U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND J. LYONS and DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Quantico, VA

Docket No. 03-431; Submitted on the Record;
Issued March 25, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a five percent permanent impairment of the right leg; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a written review of the record by an Office hearing representative.

On May 30, 2000 appellant, then a 43-year-old special agent, was lifting a breaching box into a truck when he developed a sharp pain in his back, extending into his right leg. He stopped working on June 5, 2000 and returned to work on June 12, 2000.

In a June 22, 2000 report, Dr. John Hagmann, a treating physician, indicated that appellant had a previous history of a herniated nucleus pulposus at L5-S1. He diagnosed a recurrent herniated nucleus pulposus at L5-S1. On June 30, 2000 Dr. James W. Melisi, a Board-certified neurosurgeon, performed a lumbar laminectomy and discectomy at L5-S1 and did a reexploration of the disc space. In a November 27, 2000 report, Dr. Melisi related appellant's recurrent disc herniation to lifting 80-pound crate boxes into a truck.

The Office accepted appellant's claim for acute lumbar strain and herniated nucleus pulposus.

The Office requested from Dr. Melisi an evaluation of appellant so as to determine whether he was entitled to a schedule award. In a December 6, 2001 report, Dr. Melisi stated that before the surgery appellant had weakness in the foot, decreased sensation, limited straight leg raising and limited motion of the lumbar spine. He indicated that appellant had improved after surgery but had pain and persistent weakness, directly related to the continued stress and strain to appellant's back as a result of his employment. He commented that he did not provide permanent impairment evaluations.

In a March 4, 2002 note, Dr. Melisi indicated that under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[1] appellant's disability due to his employment injury classified as a diagnosis-related estimate lumbar Category III, which equal a 10 to 13 percent permanent impairment of the whole person.[2]

In an April 15, 2002 memorandum, the Office medical adviser indicated that the maximum impairment for sensory loss of the S1 nerve root was five percent. He indicated that appellant had a Grade 1, 99 percent sensory loss. He multiplied the 99 percent for the sensory loss by the 5 percent for the maximum impairment for sensory loss and determined that appellant had a 5 percent permanent impairment of the right leg.[3]

In an April 29, 2002 decision, the Office issued a schedule award for a five percent permanent impairment of the right leg.

In a May 25, 2002 letter, appellant requested reconsideration. The letter was postmarked May 30, 2002. In a June 4, 2002 letter, appellant withdrew his request for reconsideration and requested a written review of the record by an Office hearing representative. He submitted in support of his request the operation records from his previous treatment for a herniated disc and another report from Dr. Melisi stated that appellant had a 10 to 13 percent permanent impairment based on the diagnosis-related estimate for lumbar Category III.

In an October 2, 2002 decision, the Office denied appellant's request for a written review of the record as untimely. The Office, in exercising its discretion, denied appellant's request for a review of the written record on the grounds that his case could equally be well addressed by submitting new evidence and requesting reconsideration.

The Board finds that appellant has no more than a five percent permanent impairment of the right leg.

The schedule award provisions of the Federal Employees' Compensation Act[4] and its implementing regulation[5] 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *Id.* at 384.

[3] *Id.* at 424, Tables 15-15, 15-18.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

The Office medical adviser determined that appellant's impairment was due to sensory loss of the S1 nerve root stemming from appellant's herniated L5-S1 disc. He determined that appellant had a 99 percent sensory loss of the S1 nerve root. He properly multiplied this figure by the five percent maximum permanent impairment for sensory loss of the S1 nerve root and determined that appellant had a five percent permanent impairment of the right leg. The Office medical adviser calculations were done properly in accordance with the A.M.A., *Guides*.

Dr. Melisi stated that appellant met the requirement for a Category III diagnosed-related estimate for the lumbar spine. That category is based on three alternative descriptions of appellant's condition. It can be based on significant signs of radiculopathy, such a dermatomal pain in a dermantomal distribution, sensory loss or loss of reflexes and loss of muscle strength or atrophy. It can be based on history of herniated disc at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy, or individuals had had surgery for radiculopathy but are now asymptomatic. The estimate can also be based on fractures, either a 25 percent to 50 percent compression fracture of one vertebra or a posterior element fracture with displacement that disrupts the spinal canal. Appellant did not have any fractures of the spine due to his employment injury. Dr. Melisi noted radiculopathy and some sensory loss but did not report loss of reflexes, muscle strength or atrophy. Therefore, his reports did not furnish the criteria to satisfy the first test for a Category III lumbar diagnosis based estimate of permanent impairment. He noted that appellant had a history of herniated disc with radiculopathy and had surgery, which had left appellant mostly asymptomatic. He, therefore, based his permanent impairment calculation in part of the impairment of appellant's back. Under the Act, a schedule award cannot be given for the back.[7]

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

Section 8124(b)(1) of the Act[8] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a 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." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings…."[9] Appellant's decision was issued on April 29, 2002. He made a timely request for reconsideration but his request to change to a review of the written record by an Office hearing representative was made on June 4, 2002. His request for a review of the written record was, therefore, untimely.

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 provisions were made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966

[7] 5 U.S.C. §§ 8101(20); 8107(22).

[8] 5 U.S.C. § 8124(b)(1).

[9] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

amendments to the Act, which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In this case, the Office, in exercising its discretion, found that appellant's case could equally be handled by submitting additional evidence and requesting reconsideration. It, therefore, denied appellant's request for a written review of the record by an Office hearing representative. 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 deductions from known facts.[10] There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs, dated October 2 and April 29, 2002, are hereby affirmed.

Dated, Washington, DC
March 25, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *Daniel J. Perea*, 42 ECAB 214 (1990).