U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN E. WALTERS and DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION CENTER, Stockton, CA

Docket No. 99-876; Submitted on the Record;
Issued November 17, 2000

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has greater than a 34 percent permanent impairment of her right upper extremity, for which she has received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

The Office of Workers' Compensation Programs accepted that on March 5, 1996 appellant, then a 52-year-old supply clerk/technician, sustained right shoulder and right wrist sprains while pulling open a warehouse door. Appellant had had prior claims for the right upper extremity injury accepted in 1984, 1989 and 1993 and had filed claims for other right upper extremity injuries in 1985 and 1989.

On September 10, 1991 the Office granted appellant a schedule award for a 34 percent impairment of her right upper extremity for the period October 19, 1990 to October 30, 1992 for a total of 106.08 weeks of compensation. This award was based on appellant's right upper extremity losses in range of motion, atrophy, a resection arthroplasty, weakness and pain.

On September 30, 1997 the Office acknowledged receipt of appellant's request for a further schedule award supporting medical reports. By report dated January 17, 1997, Dr. Robert R. Slater, a Board-certified orthopedic surgeon specializing in the hands and upper extremities, diagnosed right cubital tunnel syndrome, right shoulder tendinitis and wrist pain. Dr. Slater noted that the most bothersome symptomatology at that time was the right cubital tunnel syndrome and indicated that appellant was scheduled for a right cubital tunnel and ulnar nerve decompression at the elbow on March 3, 1997.

The Office thereafter referred appellant for a second opinion evaluation to Dr. Craig A. Bottke, an orthopedic surgeon, who, by report dated March 11, 1997, reviewed appellant's

history, examined her and diagnosed "right cubital tunnel syndrome [and] right upper extremity multifocal myofascitis possibly secondary to a repetitive use type syndrome." Dr. Bottke opined:

> "These symptoms appear to have been initiated by the pulling injury to her arm at work on March 5, 1996. The repetitive use of her arm at work most likely also contributes to her symptoms."

By report dated April 22, 1997, Dr. Bottke noted that appellant's examination was unchanged and he diagnosed "Chronic symptoms of right upper extremity overuse syndrome with multi-focal myofascitis, [and] mild right cubital tunnel syndrome." He opined that this condition was permanent and stationary.

By report dated May 13, 1997, Dr. Bottke opined that there was evidence of residual permanent disability, with subjective factors including slight to moderate intermittent pain in the right upper extremity, especially at the medial elbow and the objective factor of slight to moderate weakness of grip with the right hand when compared to the left.

On September 30, 1997 the Office acknowledged receipt of appellant's claim for an additional schedule award and it requested that Dr. Bottke provide an estimate of appellant's permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a November 17, 1997 response, Dr. Bottke stated that he did not perform evaluations involving specific disability ratings.

On February 24, 1998 the Office referred appellant for a second opinion evaluation to determine the degree of appellant's permanent impairment. It attached a statement of accepted facts which noted that appellant's accepted conditions were right shoulder strain and right wrist strain.

By report dated March 28, 1998, Dr. Gerald Barnes reviewed appellant's history and the statement of accepted facts, examined appellant, noted her complaints of elbow symptomatology and noted a loss in grip strength, and opined that, based upon Table 34, page 65 of the A.M.A., *Guides*, which addressed upper extremity impairment for loss of strength, she had a 20 percent upper extremity impairment.

On May 13, 1998 an Office medical adviser reviewed Dr. Barnes' report and calculated that appellant had a 28 percent impairment of the right upper extremity, based upon the diagnoses of right shoulder and right wrist strain, right cubital tunnel syndrome at the elbow and a 1989 rotator cuff repair. The Office medical adviser took the 20 percent impairment for loss of grip strength and combined that impairment with a 10 percent impairment for ulnar neuropathy at the elbow, resulting in a 28 percent permanent impairment of the right upper extremity.

By decision dated May 26, 1998, the Office denied appellant's request for an additional schedule award, finding that she had already received a schedule award for a 34 percent permanent impairment of the right upper extremity and that, since her current evaluation demonstrated only a 28 percent permanent impairment, she was not entitled to any further award, as no additional impairment had been demonstrated.

By letter dated October 10, 1998, appellant requested an oral hearing.

