

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

W.D., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY & AIR
NATIONAL GUARD, New Orleans, LA,
Employer**

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**Docket No. 06-1770
Issued: December 8, 2006**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2006 appellant filed a timely appeal from a December 30, 2005 merit decision of the Office of Workers' Compensation Programs granting him a schedule award and a May 5, 2006 nonmerit decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues are: (1) whether appellant has more than a 10 percent permanent impairment of his left upper extremity, for which he received a schedule award; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

FACTUAL HISTORY

On April 18, 2003 appellant, then a 54-year-old heavy mobile equipment repairman, filed a traumatic injury claim alleging that he crushed his left thumb while changing a tire. The Office accepted his claim for cervical "crush injury with laceration -- thumb, left hand." On February 9,

2004 appellant submitted a notice of recurrence of disability, which was accepted by the Office on March 10, 2004.

On June 1, 2004 the Office asked appellant's treating physician, Dr. Michelle R. Ritter, a Board-certified orthopedic surgeon, for an assessment of the degree of appellant's impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th edition 2001) and an opinion as to whether appellant had reached maximum medical improvement.¹

Appellant submitted a May 28, 2004 report from Dr. David N. Adams, a Board-certified physiatrist. Dr. Adams found no electrodiagnostic evidence of radiculopathy, neuropathy, myopathy radial, superficial radial or ulnar neuropathy or carpal tunnel syndrome in appellant's left upper extremity.

In a report dated July 8, 2004, Dr. Ritter opined that appellant had reached maximum medical improvement and had a two percent disability of his left hand. She noted that appellant had intrinsic tightness in his left index finger. Physical examination of the left thumb revealed no significant tendon abnormalities, no tenderness and normal motor function. Swelling was present in the entire thumb. Range of motion was 0 to 60 degrees. A neurologic examination revealed that sensibility in the left thumb was globally decreased.

In an undated narrative statement, appellant indicated that he had constant pain in his fingers and thumb in his left hand, had difficulty holding onto objects, was unable to make a fist and had tingling from his elbow to his left hand. He also stated that he had been unable to work at his former profession since July 2003.

On September 9, 2004 the Office denied appellant's request for a schedule award. On September 30, 2004 appellant submitted a request for an oral hearing.

Appellant submitted an October 6, 2004 report from Dr. Raymond E. Dennie, a treating physician, who examined him on that date for the purpose of providing an impairment rating under the A.M.A., *Guides*. Dr. Dennie opined that appellant had a 12 percent impairment of his left thumb due to abnormal motion, which equated to a five percent impairment of his left upper extremity. He noted that appellant's two-point discrimination at seven millimeter (mm) was normal. Testing of the interphalangeal (IP) joint revealed flexion of 40 degrees (normal 80 degrees) and extension of +10 degrees (normal 30 degrees), resulting in a 3 percent impairment of the IP joint, pursuant to Figure 16-12 at page 456 of the A.M.A., *Guides*. Testing of the metatarsophalangeal (MP) joint revealed flexion of 40 degrees (normal 60 degrees), resulting in an impairment rating of two percent, and extension of -10 degrees (normal 40 degrees), resulting in an impairment rating of one percent, for a total impairment rating for the MP joint of three percent, pursuant to Figure 16-15 at page 457 of the A.M.A., *Guides*. Adduction was six centimeters (cm) (normal eight cm), resulting in an impairment rating of one percent, pursuant to Table 16-8B at page 459 of the A.M.A., *Guides*. Abduction was 40 degrees (normal 50 degrees), resulting in an impairment rating of two percent, pursuant to Table 16-8a at page 459 of the A.M.A., *Guides*. Opposition was six cm (normal eight cm), resulting in an impairment rating of

¹ The Board notes that the record does not contain a copy of appellant's request for a schedule award.

three percent, pursuant to Table 16-9 at page 460 of the A.M.A., *Guides*. Dr. Dennie concluded that appellant had a twelve percent impairment of the left thumb, which equated to a five percent impairment of the left hand, pursuant to Table 16-1 at page 438 and a five percent impairment of the left upper extremity, pursuant to Table 16-2, page 439.

The record contains an October 6, 2004 grip strength report; a position description for a machinery mechanic; an October 19, 2004 functional capacity evaluation summary signed by Steve Allison, physical therapist; an October 19, 2004 behavioral assessment of pain; and an October 19, 2004 physical therapy report.

