

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

DONALD E. ANDERSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Las Vegas, NV, Employer**

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**Docket No. 05-1853
Issued: April 12, 2006**

Appearances:
Donald E. Anderson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2005 appellant filed a timely appeal from a June 23, 2005 merit decision of the Office of Workers' Compensation Programs granting a schedule award for 17 percent impairment of the left upper extremity and an August 18, 2005 decision denying appellant's request for an oral hearing as untimely. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than an 17 percent impairment to the left upper extremity for which he received a schedule award; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On October 10, 2003 appellant, then a 60-year-old letter carrier, filed an occupational disease claim for left carpal tunnel syndrome which he attributed to his employment. In a report dated September 17, 2003, Dr. Gerald W. Dunn, Board-certified in psychiatry and neurology,

noted appellant's history of pain in his left arm, with decreased sensation in his left fingers and mild weakness of the thumb. Dr. Dunn diagnosed left ulnar and median neuropathies with median nerve compression at the wrist.

The Office accepted left carpal tunnel syndrome and left ulnar nerve compression and authorized surgery, which was performed on September 21, 2003 by Dr. William Stewart.¹ Appellant retired effective November 4, 2003. On December 12, 2003 he filed a claim for a schedule award.

In a report dated October 7, 2004, Dr. Frank P. Silver, Board-certified in obstetrics and gynecology, evaluated appellant for an impairment rating. He reviewed appellant's work-related condition and September 2003 left carpal tunnel release. Dr. Silver determined that appellant had a 12 percent impairment to the left upper extremity. He calculated the impairment of the ulnar nerve below the forearm based on Table 16-15 and Table 16-10 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001). Dr. Silver rated sensory deficit of Grade 4, which equaled a 50 percent sensory deficit and motor deficit of Grade 4, which equaled a 25 percent motor impairment. He noted maximum impairment of the ulnar nerve below the forearm of 7 percent for sensory loss and 35 percent motor loss. Dr. Silver multiplied the 7 percent maximum sensory impairment by the 50 percent deficit grade, which resulted in a 3.5 percent sensory impairment. He multiplied the 35 percent maximum strength impairment by the 25 percent deficit grade, which resulted in an 8.7 percent motor impairment. Dr. Silver then added the impairments and rounded to find a total 12 percent impairment of the left upper extremity.

On December 6, 2004 an Office medical adviser reviewed Dr. Silver's report and found that appellant had a total left upper extremity impairment of 17 percent and that the date of maximum medical improvement was October 7, 2004. Applying Dr. Silver's data to the A.M.A., *Guides*, the Office medical adviser found no impairment for loss of range of motion. The medical adviser rated the motor deficit and sensory deficit of Grade 4 as a 20 percent impairment. The medical adviser also stated that the maximum combined impairment of the ulnar and median nerves was 85 percent and that 20 percent of 85 percent equaled a 17 percent left upper extremity impairment.

By decision dated June 23, 2005, the Office awarded appellant a 17 percent impairment to the left upper extremity.

In an August 11, 2005 letter, postmarked August 12, 2005, appellant requested an oral hearing. In a decision dated August 18, 2005, the Office found that the request was untimely and that appellant was not entitled to an oral hearing as a matter of right. The hearing request was further denied on the grounds that the issue in the case could be equally well addressed through a reconsideration request.

¹ Dr. Stewart's first name is not legible.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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* (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁴

Chapter 16 provides the framework for assessing upper extremity impairments⁵ and section 16.5b of the A.M.A., *Guides* describes the methods for evaluating upper extremity impairments due to peripheral nerve disorders. It provides that the severity of the sensory or pain deficit and motor deficit should be classified according to the grading tables, 16-10 and 16-11 respectively. The values for maximum impairment is determined by utilizing Table 16-15 for the nerve structure involved. The grade of severity for each deficit is then to be multiplied by the maximum upper extremity impairment value for the nerve involved to reach the proper upper extremity impairment for each function. Mixed motor and sensory or pain deficits for each nerve structure are then to be combined.⁶ Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment.⁷