By decision dated December 7, 1998, the Branch of Hearings and Review noted that the hearing request was untimely and denied the request on the basis that the matter could be equally well addressed by appellant requesting reconsideration from the Office and by submission of further probative medical evidence.

The Board finds that appellant has no greater than a 34 percent permanent impairment of her right upper extremity, for which she has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides,* fourth edition (1993) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[4]

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[5] Chapter 3.1h-j of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the upper extremity due to pain, discomfort and loss of sensation or strength.[6]

In this case, appellant was compensated for her loss in range of shoulder motion, right upper extremity atrophy, weakness and pain, all due to the accepted conditions of right shoulder and wrist sprains. Dr. Bottke identified the additional conditions of right cubital tunnel syndrome and right upper extremity multifocal myofascitis possibly secondary to a repetitive use type syndrome, but neither of these conditions has been accepted by the Office as causally

[1] 5 U.S.C § 8101 *et seq.*; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *James J. Hjort,* 45 ECAB 595 (1994); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[5] *See Paul A. Toms*, 28 ECAB 403 (1987).

[6] A.M.A., *Guides*, Tables 17-34, pp. 57-65 (4th ed. 1993).

related to the March 5, 1996 or to the shoulder and wrist sprain. Therefore, appellant is not now entitled to a schedule award for these conditions.[7]

Dr. Barnes opined that appellant had a 20 percent right upper extremity impairment due to loss of strength and the Office medical adviser agreed that this impairment was due to weakness, however, because appellant has already received a schedule award for a 34 percent impairment of her right upper extremity due, in part, to weakness, she is not entitled to any further award.

Although the Office medical adviser opined that appellant had a 10 percent additional impairment due to ulnar neuropathy at the elbow, his opinion cannot be accepted as evidence of further impairment because ulnar neuropathy at the elbow has not been accepted by the Office as being causally related to the March 5, 1996 door opening injury, appellant is not now entitled to any schedule award for this condition.

As the evidence of record supports that appellant presently has no greater than a 20 percent permanent impairment of her right upper extremity, causally related to her March 6, 1997 accepted conditions of right shoulder and wrist sprains, she has not demonstrated that she is entitled to more than the 34 percent schedule award which she had been previously granted.

Further, the Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

> "Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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 Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to

[7] The Board notes that these conditions were first diagnosed by Dr. Bottke in March 1997, more than one year after the employment incident and were erroneously annotated as accepted conditions by the Office referral nurse. Further, Dr. Bottke's opinion on the causal relation of these conditions to the accepted March 6, 1997 employment incident is speculative and unrationalized. In addition, Dr. Bottke relates them in part to a different causative factor, repetitive use. Consequently, Dr. Bottke's opinion is insufficient to establish any causal relationship with appellant's March 6, 1997 employment incident.

[8] 5 U.S.C. § 8124(b)(1).

5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[9]

The Board has held that 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 such hearings and must exercise this discretionary authority in deciding whether to grant a hearing.[10] 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 for a hearing,[11] when the request is made after the 30-day period for requesting a hearing[12] and when the request is for a second hearing on the same issue.[13] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[14] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[15]

In this case, the Office issued its most recent merit decision denying appellant's claim on May 26, 1998. Appellant formally requested an oral hearing in a letter dated October 10, 1998.[16] A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[17] Since appellant did not request a hearing within 30 days of the Office's May 26, 1998 decision she was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its December 7, 1998 decision and denied the request on the basis that appellant could equally well pursue her claim by requesting reconsideration and submitting additional evidence supporting that she has more than a 34 percent permanent impairment of her right upper extremity.

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[9] 20 C.F.R. § 10.131(a).

[10] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[11] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[12] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[13] *Johnny S. Henderson*, *supra* note 10.

[14] *Id.*; *Rudolph Bermann*, *supra* note 11.

[15] *See Herbert C. Holley*, *supra* note 12.

[16] Although the Office indicated that appellant initially requested an oral hearing by letter postmarked June 26, 1998, the Board notes that the letter from appellant dated June 24, 1998 does not request a hearing but instead asks for information and assistance regarding diagnoses, impairments and causal relation which had not been proven. This cannot be considered to be a request for an oral hearing.

[17] 20 C.F.R. § 10.131(a).

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.[18] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated December 7 and May 26, 1998 are hereby affirmed.

Dated, Washington, DC
November 17, 2000

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).