

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEPHEN N. JONES and U.S. POSTAL SERVICE,  
POST OFFICE, Medford, OR

*Docket No. 01-1438; Submitted on the Record;  
Issued April 17, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a 10 percent impairment of the right arm; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's hearing request as it was not timely filed.

The Office accepted that appellant sustained an injury to his right shoulder on November 27, 1996. The Office subsequently accepted right shoulder strain, right shoulder chronic bursitis and tendinitis and torn right rotator cuff and surgeries performed on May 26, 1998 and April 13, 1999. The Office paid appropriate medical and compensation benefits.

In a report dated January 5, 2000, Dr. Alan J. Webb, appellant's treating orthopedic surgeon, noted his continued symptoms of bilateral shoulder pain and noted also that he had essentially full range of motion of both shoulders. Dr. Webb returned appellant to duty with restrictions and released him from further medical care.

In a letter dated June 7, 2000, the Office advised appellant that, once he had reached maximum medical improvement, he was responsible for furnishing a physician's report, which would establish that he had a permanent impairment to his right arm as a result of his November 27, 1996 work-related injury. Appellant was advised that the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993), was the standard reference for rating purposes.

In a report dated July 11, 2000, Dr. Ruth Lowengart, Board-certified in occupational and internal medicine as well as preventive medicine, evaluated appellant that day and noted range of motion findings for the right and left shoulders.<sup>1</sup>

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<sup>1</sup> The Office accepted a left shoulder injury as well. However, that claim was not doubled with this claim and is not before the Board.

In a report dated August 25, 2000, Dr. David O. Wilson, an Office medical adviser and a Board-certified orthopedic surgeon, reviewed the statement of accepted facts and the medical evidence of record, including the current rating examination of July 11, 2000, by Dr. Lowengart. He determined that appellant had a 10 percent right shoulder impairment and a 10 percent left shoulder impairment. Dr. Wilson reported the following range of motion findings based on Dr. Lowengart's examination: flexion of the right shoulder was 138 degrees, a 3 percent impairment; extension of the right shoulder was 54 degrees, representing 0 impairment; abduction of the right shoulder was 100 degrees, 4 percent impairment; adduction of the right shoulder was 40 degrees, representing 0 impairment; internal rotation of the right shoulder was 56 degrees; and a 2 percent impairment; and external rotation of the right shoulder was 54 degrees, a 1 percent impairment. The total impairment for the right shoulder joint were added to find a 10 percent impairment based on loss of range of motion.

By decision dated September 19, 2000, the Office granted appellant a schedule award for 10 percent impairment of the right upper extremity.

By letter dated October 31, 2000, appellant requested an oral hearing.

By decision dated January 20, 2001, the Office found that appellant was not entitled to a hearing as a matter of right as his request was not made within 30 days of the September 19, 2000 decision. The Office further considered the matter and denied a discretionary hearing because appellant could further pursue his claim by submitting new evidence with a reconsideration request.

The Board finds that appellant has no greater than a 10 percent impairment to his right arm which the Office had granted previously.

The schedule award provisions of the Federal Employees' Compensation Act<sup>2</sup> provide for compensation to employees sustaining impairment from loss, or loss of use of, specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter, which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>3</sup>

Dr. Lowengart, appellant's treating physician, evaluated the range of motion of both shoulders, made appropriate findings and related appellant's right shoulder condition to his work-related injury. However, the physician did not explain these ratings based on the A.M.A., *Guides*. Board cases are clear that if the attending physician does not utilize the A.M.A., *Guides*,

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *John L. McClenic*, 48 ECAB 552 (1997).

his opinion is of diminished probative value in establishing the degree of any permanent impairment.<sup>4</sup>

Dr. Wilson, the Office medical adviser, relied on Dr. Lowengart's reported findings to assess the degree of permanent impairment of appellant's right upper extremity. As noted above, he properly applied the A.M.A., *Guides* to determine impairment of the shoulder joint based on loss of range of motion.<sup>5</sup> Dr. Wilson applied the A.M.A., *Guides* to calculate a 10 percent impairment of the right shoulder.

Board precedent is well settled that, when an attending physician's report gives an estimate of permanent impairment but does not base the estimate upon proper application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he has properly utilized the A.M.A., *Guides*.<sup>6</sup> In the instant case, the Office medical adviser properly utilized the A.M.A., *Guides* and explained which tables and pages he relied upon in calculating the degree of appellant's permanent impairment.

The medical evidence does not establish more than 10 percent impairment of the right upper extremity.

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

Section 8124(b)(1) of the Act provides a claimant with the right to a hearing on his claim on request made within 30 days after the date of issuance of the decision.<sup>7</sup> As the Board has pointed out, this section is unequivocal in setting forth the time limitation on requests for hearings.<sup>8</sup>

In the present case, appellant's October 31, 2000 letter requesting a hearing was filed more than 30 days after the September 19, 2000 Office decision. His request was not timely made and he, therefore, had no right to a hearing.

Even though appellant has no right to a hearing if not requested within 30 days, the Office must exercise its discretion in either granting or denying a late request for a hearing.<sup>9</sup>

The Office, in its January 20, 2001 decision, properly exercised its discretion in denying appellant's request for a hearing. The Office considered the matter and determined that any evidence not previously considered could be submitted, together with a request for

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<sup>4</sup> *Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

<sup>5</sup> See A.M.A., *Guides* 43, Figure 38; 44, Figure 41, 45; Figure 44.

<sup>6</sup> *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone* 31 ECAB 846 (1980).

<sup>7</sup> 5 U.S.C. § 8124 (b)(1).

<sup>8</sup> *Clyde Bovender*, 32 ECAB 1883 (1981).

<sup>9</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

reconsideration, to the Office. Consequently, the Office properly denied appellant's request for a hearing.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 20, 2001 and September 19, 2000 are hereby affirmed.

Dated, Washington, DC  
April 17, 2002

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member