United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 06-1123**
	)	**Issued: August 22, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

Appearances:
R.B., 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 April 10, 2006 appellant filed a timely appeal from the December 5, 2005 merit decision of the Office of Workers' Compensation Programs which awarded compensation for permanent impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the schedule award. The Board also has jurisdiction to review the Office's March 28, 2006 decision denying his request for a review of the written record.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment of his right upper extremity; and (2) whether the Office properly denied his request for a review of the written record.

FACTUAL HISTORY

On February 26, 2002 appellant, then a 50-year-old rural letter carrier, sustained an injury in the performance of duty when his postal vehicle was struck from behind. The Office accepted his claim for lumbar strain and right shoulder contusion. The Office also accepted a right rotator

cuff tear. On July 16, 2002 appellant underwent a right shoulder arthroscopic subacromial decompression with mini open rotator cuff repair.[1] He received compensation for temporary total disability on the periodic rolls. On September 23, 2002 appellant returned to limited duty.

On June 16, 2005 appellant filed a claim for a schedule award. On August 15, 2005 the Office advised what information his physician needed to provide to support a finding of permanent impairment:

> "TO PHYSICIAN: [Appellant] has a work-related lower [sic] extremity condition. We are seeking your opinion about your patient's work-related condition. Specifically, we are looking for an assessment of permanent impairment.
>
> "Our program requires that all impairment determinations be accomplished according to the [f]ifth [e]dition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* We would greatly appreciate a report from you based on a recent examination, which includes the following:
>
> 1. Whether maximum medical improvement has occurred and, if so, the approximate date.
>
> 2. Description of any restriction of movement in terms of degrees of retained active motion.
>
> 3. Description of all other pertinent objective findings -- decrease of strength, atrophy, ankylosis, sensory changes or other, as applicable.
>
> 4. Description of subjective complaints causing impairment -- pain, discomfort, *etc*.
>
> 5. Recommended percentage of impairment of the affected member(s). Show how you arrive at the figure using applicable tables in the [A.M.A.,] *Guides*. Please provide all measurements used to arrive at your rating."

To support his claim for a schedule award, appellant resubmitted the February 24, 2003 treatment note of Dr. Robert E. Elvington, Jr., an orthopedic surgeon. He stated:

> "[Appellant] is back for a recheck of his shoulder. He did improve since his last visit. [Appellant] still has occasional ache and I think he is going to have continued pain in that shoulder, especially with two operations within a year. His active abduction is up to 150 degrees, forward flexion is 150 degrees, external rotation is 90 and internal rotation is 75. [Appellant] has some residual strength

[1] Appellant stated that he had a right shoulder rotator cuff surgery on July 17, 2001, about six months before his employment injury.

deficit, about four out of five, for the rotator cuff. I think he is at MMI [maximum medical improvement] and would have a permanent physical impairment rating of 18 percent for the right upper extremity."

On October 12, 2005 Dr. Elvington reported that he still thought the impairment rating was accurate. He stated: "This is based on my professional expertise and opinion using [the A.M.A., *Guides*] as a guide and not as a Bible."

On November 8, 2005 an Office medical adviser reviewed Dr. Elvington's findings and determined that appellant had a four percent impairment of the right upper extremity due to loss of shoulder motion.

In a decision dated December 5, 2005, the Office granted a schedule award for a four percent impairment of the right upper extremity. In an attached statement of review rights, the Office notified appellant that any request for an oral hearing or review of the written record must be made within 30-calendar days after the date of the decision.

In a letter postmarked January 6, 2006, appellant request a review of the written record by an Office hearing representative.

