



In a report dated July 2, 2002 Dr. Gerard W. Hooke, a specialist in emergency medicine, stated that appellant sustained a work-related right foot contusion on that day and that he could return to work on July 5, 2002. In a hospital form report also dated July 2, 2002, Dr. Hooke stated that appellant had a right foot contusion and marked an illustration noting only a right foot condition. X-rays taken that day revealed a normal right foot and ankle. On July 18, 2002 Dr. Tom Summe, appellant's treating osteopath, stated that he had severe pain in the right foot and diagnosed right foot strain.

On July 19, 2002 Dr. Gordon S. Nishimoto, appellant's treating podiatrist, treated him for a right foot fracture and sprain, and placed him on total disability from that date until September 11, 2002. On July 29, 2002 Dr. Nishimoto stated that appellant related that a log fell on his right foot on July 2, 2002. Upon examination, Dr. Nishimoto noted pain with forced dorsiflexion in the metatarsal joint, particularly along the left, along the extensor tendons, the dorsal lateral aspect of the hindfoot and directly under the tibial sesamoid of the metatarsal. He stated that x-rays that day revealed a fracture of the right tibial sesamoid and mild degenerative joint disease throughout the midfoot. Dr. Nishimoto diagnosed midtarsal joint sprain, left foot, and a fracture of the tibial sesamoid, right foot. He placed appellant in a right fracture boot and scheduled a follow-up appointment. In a July 31, 2002 report, Dr. Nishimoto stated that appellant had pain in his right foot noting that he had tried to use the fracture boot but was unable to keep weight off his foot. The doctor sized appellant for an immobilizing cast and scheduled a follow-up appointment. In a physical limitation report dated July 31, 2002 Dr. Nishimoto specified that appellant sustained a fracture and sprain of the right foot and was totally disabled from work until September 11, 2002.

On August 19, 2002 Dr. Nishimoto stated that appellant remained symptomatic with pain with palpation under the right sesamoid which was exacerbated with forced dorsiflexion and plantar flexion of the great toe. On September 12, 2002 Dr. Nishimoto stated that appellant had returned to regular work, noting that x-rays revealed that the plantar cortex had not completely healed. In a progress note dated October 21, 2002 Dr. Nishimoto noted that appellant was treated by cast immobilization but had again developed right foot pain. He recommended orthotics to limit motion of the foot. In an attending physician's report also dated October 21, 2002 Dr. Nishimoto stated that appellant had a right foot fracture of the tibial sesamoid and was partially disabled from July 29 to September 12, 2002. He noted that appellant remained symptomatic with pain. On October 31, 2002 Dr. Nishimoto requested authorization for orthotic foot appliances based on appellant's fractured foot and tendonitis and capsulitis.

On November 5, 2002 the Office accepted appellant's claim for right foot contusion and fracture.

On January 28, 2003 appellant filed a claim for a schedule award. In support of his claim, appellant submitted progress notes from Dr. Nishimoto. In a treatment note dated October 31, 2002, Dr. Nishimoto stated that appellant remained symptomatic with right foot pain caused by a fracture of the right sesamoid. The doctor prepared foot casts for orthotic devices.<sup>1</sup> On November 21, 2002 Dr. Nishimoto provided appellant with foot orthotics. On January 17,

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<sup>1</sup> Dr. Nishimoto refers to a fracture of the right foot.

2003 Dr. Nishimoto stated he treated appellant that day in a follow-up examination of his sesamoid fracture of the right foot. He related that appellant's pain had improved, and noted mild pain underneath the tibial sesamoid and minimal pain with range of motion and no pain with plantar flexion or dorsiflexion of the great toe. Dr. Nishimoto stated that appellant requested permanent disability but that the condition did not warrant such a finding because "he is doing pretty well with it." He noted he would treat appellant as necessary. On March 14, 2003 the Office advised appellant regarding the evidence he needed to support his schedule award claim. The Office advised appellant to submit an impairment evaluation regarding his accepted injury from his attending physician based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001).

In a report dated March 27, 2003 Dr. Dianna L. Chamblin, Board-certified in physical medicine and rehabilitation, stated that appellant requested an impairment rating based on his sesamoid fracture of July 2, 2002. Dr. Chamblin noted a familiarity with appellant's July 2, 2002 work-related injury including Dr. Nishimoto's diagnosis of a right foot fracture of the tibial sesamoid. She reported upon examination that his feet were symmetrical although she noted a mild bunion deformity of the left foot. The doctor noted the following range of motion findings: metatarsophalangeal (MTP) right joint on extension of 60 degrees, on the left of 40 degrees; flexion on the right of 25 degrees, on the left of 15 degrees; interphalangeal (IP) joint flexion on the right of 52 degrees, on the left passively of 50 degrees, and actively of at least 20 degrees. The doctor related appellant's symptoms of increased pain upon flexion of the left toe in the area of the bunion deformity and tenderness over the metatarsal head and sesamoids of the great toe. However, she noted normal strength and pain sensation over the metatarsal head and sesamoids of the great toe, medially greater than laterally. Dr. Chamblin stated that appellant was status post sesamoid fracture of the left great toe from a crush injury and was fixed and stable with symptoms of pain. Based on Table 17-14 of the A.M.A., *Guides*, appellant did not have a ratable impairment.

