

**United States Department of Labor
Employees' Compensation Appeals Board**

ROGER D. LANDRY, Appellant

and

PEACE CORPS, Zambia, Employer

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**Docket No. 04-1449
Issued: January 27, 2005**

Appearances:
Roger D. Landry, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 22, 2003 merit decision granting a schedule award for a seven percent permanent impairment of his right leg. He also filed a timely appeal from the Office's nonmerit decision dated February 13, 2004 denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these merit and nonmerit decisions.¹

ISSUES

The issues are: (1) whether appellant has more than a seven percent permanent impairment of his right leg, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a review of the written record.

¹ The record contains an April 9, 2003 decision in which the Office approved a fee request by appellant's attorney. Because more than one year has elapsed between this decision and the filing of this appeal on May 10, 2004, the Board lacks jurisdiction to review the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On July 6, 1995 appellant, then a 55-year-old volunteer, sustained a right hip contusion and inflammation of the right buttock due to a motorcycle accident which occurred during a motorcycle test drive session. In July 2003 appellant filed a claim for entitlement to a schedule award due to the July 6, 1995 employment injury.

In a report dated August 13, 2003, Dr. Syed A. Razvi, an attending physician specializing in surgery, stated that his physical examination of appellant was unremarkable except for paraspinal muscle spasms. He noted that muscle tone and strength were equal in both lower extremities. Dr. Razvi indicated that magnetic resonance imaging testing on November 8, 1998 showed mild annulus bulging at L2, L3, L4 and L5 without evidence of disc herniation. Electromyogram testing on January 12, 1999 revealed abnormal results consistent with mild sensory motor peripheral neuropathy of the axonal type. He noted that appellant had been diagnosed with right sciatic neuritis versus injury to the sciatic nerve at the sciatic notch. Dr. Razvi stated that it was evident appellant sustained an employment-related injury to his sciatic nerve and continued to experience pain, numbness and discomfort on and off with some periods of exacerbated symptoms.

In an undated addendum, Dr. Razvi provided the following notation:

- “1. Medical improvement has occurred in 2001.
- “2. Twenty percent body impairment of the lower extremity.
- “3. Five percent loss of function due to sensory deficit or pain. Twenty percent loss of function due to strength.”

In a report dated December 10, 2003, an Office medical adviser determined that appellant had a seven percent impairment of his right leg. He reviewed the August 13, 2003 report of Dr. Razvi and indicated that no motor strength loss was reported in the lower extremities upon his examination. The medical adviser stated that electromyogram testing from January 12, 1999 showed a mild sensory periphery neuropathy of the right superficial peroneal and right sural nerves with no evidence of right lumbar or sacral radiculopathy. He indicated that Table 17-37 on page 552 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* showed that the maximum value for sensory loss of the superficial peroneal nerve was five percent and the maximum value for sural nerve loss was two percent. He indicated that, given the results of diagnostic testing and the degree of pain and numbness reported, appellant had a Grade 1 or 95 percent pain grade for the involved nerves according to Table 15-15 on page 424. He then multiplied the 95 percent grade value times the maximum values for sensory loss of both the superficial peroneal nerve (5 percent) and sural nerve (2 percent) to conclude that appellant had a 7 percent permanent impairment of his right leg.²

² The medical adviser noted that Dr. Razvi's apparent opinion that appellant had a 20 percent impairment related to "loss of function due to strength" was not warranted because he had indicated on examination that appellant's muscle tone and strength were equal in both lower extremities.

By award of compensation dated December 22, 2003, the Office granted appellant a schedule award for a seven percent permanent impairment of his right leg. The award ran for 20.16 weeks from December 15, 2001 to May 5, 2002.

On January 20, 2004 appellant requested a review of the written record by an Office hearing representative. The postmark contained in the record reveals that the request was sent to the Office on January 22, 2004.

By decision dated February 13, 2004, the Office denied appellant's request for a review of the written record.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ sets 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.⁵

ANALYSIS -- ISSUE 1

In a report dated December 10, 2003, an Office medical adviser properly determined that appellant had a seven percent permanent impairment of his right leg. His evaluation of appellant's impairment was based on the August 13, 2003 report of Dr. Razvi, an attending physician specializing in surgery. The medical adviser noted that electromyogram testing from January 12, 1999 showed a mild sensory periphery neuropathy of the right superficial peroneal and right sural nerves with no evidence of right lumbar or sacral radiculopathy. He indicated that Table 17-37 on page 552 of the fifth edition of the A.M.A., *Guides* showed that the maximum value for sensory loss of the superficial peroneal nerve was five percent and the maximum value for loss of the sural nerve was two percent.⁶ The medical adviser correctly applied Table 15-15 on page 424 to determine that appellant had a Grade 1 or 95 percent pain grade for the involved nerves.⁷ The medical adviser then multiplied the 95 percent value times the maximum values for sensory loss of the superficial peroneal nerve (5 percent) and the sural

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *Id.*

⁶ *See* A.M.A., *Guides* 552, Table 17-37.

⁷ *Id.* at 424, Table 15-15. He evaluated the results of diagnostic testing and the degree of pain and numbness reported by appellant in reaching this conclusion.

nerve (2 percent) to conclude that appellant had a 7 percent permanent impairment of his right leg.⁸

In an undated addendum to his August 13, 2003 report, Dr. Razvi indicated that appellant had 5 percent loss of function due to sensory deficit or pain and a 20 percent loss of function due to loss of strength.⁹ The Board notes, however, that Dr. Razvi did not specify the affected lower extremity or provide any indication that his impairment rating was derived in accordance with the protocols and standards of the A.M.A., *Guides*. The opinion of Dr. Razvi is of limited probative value in that he failed to provide a full explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.

As the report of the Office medical adviser provides the only evaluation which conforms with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.¹⁰

LEGAL PRECEDENT -- ISSUE 2

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 final decision. The Office's regulations have 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 has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.¹¹

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.¹² The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.¹³

⁸ The medical adviser rounded up the figures to the nearest whole numbers. He properly determined that appellant did not have an impairment due to strength loss as Dr. Razvi's examination showed that appellant's muscle tone and strength were equal in both lower extremities.

⁹ He also noted that appellant had a "20 percent body impairment of the lower extremity" but did not indicate whether this rating was in addition to the other ratings provided.

¹⁰ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

¹¹ 20 C.F.R. § 10.616(a); see *Michael J. Welsh*, 40 ECAB 994, 996 (1989).

¹² *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹³ See *Welsh*, *supra* note 5 at 996-97.

ANALYSIS -- ISSUE 2

Appellant's January 22, 2004 request for a review of the written record was made more than 30 days after the date of issuance of the Office's December 22, 2003 decision. Therefore, appellant is not entitled to a review of the written record as a matter of right. Appellant requested a review of the written record in a form letter postmarked January 22, 2004. The Office properly found in its February 13, 2004 decision that appellant was not entitled to a review of the written record as a matter of right because his request for a review of the written record was not made within 30 days of the Office's decision.

The Office has the discretionary power to grant a review of the written record when a claimant is not entitled to such review as a matter of right. The Board finds that the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request on the basis that he could request reconsideration and submit additional evidence. The Board has held that 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.¹⁴ In this case, the evidence of record does not establish that the Office abused its discretion in denying appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a seven percent permanent impairment of his right leg, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for a review of the written record.

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2004 and December 22, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 27, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member