U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMA J. GIAQUINTA and DEPARTMENT OF THE NAVY, NAVAL STATION MEDICAL CLINIC, San Diego, CA

Docket No. 01-1084; Submitted on the Record;
Issued March 25, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant is entitled to more than a 19 percent permanent impairment for her left lower extremity, for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record as untimely.

On May 21, 1991 appellant, then a 45-year-old secretary, filed a traumatic injury claim alleging that on that date she sustained a Grade I sprain of the left ankle while walking.

The Office accepted appellant's claim for a sprained left ankle with arthroscopic debridement and consequential left ankle osteoarthritis, osteochondral defect of the left ankle and right carpal tunnel syndrome and release.

On July 11, 2000 appellant filed a claim for a schedule award.

By decision dated September 12, 2000, the Office granted appellant a schedule award for a 19 percent permanent impairment for her left lower extremity. In a December 1, 2000 letter, appellant requested reconsideration and a review of the written record.

In a February 13, 2001 decision, the Office denied appellant's request for a review of the written record as untimely.

The Board has duly reviewed the case record and finds that appellant is not entitled to more than a 19 percent permanent impairment for her left lower extremity, for which she received a schedule award.

The schedule award provisions 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 of loss of use.[3] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[4]

In an April 11, 2000 report, Dr. Steven N. Copp, a Board-certified orthopedic surgeon and appellant's treating physician, submitted his findings relative to his evaluation of appellant.

On August 19, 2000 an Office medical adviser, after reviewing appellant's medical records, including Dr. Copp's report, determined:

> "Subjective complaints documented on the April 11, 2000 report indicate pain that prevents activities that would be graded quite high as per the … Grading Scheme (Table 11) found in [C]hapter 3, fourth edition of the [A.M.A.,] *Guides*. This would be pain and/or altered sensation that prevents activities, or an 80 percent grade of a maximal 10 percent (branches of the common peroneal nerve 5 percent, and branches of the sural nerve 5 percent),[5] equivalent to an 8 percent impairment for pain factors. Records describe motor function to be 5/5 with no loss, for a 0 percent impairment. Records state that there was no loss of ankle motion and no loss of subtalar motion, for a zero percent impairment.
>
> "The only other factor to mention was that roentgenographs obtained on March 27, 2000 are reported to reveal loss of the medial column alignment of the foot, with a break in the mid-foot alignment at the naviculocuneiform articulation, with an 'increase in heel valgus on the left versus the right.' Table 44 allows for a 12 percent impairment for 'Mild' impairment for valgus of 10 [to] 20 degrees at the hind foot. Although the valgus is not quantified, this reviewer would recommend assessing this value. Utilizing the Combined Values Chart, the 8 percent impairment for pain factors, combined with the 12 percent impairment for heel valgus, combined with the 0 percent for loss of motion, combined with the 0

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8107(c)(19).

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

[5] The Board notes that it appears that the Office medical adviser utilized Table 68, page 89 of the fourth edition of the A.M.A., *Guides* in determining that appellant had a 10 percent impairment from nerve deficits.

percent for atrophy/weakness would be equivalent to a 19 percent impairment of the left lower extremity or leg. Date of maximum medical improvement would have been reached by March 27, 2000, close to two years following the second operative procedure."

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in determining that appellant had a 19 percent permanent impairment of the left lower extremity.

The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision. The Office's regulations expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office provided that such review of the written record is also subject to the same requirement that the request must be made within 30 days of the Office's final decision.[6]

The Office merit decision granting appellant a schedule award for a 19 percent permanent impairment of her left lower extremity in this case was dated September 12, 2000. Appellant's request for a review of the written record is dated December 1, 2000, which is more than 30 days after the merit decision. It is therefore untimely and appellant is not entitled to review of the written record as a matter of right.

Although appellant's request for a review of the written record was untimely, the Office has discretionary authority with respect to granting the request and the Office must exercise such discretion.[7] In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office's discretionary authority.[8] There is no evidence of an abuse of discretion in this case.[9]

[6] 20 C.F.R. §§ 10.615-10.616 (1999); *Michael J. Welsh*, 40 ECAB 994 (1989).

[7] *See Cora L. Falcon*, 43 ECAB 915 (1992).

[8] *Id.*

[9] The Board notes that the Office did not act upon appellant's request for reconsideration. Thus, the case record will be returned to the Office to act upon appellant's request for reconsideration of the Office's decision denying appellant's claim for an additional schedule award.

The February 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 25, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member