United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM B. WEBB, Appellant	)	
and	)	**Docket No. 04-1413**
	)	**Issued: November 23, 2004**
DEPARTMENT OF THE ARMY, FORT CAMPBELL, Clarksville, TN, Employer	)	

Appearances:
William B. Webb, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 5, 2004 appellant filed a timely appeal from an April 16, 2004 decision by a hearing representative of the Office of Workers' Compensation Programs finding that appellant had failed to submit medical evidence to support his entitlement to a schedule award. The Board has jurisdiction over the merits of this schedule award case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's claim for a schedule award.

FACTUAL HISTORY

On August 19, 2002 appellant, then a 56-year-old sheet metal mechanic, filed a claim for severe arthritis in his hands. He stated that the lifting and fabrication of material, gripping, holding with extreme hand pressure, pulling, and snatching and jerking with his hands caused his condition. Appellant submitted a copy of his job description which indicated that the position required continuous physical exertion, prolonged standing, climbing up and down scaffolds and

ladders, and working in cramped and awkward positions. The position also required considerable effort reaching, lifting, and bending items, and using hand and power tools and other equipment. Appellant also had to carry and handle objects weighing up to 44 pounds.

In an undated note, appellant indicated that his hand condition was caused by the lifting of material used in his work, along with the pressure he used with his hands in fabrication. He also noted other activities that affected his hand including gripping and holding with extreme pressure, and pulling, jerking, snatching and hammering. Appellant stated that he had done these activities over the last 25 years. He commented that his bilateral hand condition had gone from mild to severe over the past six years. Appellant indicated that he carried material weighing from 80 to 327 pounds, hauling it anywhere from 4 feet to over 40 feet. He stated that the first awareness of his arthritis was in November 1995 when the symptoms were mild. Appellant reported that the symptoms were now severe, with pain in the hands, wrist and fingers.

In an April 1, 2002 report, Dr. Ginny C. Charnock stated that x-rays showed radiocarpal joint space narrowing with cystic degenerative change seen in the distal radius. She indicated that the degenerative changes were severe. Dr. Charnock noted that appellant had apparent benign cystic change in the navicular bone. She stated that appellant had a small bony ossicle in the ulnarcarpal joint medially which was most suggestive of a remote trauma. The x-rays of the left hand showed severe degenerative changes at the first carpal metacarpal joint with subluxation of the first metacarpal joint with subluxation of the first metacarpal.

In an April 29, 2002 report, Dr. Joseph Hudson stated that appellant had a history of pain in his thumbs and wrists over the prior 10 years that had progressed over the prior 5 years. He indicated that, on examination, appellant had subtle signs of osteoarthritis in several interphalangeal joints. Dr. Hudson commented that the examination of the carpal-metacarpal joints at the base of each thumb were particularly impressive. He found subluxation and severe limitation of motion which was more noticeable on the left. Dr. Hudson noted that appellant had limited range of motion in the right wrist associated with evidence of synovitis. He indicated that x-rays showed osteoarthritis in the joints he had previously mentioned. Dr. Hudson compared the most recent x-ray with the x-rays taken in 1996 which revealed marked deterioration in the carpal metacarpal joint at the base of the left thumb with fragmentation on both sides of the thumb. He stated that the right wrist showed significant joint space narrowing at the radiocarpal joint. Dr. Hudson concluded that these patterns suggested an underlying inflammatory arthritis.

In a September 27, 2002 letter, the Office accepted appellant's claim for aggravation of bilateral arthritis of the hands.

In an April 11, 2003 letter, the Office referred appellant to Dr. Bruce McDougal for an examination and determination on whether appellant had any permanent impairment which would entitle him to a schedule award. In a May 1, 2003 letter, appellant indicated that he contacted Dr. McDougal's office and was informed that the doctor did impairment ratings only for his patients. In a May 20, 2003 response, the Office stated that it was appellant's responsibility to get a doctor who would agree to examine him for an impairment rating. The Office commented that, if Dr. McDougal would not see him, he should find someone else and

advise the Office of the physician's name and address. The Office would then authorize a one-time evaluation for the rating.

In an August 12, 2003 letter, the Office commented that appellant's physician had not given a response to its request for an impairment rating. The Office informed appellant that he had to submit a medical report which showed that he had reached maximum medical improvement and contained an impairment rating.

In an August 18, 2003 letter, appellant stated that he had sought doctors in Nashville, Tennessee. He indicated that he reached one doctor who stated that he did not perform impairment ratings. The doctor's partner did impairment ratings but only for his own patients. Appellant stated that he had called other doctors throughout the Nashville area. He commented that the doctors he contacted either did not perform impairment ratings or requested $500.00 be paid before the examination. Appellant indicated that he had done all he could in trying to get an impairment rating but he could not afford the $500.00 fee requested.

