

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DORIS S. SMITH and U.S. POSTAL SERVICE, DELAWARE  
PROCESSING & DISTRIBUTION CENTER, New Castle, DE

*Docket No. 03-900; Submitted on the Record;  
Issued July 1, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 10 percent impairment of both (each) lower extremities, for which she received schedule awards; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On January 26, 1999 the Office accepted that appellant, then a 57-year-old registry clerk, sustained employment-related bilateral plantar fasciitis, aggravation of right heel spurs, and heel spur syndrome. In March and May 1999, appellant underwent fasciotomies of the left and right feet, respectively. On July 26, 2001 she underwent authorized tarsal tunnel decompression and fasciotomy with heel spur resection on the right. On November 5, 2001 she returned to sedentary duty for four hours per day. The record indicates that she elected retirement under the Office of Personnel Management on February 1, 2002 and on that same day she filed a claim for a schedule award.

By letter dated March 28, 2002, the Office informed appellant that she needed to have her treating podiatrist evaluate her lower extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. In a report dated May 3, 2002, Dr. Richard J. Conti, evaluated appellant's lower extremities and in a report dated June 6, 2002, an Office medical adviser reviewed this report. By decision dated June 17, 2002, appellant was granted a schedule award for a 20 percent permanent impairment of both lower extremities, for a total of 403.20 days of compensation, to run from May 3, 2002 to June 10, 2003.

In a letter dated July 11, 2002, appellant stated that she was "writing in reference to make a claim to continue my compensation. The disability I have prevents me from performing my job and receiving my wages due to my lifetime disability." She attached a July 11, 2002 report from Dr. Conti. Appellant forwarded the same letter to the Branch of Hearings and Review, postmarked July 31, 2002. By decision dated January 29, 2003, an Office hearing representative

denied appellant's hearing request on the grounds that it was untimely filed. The instant appeal follows.

The Board finds that appellant has no greater than a 10 percent impairment of the left lower extremity and a 10 percent impairment of the right lower extremity, for which she received schedule awards.

The schedule award provisions of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> 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. The Act, however, 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 A.M.A., *Guides*<sup>3</sup> has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

The relevant medical evidence includes a May 3, 2002 report in which appellant's treating podiatrist, Dr. Conti, evaluated her lower extremities under the fifth edition of the A.M.A., *Guides*. He advised that he used a diagnosis based estimate under Table 17-33 to evaluate her bilateral plantar fasciitis, finding that mild ligamentous instability equaled a five percent impairment for each foot. Dr. Conti then evaluated her tarsal tunnel syndrome due to nerve deficit under Table 17-37, to find that this equaled a 5 percent impairment for each foot with a total impairment of 10 percent for each lower extremity. In a report dated June 6, 2002, an Office medical adviser reviewed Dr. Conti's report and, utilizing the fifth edition of the A.M.A., *Guides*, concurred with his findings. The Office medical adviser found that maximum medical improvement had been reached on May 3, 2002, the date of Dr. Conti's report and noted that, under Table 17-2, the impairment values found under the two tables could be added to determine total impairment.

In this case, the Board finds that Dr. Conti, whose opinion was supported by the Office medical adviser, properly determined that appellant had a 10 percent impairment of each lower extremity. Section 17.2j of the A.M.A., *Guides* provides that diagnosis-based estimates can be utilized to evaluate lower extremity impairments.<sup>5</sup> Table 17-33, which provides estimates for certain lower extremity impairments, specifies that mild ligamentous instability is equal to a five percent lower extremity impairment, as found by Dr. Conti.<sup>6</sup> Section 17.2l advises that

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.404 (1999).

<sup>3</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB \_\_\_\_ (Docket No. 01-1361, issued February 4, 2002).

<sup>4</sup> *Ronald R. Kraynak*, 53 ECAB \_\_\_\_ (Docket No. 00-1541, issued October 2, 2001).

<sup>5</sup> A.M.A., *Guides*, *supra* note 3 at 545.

<sup>6</sup> *Id.* at 547.

peripheral nerve injuries are to be evaluated under Tables 17-37 and 16-10 and/or 16-11.<sup>7</sup> Dr. Conti advised that, under Table 17-37,<sup>8</sup> appellant was entitled to a five percent impairment of each lower extremity due to pain. The Office medical adviser concurred with Dr. Conti's findings and further noted that, under Table 17-2, the impairment values found under Tables 17-33 and 17-37 could be added to determine total impairment. The Board thus finds that there is no medical evidence in this case to indicate that appellant is entitled to an increased award. She therefore failed to establish that she is entitled to more than the 10 percent impairment for each lower extremity, for which she received schedule awards.<sup>9</sup>

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

In the instant case, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its January 29, 2003 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since her request, postmarked July 31, 2002, had not been made within 30 days of its June 17, 2002 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>10</sup> In the present case, appellant's request for a hearing was postmarked July 31, 2002 and was thus made more than 30 days after the date of issuance of the Office's prior decision, dated June 17, 2002. The Office was therefore correct in stating in its January 29, 2003 decision that appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its January 29, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether the Office properly appellant's compensation benefits could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

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<sup>7</sup> *Id.* at 550.

<sup>8</sup> *Id.* at 552.

<sup>9</sup> The Board, however, notes that neither Dr. Conti nor the Office medical adviser indicated that the grade of sensory deficit identified under Table 37 was determined utilizing Table 16-10. It would thus appear that Dr. Conti determined that appellant's nerve deficit under Table 16-10 was equal to Grade 0, entitling her to 100 percent of the 5 percent impairment found under Table 17-37.

<sup>10</sup> *Henry Moreno*, 39 ECAB 475 (1988).

deduction from established facts.<sup>11</sup> In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.<sup>12</sup>

The decisions of the Office of Workers' Compensation Programs dated January 29, 2003 and June 17, 2002 are hereby affirmed.

Dated, Washington, DC  
July 1, 2003

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>12</sup> The Board notes that the record does not indicate that the Office responded to the July 11, 2002 letter in which appellant stated her wish to continue compensation.