ANALYSIS -- ISSUE 1

Dr. Silver calculated appellant's impairment applying Tables 16-10, 16-11 and 16-15, A.M.A., *Guides* 482, 484 and 492. Table 16-15 at page 492 reflects the following maximum percentage impairments for the ulnar nerve below the forearm, 7 percent for sensory loss and 35 percent for motor loss.⁸ Although he classified appellant's sensory deficit of the left ulnar nerve as Grade 4, he stated that it equaled a 50 percent deficit. The Board notes that a 50 percent sensory deficit is a Grade 3 sensory loss. Dr. Silver described appellant's pain as "distorted tactile sensibility with abnormal sensations and pain that interferes with some activity," which

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002); *Willie C. Howard*, 55 ECAB ____ (Docket No. 04-342 & 04-464, issued May 27, 2004).

⁵ *Id.* at 433-521.

⁶ *Id.* at 481.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, Schedule Awards and Permanent Disability Claims, Chapter 2.808.6(d) (August 2002).

⁸ A.M.A., *Guides*, *see supra* note 4.

corresponds to a Grade 3 sensory loss with a range of deficit of 26 to 60 percent, A.M.A., *Guides* at 482, Table 16-10. The 50 percent grade deficit percent impairment when multiplied by the 7 percent maximum impairment of the ulnar nerve under Table 16-15 resulted in a left upper extremity impairment rating of 3.5 percent (50 percent x 7 percent = 3.5 percent) for sensory loss.

Dr. Silver properly calculated appellant's motor deficit at Grade 4, which represents a 25 percent deficit. When multiplied by the 35 percent maximum impairment of the ulnar nerve under Table 16-15, results in a rating of 8.75 percent impairment due to motor loss. Under Office procedures, the 3.5 percent sensory loss is rounded up to 4 percent and the 8.75 percent motor loss is rounded up to 9 percent.⁹ Using the Combined Values Chart,¹⁰ appellant's total impairment is 13 percent pursuant to the A.M.A., *Guides*. While the Office medical adviser rated 17 percent impairment, it is not clear how her calculations conformed with the grading schemes contained in the A.M.A., *Guides*.¹¹ The Board finds a 13 percent impairment of the left upper extremity. Consequently, appellant has not established any greater impairment than that for which he has already received a schedule award.

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 her claim before a representative of the Secretary."¹² Sections 10.617 and 10.618 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.¹³ Although there is no right to a review of the written record or an oral hearing 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 its discretion.¹⁴ The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

"If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, *etc.*), H&R [Hearings and

⁹ The Office rounds the calculated percentage of impairment to the nearest whole point. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (June 2003).

¹⁰ A.M.A., *Guides*, *see supra* note 4.

¹¹ *See Shalanya Ellison*, 56 ECAB ____ (Docket No. 04-824, issued November 10, 2004) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is not probative where it is not based on the A.M.A., *Guides*).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. §§ 10.616 and 10.617.

¹⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.”¹⁵

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing in a letter postmarked on August 12, 2005. Section 10.616 of the Office’s 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.”¹⁶ As the postmark date of appellant’s request, August 12, 2005, was more than 30 days after issuance of the June 23, 2005 Office decision, appellant’s request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its August 18, 2005 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 June 23, 2005 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 August 18, 2005 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 a diagnosed condition was causally related to his employment.

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.¹⁷ 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.

CONCLUSION

The Board finds that appellant has a 13 percent left upper extremity impairment. The Board finds that the Office did not abuse its discretion in denying appellant’s request for a hearing.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

¹⁶ 20 C.F.R. § 10.616.

¹⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 23, 2005 be affirmed, as modified, to find no more than a 13 percent impairment of the left upper extremity. The August 18, 2005 decision is affirmed.

Issued: April 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board