In a September 30, 2003 decision, the Office stated that, in its August 12, 2003 letter, appellant was advised to submit medical evidence supporting an impairment rating within 30 days of the letter. It found that it had not received a response and that the evidence of record failed to support an impairment rating for appellant's hands. It therefore denied his claim for compensation.

In an October 13, 2003 letter, appellant requested a review of the written record by an Office hearing representative. In an April 16, 2004 decision, the hearing representative found that appellant had failed to submit sufficient evidence to support his entitlement to a schedule award. He therefore affirmed the Office's September 30, 2003 decision.

LEGAL PRECEDENT

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature. The Office shares responsibility in the development of the evidence and has an obligation to see that justice is done.[1] The nonadversarial policy of proceedings under the Act is reflected in the Office's regulations at section 10.121.[2]

The Office has the discretion to have a claimant submit to an examination by a physician designated or approved by the Office after the injury and as frequently and at the times and places as may be reasonably required.[3] Generally, abuse of discretion is 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.[4]

[1] *Lyle Dayberry*, 49 ECAB 369, 372 (1998).

[2] 20 C.F.R. § 10.121.

[3] 5. U.S.C. § 8123(a).

[4] *Delmont L. Thompson*, 51 ECAB 155, 157-58 (1999).

ANALYSIS

The medical evidence of record showed that appellant had developed severe arthritis in his hands that would cause a permanent impairment. The Office accepted appellant's claim for aggravation of arthritis in his hands. The Office then referred appellant to Dr. McDougal for an examination which would determine whether appellant had a permanent impairment of the hands. Appellant, however, reported to the Office that Dr. McDougal performed examinations for permanent impairment ratings only for his own patients. The Office, in response, passed the responsibility to appellant to find a physician who could perform an impairment rating and then seek the Office's approval of such an examination by the physician found by appellant. The Office, however, has more resources to locate a physician to perform such an examination than any claimant. In *Robert Kirby*[5] the Board stated that, when the Office referred a claimant for a second opinion examination, it had an obligation to secure a report on the relevant issues.[6] In this case, the Office referred appellant for a preliminary examination to get a rating of appellant's permanent impairment. The Office made the mistake of referring appellant to Dr. McDougal without knowing that Dr. McDougal restricted such examinations to his patients and not people referred by the Office. Since the Office, in its discretion, had taken the responsibility to help appellant develop the case by referring him to Dr. McDougal, the Office retained that responsibility when Dr. McDougal refused to examine appellant. When the Office required appellant to submit additional medical evidence, appellant explained that he was unable to find a physician who would perform an examination to obtain an impairment rating because the physicians he contacted performed such examinations for only their own patients or wanted $500.00 paid in advance before they would perform the examination. The Office was in a position to repeat its instructions to appellant to submit the names of any physician who was willing to agree to examine appellant and, after a review of the physician's qualifications, to refer appellant, at the Office's expense, to the selected physician that had been approved by the Office. It was error for the Office to refer appellant to a physician for an examination and then leave appellant to his own devices to find a physician to provide an impairment rating examination when the referral physician refused to perform the examination. Since the Office has the duty to help develop the record, had exercised its discretion to refer appellant to an appropriate specialist to perform the impairment rating examination, and possessed the resources to locate such a physician, it abused its discretion when it thrust its responsibility to appellant after it had begun the effort to find a physician to perform the impairment rating examination. It was further error for the Office to deny appellant's claim for a schedule award when appellant informed the Office that he could not find a physician to perform the examination that he could afford to pay in advance and then receive reimbursement from the Office.

The Board further notes that section 10.121[7] allows the Office to request medical information from a claimant and gives the claimant 30 days to submit such evidence. However, the August 12, 2003 letter sent by the Office to request further medical evidence did not contain any written requirement that appellant was required to submit the information within 30 days.

[5] 51 ECAB 474 (2000).

[6] *Id.* at 476.

[7] 20 C.F.R. § 10.121.

The Office's action in denying appellant's claim because appellant did not submit any of the requested medical information within 30 days cannot stand when appellant was not informed of the requirement to submit the medical evidence within 30 days. Thus, the Office's action constitutes reversible error.

CONCLUSION

The Office's decision to deny appellant's claim for a schedule award must be reversed because the Office did not inform appellant of any requirement to submit the requested medical information within 30 days. The case is returned to the Office for the referral of appellant to an appropriate specialist to determine whether he has any permanent impairment due to his accepted injury. After further development as it may find necessary, the Office shall issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs, dated April 16, 2004 and September 30, 2003, are set aside and the case returned to the Office for further action as required by this decision.

Issued: November 23, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member