripheral nerves.⁶ However, Dr. Flint did not describe how he used the tables to reach his determination that appellant had a 13 percent permanent impairment. Dr. Flint also did not specify whether appellant had a 13 percent permanent impairment for each arm or 13 percent permanent impairment for both arms considered together.

In a May 8, 1998 memorandum, an Office medical adviser reviewed the medical evidence of record and stated that appellant had a mild recurrent carpal tunnel syndrome of both arms. He concluded from the A.M.A., *Guides* that appellant had a 10 percent permanent impairment of each arm for a total 20 percent permanent impairment of the arms.⁷ The portion of the A.M.A., *Guides* used by the Office medical adviser provide for a 10 percent permanent impairment of the arm for mild entrapment neuropathy of the median nerve at the wrist. As the Office medical adviser properly used the A.M.A., *Guides* and provided an explanation on how

² 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.304.

⁴ (4th ed. 1993).

⁵ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

⁶ A.M.A., *Guides*, pp. 34, 151, Tables 15, 20 and 21.

⁷ *Id.* at p. 57, Table 16.

he used the A.M.A., *Guides* to reach his calculation, the Office properly used his estimate of appellant's permanent impairment as the basis for the schedule award.⁸

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 Act⁹ 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 her 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."¹⁰ In this case, the Office issued its decision on appellant's schedule award on July 17, 1998. Appellant did not request a hearing until her August 24, 1998 letter, which was more than 30 days after the Office's decision. Appellant, therefore, is not entitled to a hearing as a matter of right.

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 denied appellant's request for a hearing because she could request reconsideration and submit additional evidence not previously considered. 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.¹¹ There is no evidence that the Office abused its discretion in this case.

⁸ See *Kenneth D. Loney*, 47 ECAB 660 (1996).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs, dated September 23 and July 17, 1998 and November 28, 1997, are hereby affirmed.

Dated, Washington, D.C.
May 24, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member