U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY R. MONTGOMERY and DEPARTMENT OF THE JUSTICE, BUREAU OF PRISONS, Marion, IL

Docket No. 02-429; Submitted on the Record;
Issued June 21, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 14 percent permanent impairment to his right leg; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On May 4, 1999 appellant, then a 47-year-old supervisor, filed a traumatic injury claim alleging that on that date he sustained a right knee injury when he twisted and fell while in the performance of duty. The Office accepted the claim for right knee strain/sprain, osteochondral fracture and tears of the anterior cruciate ligament and medial collateral ligament. On July 9, 1999 appellant underwent arthroscopic knee surgery. The surgeon, Dr. Thomas Davis, found a tear of the anterior horn of the medial meniscus and performed a partial medial meniscectomy. He also noted that the medial femoral condyle was intact with no evidence of loose osteochondral fracture fragments and both cruciate ligaments were intact.

In a decision dated January 23, 2001, the Office issued a schedule award for a 14 percent permanent impairment to the right leg. By letter dated March 21, 2001, appellant requested an oral hearing on his claim.

In a decision dated May 3, 2001, the Office determined that appellant's request was untimely and, therefore, he was not entitled to a hearing as a matter of right. The Office exercised its discretionary authority and denied a hearing on the grounds that the issues could be addressed by the submission of new evidence pursuant to a reconsideration request.

The Board finds that the record does not establish more than a 14 percent permanent impairment to the right leg.

The schedule award provisions of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled 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 to 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 American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, Dr. Davis submitted a form report (CA-20), dated August 17, 2000, diagnosing degenerative arthritis changes and stating that appellant has an 18 percent disability with respect to his right knee. In an undated Form CA-1303 report, he reported 135 degrees of knee flexion and 3 degrees of extension; he reported an 18 percent impairment due to weakness, atrophy, pain or discomfort.

On appeal appellant states that he did not receive an explanation as to why his schedule award was issued for 14 percent, rather than the 18 percent reported by Dr. Davis. A schedule award is based on application of the A.M.A., *Guides*, to the relevant medical evidence regarding an employment-related permanent impairment. Dr. Davis does not provide any indication as to how he calculated an 18 percent impairment.[3] The only medical evidence applying the A.M.A., *Guides* is a November 20, 2000 report from an Office medical adviser. The medical adviser indicated that he reviewed the medical evidence of record with respect to appellant's knee condition. Based on the range of motion reported by Dr. Davis, the medical adviser properly indicated under Table 41 of the A.M.A., *Guides*, no impairment is found.[4] With respect to muscle weakness, the medical adviser graded appellant's muscle function at Grade 4 under Table 38 for "active movement against gravity with some resistance."[5] The medical adviser then found that under Table 39, a Grade 4 impairment for the knee resulted in a 12 percent impairment to the leg.[6]

In addition, the 12 percent impairment for muscle weakness was combined with a 2 percent impairment for a partial meniscectomy, pursuant to Table 64, for a 14 percent

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] Dr. Davis may have relied on an August 31, 2000 functional capacity evaluation that reported an 18 percent functional strength deficit. This calculation was not based on the A.M.A., *Guides*.

[4] A.M.A., *Guides* (4th ed. rev.) 78, Table 41.

[5] *Id.* at 77 Table 38.

[6] *Id.* at 77 Table 39.

impairment.[7] There is no other probative medical evidence of record supporting an additional permanent impairment under the A.M.A., *Guides.* The Board accordingly finds that appellant has not established more than a 14 percent permanent impairment to the right leg in this case.

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

Section 8124(b)(1) of the Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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."[8]

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.[9] Appellant's request for a hearing was dated March 21, 2001. As this is more than 30 days after the January 23, 2001 Office decision, it is untimely.

The Board has held that the Office, in its broad discretionary authority to administer the Act, has power to hold hearings in circumstances where no legal provision is made for such hearings and the Office must exercise its discretion in such circumstances.[10]

In this case, the Office advised appellant that he could submit additional relevant evidence on the issue through the reconsideration process. This is considered a proper exercise of the Office's discretionary authority.[11] The Board finds no abuse of the Office's discretionary authority in this case.

[7] The A.M.A., *Guides* indicate that Table 64 represents an alternate method of estimating impairment based on a diagnosis, rather than findings on examination and is generally not to be combined with examination criteria, such as in Table 39. *Id.* at 84. Since application of Table 64 results in an additional impairment to appellant, it is not an adverse determination.

[8] 5 U.S.C. § 8124(b)(1).

[9] *See William F. Osborne*, 46 ECAB 198 (1994).

[10] *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann,* 26 ECAB 354 (1975).

[11] *See Mary E. Hite*, 42 ECAB 641, 647 (1991).

The decisions of the Office of Workers' Compensation Programs dated May 3 and January 23, 2001 are affirmed.

Dated, Washington, DC
June 21, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member