In a decision dated March 28, 2006, the Office denied appellant's request for a review of the written record. The Office found that the request was untimely. The Office nonetheless considered the request and determined that appellant could equally well address the issue by requesting reconsideration and submitting evidence not previously considered establishing that the permanent impairment of his right upper extremity exceeded four percent.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[2] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[3]

ANALYSIS -- ISSUE 1

On February 24, 2003 Dr. Elvington, the orthopedic surgeon, reported that appellant had reached maximum medical improvement. He found that active shoulder abduction was 150 degrees. According to Figure 16-43, page 477, of the A.M.A., *Guides*, this represents a one percent impairment of the upper extremity. Dr. Elvington reported that forward flexion was also 150 degrees. According to Figure 16-40, page 476, this represents a two percent impairment of the upper extremity. External rotation was 90 degrees, showing no impairment under Figure 16-

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001). FECA Bulletin No. 01-05 (issued January 29, 2001).

46, page 479. Internal rotation was 75 degrees, however, which interpolates to a 0.5 percent impairment under the same table.[4] The Office medical adviser rounded this to one percent.

When a joint has more than one unit of motion, its total motion impairment is obtained by adding the impairment values contributed by each unit of motion.[5] According to the measurements reported by Dr. Elvington appellant has a four percent impairment of his right upper extremity due to loss of shoulder motion.

Dr. Elvington reported that appellant had some residual strength deficit, "about 4 out of 5," but decreased strength generally cannot be rated in the presence of decreased motion.[6] Dr. Elvington also reported that appellant still had "occasional ache," but he noted no peripheral nerve injury or chronic pain syndrome, nor did he report "other disorders" contributing to impairment, such as shoulder instability. Appellant's total impairment, therefore, is defined solely by his loss of shoulder motion.[7]

Dr. Elvington rated appellant's impairment at 18 percent, but he did not show how he arrived at this figure using applicable tables in the A.M.A., *Guides*, as the Office requested in its August 15, 2005 development letter. He made clear in his October 12, 2005 report that he relied more on his professional expertise and less on the standardized procedures applicable to all claimants. However, well intentioned, this reduces the probative or evidentiary value of his estimate of impairment.

The clinical findings reported by Dr. Elvington on February 24, 2003 establish that appellant has a four percent impairment of his right upper extremity, which is what the Office awarded. The Board will, therefore, affirm the Office's December 5, 2005 schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides a time-limited right to a hearing:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is

[4] The actual range of motion measurements are recorded and applied to the various impairment pie charts. Impairment values for degree measurements falling between those listed may be adjusted or interpolated proportionally in the corresponding interval. A.M.A., *Guides* 453.

[5] *Id*. at 452.

[6] *See id.* at 508. The A.M.A., *Guides* permits a separate rating for loss of strength "in a rare case," but only if it is based on unrelated etiologic or pathomechanical causes. Otherwise, the A.M.A., *Guides* emphasizes the impairment ratings based on objective anatomic findings, such as range of motion, take precedence.

[7] Summarizing the steps for evaluating impairment involving the shoulder region, the A.M.A., *Guides* instructs to determine upper extremity impairments due to loss of motion (section 16.4i) and other disorders (section 16.7) and then to combine the values. *Id*. at 512.

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."[8]

A hearing is a review by a hearing representative of an adverse Office decision. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. At the discretion of the hearing representative, an oral hearing may be conducted by telephone or teleconference. In addition to the evidence of record, the employee may submit new evidence to the hearing representative.[9]

ANALYSIS -- ISSUE 2

Appellant's request for review of the written record was postmarked January 6, 2006. As this was more than 30 days after the schedule award issued on December 5, 2005, he is not entitled to a review of the written record as a matter of right. The Office nonetheless considered the matter and correctly advised appellant that he could instead pursue the schedule award issue through the reconsideration process. As he had an acceptable appellate alternative to review of the written record, the Board finds that the Office did not abuse its discretion in denying his untimely request.[10]

CONCLUSION

The Board finds that the medical evidence establishes a four percent impairment of appellant's right upper extremity, which is what the Office awarded. The Board also finds that the Office properly denied his untimely request for a review of the written record.

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.615 (1999).

[10] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2006 and December 5, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 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