U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVESTER W. JONES and U.S. POSTAL SERVICE, POST OFFICE, Petersburg, VA

Docket No. 01-1505; Submitted on the Record; Issued January 25, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant has any permanent impairment of his left foot for which he should receive a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On October 20, 1998 appellant, then a 46-year-old letter carrier, filed an occupational disease claim alleging that on April 27, 1998 he first realized that his calcaneal spur with bursitis on the left foot was caused by factors of his federal employment.

By letter dated November 9, 1998, the Office accepted appellant's claim for left foot calcaneal spur with bursitis.

On February 23, 2000 appellant filed a claim for a schedule award. Appellant's claim was accompanied by an attending physician's report from Dr. John W. Van Manen, a Board-certified orthopedic surgeon, who indicated that appellant had plantar fasciitis that was caused by his April 27, 1998 employment injury.

In a March 16, 2000 letter, the Office requested that Dr. Van Manen estimate the extent of any permanent impairment of appellant's ankle/foot due to the April 27, 1998 employment injury based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a letter dated April 13, 2000, the Office advised appellant that it had not received the requested medical evidence and thus his case was closed. The Office advised appellant that his claim for a schedule award would be reconsidered if he submitted the necessary documents.

Dr. Van Manen submitted a May 5, 2000 report indicating that he had been treating appellant for chronic plantar fasciitis. He stated that appellant had reached maximum medical improvement at that time if he did not wish to pursue surgical intervention. Dr. Van Manen noted that appellant's condition had improved, but that he could not return to the extreme activities of a walking mail carrier. Also, he noted that appellant's objective findings included

an exostosis on the plantar heel with exquisite tenderness well localized to the origin of the plantar fascia. Dr. Van Manen stated that the percentage of appellant's impairment was based on his gait derangement as none of the other factors for rating appellant's problems directly applied to him. Using Table 36 of the A.M.A., *Guides*, Dr. Van Manen determined that appellant's gait derangement was mild and fell in the category "a," which indicated antalgic limp with short stance phase. Further, he determined that this constituted a 7 percent whole person impairment, corresponding to a 17 impairment of the left extremity.

On June 15, 2000 an Office medical adviser reviewed Dr. Van Manen's report. The Office medical adviser stated that the fourth edition of the A.M.A., *Guides* did not provide a basis for a rating because there was no loss of motion, no diminished muscle function and no neurologic impairment. Also, the Office medical adviser stated that the companion to the fourth edition stated that once the offending agent had been removed and the patient was functioning normally, no impairment existed. Further, the Office medical adviser stated that Dr. Van Manen only provided a whole person impairment rating, which was not accepted by the Office, rather than an impairment rating for the lower extremity.

The Office requested that the Office medical adviser review his findings noting that Dr. Van Manen converted his whole person impairment rating to a 17 percent impairment of the lower extremity. In response, the Office medical adviser stated that any award would have to be as a percent of the foot and not the leg because the diagnosis was confined to the foot. The Office medical adviser further stated that Table 36 did not apply due to the absence of arthritis and that the heel spur/exostosis was not arthritis.

By decision dated July 20, 2000, the Office found the evidence of record insufficient to establish that appellant had any permanent impairment of his left foot as a result of the April 27, 1998 employment injury. In an August 19, 2000 letter, postmarked August 23, 2000, appellant requested an oral hearing.

By decision dated October 5, 2000, the Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.[1]

In an April 6, 2001 letter, the Office advised appellant that it would reissue its October 5, 2000 decision on that date because the original decision had been returned to its office noting it was mailed to the wrong address.

By decision dated April 6, 2001, the Office again denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to section 8124 of the Act.

The Board has duly reviewed the case record and finds that appellant does not have any permanent impairment of his left foot for which he should receive a schedule award.

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[1] 5 U.S.C. §§ 8101-8193.

The schedule award provision of the Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of the schedule members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates 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 implementing regulation as the appropriate standard for evaluating schedule losses.

In support of his claim for a schedule award, appellant submitted Dr. Van Manen's May 5, 2000 report finding that he had a 17 percent impairment of the lower extremity based on his gait derangement. In so doing, Dr. Van Manen utilized Table 36 of the A.M.A., *Guides*. However, as noted by the Office medical adviser, this table requires a finding of arthritic changes of the hip, knee or ankle, which was not made by Dr. Van Manen. As Dr. Van Manen's evaluation does not conform to the A.M.A., *Guides*, it is entitled to little weight.[4]

In finding that appellant did not have any impairment of the left foot based on the A.M.A., *Guides*, the Office medical adviser explained that there was no loss of motion, no diminished muscle function and no neurologic impairment. The Board finds that the Office medical adviser's opinion constitutes the weight of the evidence.[5]

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

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."[6] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[7]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[8] Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.[9]

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Annette M. Dent*, 44 ECAB 403 (1993).

[5] *Lena P. Huntley*, 46 ECAB 643 (1995).

[6] 5 U.S.C. § 8124(b)(1).

[7] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

[8] *Tammy J. Kenow*, 44 ECAB 619 (1993).

[9] *Id.*

In this case, the Office issued its decision on July 20, 2000. In a letter dated August 19, 2000, but postmarked August 23, 2000, appellant requested a hearing. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

The April 6, 2001 and July 20, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member