U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILTON LINDSEY and U.S. POSTAL SERVICE,
MARINA PROCESSING & DISTRIBUTION CENTER,
Inglewood, CA

Docket No. 02-907; Submitted on the Record;
Issued August 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to more than a six percent permanent impairment for his right upper extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly determined that he abandoned his request for an oral hearing.

On July 16, 1990 appellant, then a 33-year-old mailhandler, filed a traumatic injury claim alleging that on July 13, 1990 he hurt his back and right shoulder while working a meter belt. He stated that the reaching and bending caused something to pull in his back aggravating his back and right shoulder. Appellant further stated that he was required to work outside his light-duty physical restrictions by his supervisor, Jerry Vinson.

The Office accepted appellant's claim for thoracic and right shoulder strains.

On April 28, 1993 appellant filed a claim for a schedule award.

In a June 12, 1995 decision, the Office granted appellant a schedule award for a six percent permanent impairment for the loss of use of the right arm. By letter dated June 30, 1997, he requested reconsideration of the Office's decision.

In a decision dated July 31, 1997, the Office denied appellant's June 30, 1997 request for reconsideration of his schedule award on the grounds that it was untimely filed and failed to establish clear evidence of error. Appellant appealed the Office's January 23 and July 31, 1997 decisions to the Board.

By decision dated August 12, 1999, the Board affirmed the Office's decisions.[1]

[1] Docket No. 98-35 (issued August 12, 1999).

On March 5, 2001 appellant filed another claim for a schedule award.

By letter dated March 30, 2001, the Office referred appellant to Dr. H. Harlan Bleecker, a Board-certified orthopedic surgeon, for a second opinion examination to determine *inter alia*, whether appellant had any permanent impairment. Dr. Bleecker submitted an April 12, 2001 report finding that appellant had no permanent impairment.

On May 15, 2001 an Office medical adviser reviewed appellant's medical records including, Dr. Bleecker's report and determined that he had a three percent permanent impairment of the right upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated May 16, 2001, the Office found the evidence of record insufficient to establish that appellant was entitled to more than a six percent permanent impairment for his right upper extremity, for which he received a schedule award.

In a June 8, 2001 letter, appellant requested an oral hearing before an Office hearing representative, which was scheduled for December 11, 2001.

In a December 20, 2001 decision, the Office found that appellant abandoned the hearing.

The Board has reviewed the case record in this appeal and finds that appellant is not entitled to more than a six percent permanent impairment for his right upper extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 of loss of use.[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 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* has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[5]

In his April 12, 2001 report, Dr. Bleecker provided a history of appellant's July 13, 1990 employment injury, employment, family background and medical treatment. He noted his findings on physical examination and opined that there was no current diagnosis for appellant's right shoulder or thoracic area. Dr. Bleecker stated contrary to appellant's complaint that his

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

right shoulder continued to bother him; there were no objective findings present regarding his shoulder. Regarding the extent of permanent impairment, he opined that there was no sensory loss, atrophy, apparent weakness and additional factors such as, reflex sympathetic dystrophy. Dr. Bleecker further opined athat ppellant had normal range of motion in both shoulders, although the right shoulder attained range of motion much more slowly than the left shoulder. He concluded that appellant was permanent and stationary as of 1995. In an accompanying work capacity evaluation, Dr. Bleecker noted appellant's physical restrictions.

In reviewing appellant's medical records and Dr. Bleecker's report, the Office medical adviser noted that appellant's schedule award for a six percent permanent impairment of the right upper extremity was based on pain factors. She opined that he had no impairment due to loss of range of motion or strength. Dr. Bleecker determined that appellant's impairment due to sensory deficit or pain was 25 percent based on Table 16-10, page 482 of the fifth edition of the A.M.A., *Guides*. Using Table 16-15, page 492, the Office medical adviser determined that maximum impairment based on the axillary and suprascapular nerves was 10 percent. Multiplying 25 percent by 10 percent, the Office medical adviser determined that appellant had a 3 percent permanent impairment of the right upper extremity and the date of maximum medical improvement was January 3, 1995.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had a three percent permanent impairment of the right upper extremity. As appellant has no more than a six percent impairment of the right impairment for which he received a schedule award, the Office properly denied appellant's claim for an additional schedule award.

The Board further finds that the Office properly determined that appellant abandoned his request for an oral hearing.

In finding that appellant abandoned his June 8, 2001 request for an oral hearing before an Office hearing representative, the Office noted that the hearing was scheduled for December 11, 2001, that appellant received written notification of the hearing 30 days in advance, that he failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

The legal authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
>
> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
>
> "Under these circumstances, Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district office]. In cases involving prerecoupment

hearings, hearings and review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district office.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, district office should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if district office can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[6]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place. The record shows that the Office mailed appropriate notice to appellant's last known address. The record also supports that he did not request postponement, that appellant failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The December 20 and May 16, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 15, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).