

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

_____)
PAUL E. WYNDER, SR., Appellant)

and)

DEPARTMENT OF JUSTICE, FEDERAL)
BUREAU OF PRISONS, FEDERAL)
CORRECTIONAL INSTITUTE, Jessup, GA,)
Employer)

_____)

Docket No. 05-646
Issued: June 2, 2005

Appearances:
Paul E. Wynder, Sr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On January 21, 2005 appellant filed a timely appeal from a November 24, 2004 decision of the Office of Workers' Compensation Programs which found that he did not demonstrate clear evidence of error of an August 20, 2003 schedule award decision. He also appealed an August 24, 2004 decision in which the Office denied his request for a hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a hearing; and (2) whether the Office properly found that he failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 1, 2001 appellant, then a 40-year-old lieutenant/supervisor, sustained a left Achilles tendon rupture and right torn medial meniscus causally related to his federal employment. He came under the care of Dr. Douglas Hein, Board-certified in orthopedic surgery, and underwent surgical repair on the left lower extremity on May 3, 2001 and on his right knee on June 28, 2001. Dr. Hein thereafter referred appellant to Dr. James W. Wilson, also a Board-certified orthopedic surgeon, for treatment of the right knee condition.

On April 24, 2002 appellant filed a schedule award claim, and by letter dated May 13, 2002, the Office requested that Dr. Hein evaluate appellant's left Achilles tendon condition for schedule award purposes. Based on Dr. Hein's reports and review by an Office medical adviser, on July 31, 2002 appellant was granted a schedule award for a three percent loss of use of the left lower extremity. He timely requested a review of the written record.¹ Appellant underwent a second surgical procedure on his right knee on November 5, 2002. On February 24, 2003 he filed a second schedule award claim.

In a decision dated June 26, 2003, an Office hearing representative set aside the July 31, 2002 schedule award and remanded the case for further development of the medical evidence. On August 20, 2003 the Office granted appellant a schedule award for an additional seven percent left lower extremity impairment and a two percent impairment for his right lower extremity.² By letter dated July 5, 2004, appellant requested a hearing regarding the schedule award of his right lower extremity, and submitted a June 22, 2004 report in which Dr. Mark J. Rosen, Board-certified in orthopedic surgery, provided a history of the employment injury, appellant's medical treatment history, and findings on physical examination of medial and lateral joint line tenderness, an equivocal McMurray's test, "a lot of" pain with patellar grind and patellar trochlear crepitus. He diagnosed right knee chondromalacia patellae trochlea of the medial femoral condyle and opined that it was causally related to appellant's 2001 employment injury. Dr. Rosen advised that "[appellant] is interested in getting another rating. It is evident that his symptoms have worsened. This is not unexpected. Usually when there is a significant defect, it does over the course of time get larger and sometimes involving the opposite side of the joint."

In a decision dated August 24, 2004, an Office hearing representative denied the hearing request on the grounds that it was untimely filed. On September 6, 2004 appellant requested reconsideration and submitted Dr. Rosen's June 22, 2004 report. By decision dated November 24, 2004, the Office found that appellant failed to demonstrate clear evidence that the Office erred in its August 20, 2003 schedule award decision. The Office noted that appellant could file a new schedule award claim and attached form reports for his physician to complete.

¹ Appellant initially requested a hearing but changed his request to a review of the written record.

² The schedule award was initially issued on August 1, 2003, but upon receiving appellant's change of address to Nevada, the Office reissued the schedule award decision.

LEGAL PRECEDENT -- ISSUE 1

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.³ The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,⁴ 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.⁵ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.⁶

ANALYSIS -- ISSUE 1

In this case, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its August 24, 2004 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing as his request, dated July 5, 2004, had not been made within 30 days of its August 20, 2003 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 finds that, as appellant's request for a hearing was dated July 5, 2004,⁷ more than 30 days after the date of issuance of the Office's prior decision dated August 20, 2003, the Office was correct in stating in its August 24, 2004 decision that appellant was not entitled to a hearing as a matter of right as his request was untimely filed.

While the Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right, the Office, in its August 24, 2004 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 in this case 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 deduction from established facts.⁸ In the present case, the evidence of

³ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁶ *Claudio Vazquez*, *supra* note 3.

⁷ While a copy of the mailing envelope is found in the case record, it is somewhat illegible but seems to read July 6, 2004.

⁸ See *Claudio Vazquez*, *supra* note 3; *Daniel J. Perea*, 42 ECAB 214 (1990).

record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion. The Office therefore properly denied his request.

LEGAL PRECEDENT -- ISSUE 2

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to the employment injury.⁹ Moreover, Office procedure provides that a claim for an increased schedule award may be based on an incorrect calculation of the original award or an increased impairment at a later date which is due to work-related factors. In such a situation, an increased schedule award may be payable if supported by the medical evidence.¹⁰

ANALYSIS -- ISSUE 2

In its November 24, 2004 decision, the Office treated appellant's claim that he sustained an increased percentage of permanent impairment to his right knee as a request for reconsideration of its August 20, 2003 decision. This was improper as appellant claimed that his condition had worsened, not that there had been an incorrect calculation of the original right lower extremity award. Although appellant used the term "reconsideration" in his September 6, 2004 letter, he clearly expressed his request for an increased schedule award due to a claimed worsening of his right knee impairment, noting that Dr. Rosen had advised that his condition had worsened.

With his September 6, 2004 letter, appellant submitted a June 22, 2004 report in which Dr. Rosen provided a history of the employment injury, appellant's medical treatment history, and findings on physical examination which included medial and lateral joint line tenderness, an equivocal McMurray's test, pain with patellar grind and patellar trochlear crepitus. The physician diagnosed right knee chondromalacia patellae trochlea of the medial femoral condyle and opined that it was causally related to appellant's 2001 employment injury, advising that it was evident that appellant's symptoms had worsened, noting that usually when there is a significant defect, it gets larger over time and can involve the opposite side of the joint. The Board finds that this evidence clearly concerns appellant's right knee condition in June 2004 and provides an opinion as to his right knee permanent impairment at that time and not prior to August 20, 2003 when the schedule award was issued.

As appellant has made a claim for an increased schedule award for his right knee, including the submission of medical evidence regarding his permanent impairment at a date

⁹ *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b (August 2002). In addition, Office procedure provides that a request for reconsideration of a schedule award based on a disagreement with the percentage awarded must be distinguished from a situation where a claimant who previously received an award is filing for an increased impairment due to a worsening of the claimant's medical condition due to deterioration of his condition or increased exposure. Such a request for increased impairment is not subject to the one-year time limitation for reconsideration. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602. 5.b (January 2004).

subsequent to the August 20, 2003 schedule award decision, he is entitled to a merit decision on the medical evidence in connection with this claim. The Office has not made a final determination regarding appellant's entitlement to an increased schedule award for his claimed increased right knee impairment. The case will therefore be remanded to the Office for further development, to include an appropriate merit decision regarding appellant's claim for an increased schedule award for his right knee impairment, to be followed by an appropriate decision.¹¹

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing but improperly refused to reopen his claim for merit review regarding entitlement to an increased schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 24, 2004 be affirmed. The decision dated November 24, 2004 is vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Issued: June 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹¹ *Linda T. Brown, supra* note 9.