On June 22, 2003 the Office medical adviser reviewed the medical record including the reports of Drs. Chamblin and Nishimoto and found that appellant had no ratable impairment for the right leg. In a September 10, 2003 decision, the Office denied appellant's claim for a schedule award, finding that the weight of the medical evidence did not result in a ratable impairment to his right leg.

On October 14, 2003 appellant requested an oral hearing. On November 25, 2003 the Office denied appellant's request on the grounds that it was not timely filed. The Office informed him that it had further considered his case in relation to the issue involved, and that the request was further denied for the reason that the issue could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

## LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</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. 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* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

## ANALYSIS -- ISSUE 1

In this case, the Office accepted appellant's claim for a right foot contusion and fracture. As noted, appellant claimed a left foot and ankle contusion, but the weight of the medical evidence supports that appellant sustained a right foot contusion and fracture on July 2, 2002. It is noted that, in his CA-1 claim form, appellant claimed that he injured only his left foot and ankle on July 2, 2002. However, the medical records appellant submitted in support of his claim for a traumatic injury support that a July 2, 2002 right foot fracture. Only one report from an attending physician refers to a left foot condition prior to the Office's acceptance on November 5, 2002. In his July 29, 2002 report, Dr. Nishimoto stated that appellant had a midtarsal joint sprain of the left foot and a right foot fracture of the tibial sesamoids for which he prescribed a fracture boot. Dr. Nishimoto in multiple subsequent reports referred to appellant's right foot fracture or the fracture boot which he prescribed for the right foot. None of the other medical reports referred to a left foot condition.

Appellant's claim for a schedule award must therefore be for the accepted injury of a right foot contusion and fracture. In support of the impairment claim, appellant submitted a March 27, 2003 report from Dr. Chamblin, who noted that she reviewed appellant's records including Dr. Nishimoto's July 27 2002 and January 17, 2003 reports, conducted an impairment evaluation and determined that, based on the A.M.A., *Guides*, he had no ratable impairment. Dr. Chamblin referred to pain under appellant's left great toe with some mild decrease in cold perception. Upon examination, she noted that appellant had symmetrical feet with a left bunion deformity. Dr. Chamblin's range of motion findings revealed more right foot movement but she also noted his inconsistent effort. She related his complaints of pain with flexion and tenderness over the metatarsal and sesamoids of the left great toe, but also noted normal strength and pain sensation over the toe. Dr. Chamblin stated that appellant was status post sesamoid fracture of the left great toe after a crush injury and remained symptomatic. However, she meant right great toe as she referred in her report to Dr. Nishimoto's July 29, 2002 and January 17, 2003 reports where he referenced appellant's right foot fracture of the right tibial sesamoids. In his July 29,

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Jacqueline S. Harris*, 54 ECAB \_\_\_\_ (Docket No. 02-303, issued October 4, 2002).

2002 report, Dr. Nishimoto stated that appellant sustained a left foot sprain and a right foot tibial sesamoid fracture as revealed by x-rays taken that day. On January 17, 2003 Dr. Nishimoto referred to appellant's fracture, which the Office accepted as being a right foot fracture. Dr. Nishimoto also noted in that report that the condition did not warrant a permanent disability because appellant was "doing pretty well with it." Thus, Dr. Chamblin's findings relate to the right foot fracture and resulted in no ratable impairment. She determined that appellant had right MTP joint extension of 60 degrees and an IP joint flexion of 52 degrees which according to the A.M.A., *Guides* results in a 0 percent impairment. Table 17-14, p. 537.<sup>5</sup>

The record contains no medical evidence supporting a right foot impairment and thus appellant failed to establish that she had a ratable impairment based on the July 2, 2002 right foot injury.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides that "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."<sup>6</sup> Section 10.615 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>7</sup> Although there is no right to an oral hearing or a review of the written record if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise that discretion.<sup>8</sup> In such cases, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, appellant requested an oral hearing by an Office hearing representative on October 14, 2003.<sup>10</sup> Section 10.616 of the federal regulation provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."<sup>11</sup> As the postmark date of

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<sup>5</sup> Dr. Chamblin also noted an MTP joint finding of flexion, a measurement which is not included in the A.M.A., *Guides*.

<sup>6</sup> 5 U.S.C. § 8124(b)(1).

<sup>7</sup> 20 C.F.R. § 10.615.

<sup>8</sup> *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

<sup>10</sup> The record does not include appellant's written request for an oral hearing. It includes appellant's envelope postmarked October 14, 2003 which includes the annotation "Hearing Request," and an October 20, 2003 Office form requesting the district office to forward the case record to the Branch of Hearings and Review.

<sup>11</sup> 20 C.F.R. § 10.616.

appellant's request, October 14, 2003, was more than 30 days after issuance of the September 10, 2003 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its November 25, 2003 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's September 10, 2003 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its November 25, 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 for an oral hearing on the basis that the case could be resolved by the submission of additional evidence to establish that he sustained a permanent impairment as a result of his work-related injury.

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 deduction from established facts.<sup>12</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 request for an oral hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award as a result of his employment-related right foot contusion and fracture and that the Office properly denied his request for an oral hearing.

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<sup>12</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 25 and September 10, 2003 be affirmed.

Issued: November 24, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member