Appellant submitted an October 27, 2004 report from Dr. Clinton McAlister, a Board-certified orthopedic surgeon, who examined appellant on that date for the purpose of providing an impairment rating pursuant to the fifth edition of the A.M.A., *Guides*. Dr. McAlister indicated that appellant continued to experience residual effects of his accepted left thumb injury and was unable to return to his previous employment. He found no instability in the MP or IP joint, but found some decreased sensation to the area of the ulnar aspect of the thumb. Dr. McAlister noted that the October 19, 2004 functional capacity examination demonstrated appellant's physical demand level range to be at a restricted medium range according to the Department of Labor, *Dictionary of Occupational Titles*, as compared to a heavy strength level occupation from his former job. Range of motion testing at the carpometacarpal joint revealed opposition of 7 cm, resulting in an impairment rating of one percent, pursuant to Table 16-19 at page 460; abduction of 55 degrees and adduction of 0 degrees, resulting in an impairment rating of zero percent, pursuant to Table 16-8A at page 459; IP joint motion of +10 to 35 degrees, resulting in an impairment rating of four percent, pursuant to Table 16-12; and metacarpophalangeal (MCP) joint motion of 10 to 60 degrees, for an impairment rating of one percent, pursuant to Table 16-15 at page 457. Dr. McAlister concluded that appellant had a combined six percent range of motion deficit of the left thumb, which equated to a two percent impairment of his hand pursuant to Table 16-1 at page 438. Testing of the left index finger revealed range of motion of 0 to 40 degrees at the DIP joint, resulting in a 15 percent impairment rating pursuant to Table 16-21 at page 461. Proximal interphalangeal (PIP) joint motion of 0 to 105 degrees yielded a zero percent rating per Table 16-23 at page 463. MP joint motion of +20 to 75 degrees resulted in a nine percent impairment pursuant to Table 16-25 at page 464. Combining these ratings pursuant to page 604, Dr. McAlister concluded that appellant had a 23 percent range of motion impairment of his index finger. Testing of the wrist revealed 65 percent flexion and extension, resulting in a zero percent impairment pursuant to Table 16-28 at page 467. Radial deviation of 25 percent and ulnar deviation of 45 percent resulted in a 0 percent impairment according to Table 16-31 at page 469. Dr. McAlister concluded that appellant's seven mm, two-point deficit constituted a partial sensory deficit on the ulnar aspect of the left thumb pursuant to Table 16-5 at page 447, which yielded an eight percent sensory loss of the thumb. However, in order to award the largest rating as directed by the A.M.A., *Guides*, he referred to Table 16-10 at page 482, finding that appellant had a Grade 3 deficit, which he rated at 40 percent. Referring to Table 16-15 at page 492, he found that the ulnar digital nerve showed a total sensory deficit of 11 percent, yielding a 4 percent upper extremity sensory loss of the thumb (40 percent x 11 percent). Referring to Table 16-1 at page 438, Dr. McAlister found that the 6 percent impairment for range of motion of the thumb yielded a 2 percent hand impairment and that the 23 percent impairment of the index finger yielded a 5 percent impairment of the hand, for a total range of motion deficit of 7 percent of the hand. Referring to Table 16-2, he

concluded that appellant had a four percent impairment of the upper extremity due to range of motion. Referring to the combined table at page 604, Dr. McAlister combined appellant's four percent range of motion deficit with his four percent sensory deficit and concluded that he had an eight percent left upper extremity impairment. He opined that the date of maximum medical improvement (MMI) was June 11, 2002.

By decision dated September 8, 2005, the Office hearing representative set aside the September 9, 2004 decision and remanded the case to the Office for preparation of a statement of accepted facts and referral to a medical adviser and an opinion on the nature and extent of appellant's impairment.

The Office referred the entire medical file and a statement of accepted facts to the district medical adviser for a determination of the percent of impairment to appellant's left upper extremity. In a report dated December 9, 2005, he concluded that appellant had a 10 percent impairment of his left upper extremity. After reviewing the medical reports of Dr. Dennie and Dr. McAlister, the district medical adviser chose to rely on Dr. McAlister's report because his impairment rating was higher than that of Dr. Dennie. In determining an impairment rating for range of motion for the left thumb, he referred to the following pages and figures of the A.M.A., *Guides*: pages 456, 457, 459 and 460; Figures 16-12, 16-15, 16-16, 16-8a, 16-8b and 16-9. He found that IP flexion was 35 percent, resulting in an impairment rating of 4 percent. IP extension was +10, which is not ratable. MP flexion was six percent, resulting in an impairment rating of one percent. MP extension was 60, which is not ratable. CMC adduction and abduction were 0 cm and 55 percent respectively and, therefore, were not ratable. Opposition was seven cm, for a one percent impairment rating. Total impairment for the left thumb was six percent, which equated to a two percent impairment rating for the left hand, pursuant to Table 16-1 at page 438. In determining an impairment rating for range of motion for the index finger, the medical adviser referred to the following pages and figures of the A.M.A., *Guides*: Figures 16, 21, 16-23 and 16-25 at pages 461, 463 and 464. DIP flexion was 40 degrees, resulting in a 15 percent rating. DIP extension was zero degrees, which was not ratable. PIP flexion and extension were 105 degrees and 0 degrees respectively, resulting in a zero percent rating. MP flexion and extension were 75 degrees and +20 degrees respectively, resulting in a combined 9 percent impairment rating. Pursuant to the combined table at page 604, appellant had a 23 percent impairment rating for the left index finger (9 percent + 15 percent = 23 percent), which equated to a 5 percent impairment of the left hand pursuant to Table 16-1 at page 435. Referring to Table 16-2 at page 439, the medical adviser concluded that the combined impairment rating for the left hand was 7 percent (5 percent + 2 percent), resulting in a 6 percent impairment of the left upper extremity for range of motion. Referring to Table 15-16 at page 492, the medical adviser determined that appellant had an 11 percent sensory deficit. Pursuant to Table 16-10 at page 482, he found that appellant's pain or sensory deficit was a Grade 3/40 percent, resulting in a 4 percent (40 percent x 11 percent = 4 percent) left upper extremity impairment for pain or sensory deficit. The medical adviser concluded that appellant had a combined left upper extremity impairment of 10 percent (4 percent + 6 percent = 10 percent). The medical adviser determined that the date of MMI was October 27, 2004, the date of Dr. McAlister's examination.

On December 30, 2005 the Office granted appellant a schedule award for a 10 percent impairment of his left upper extremity. The award was for 31.2 weeks, for the period from

October 27, 2004 through June 2, 2005. The Office found that the date of MMI was October 27, 2004.

Appellant submitted an undated request for an oral hearing that was received by the Office on February 6, 2006. A certified mail return receipt reflected that the date of delivery was January 31, 2006.

On May 5, 2006 the Office hearing representative denied appellant's request for an oral hearing as untimely, in that it was received on February 6, 2006. The hearing representative also found that the issue in the case could equally well be addressed in a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing federal regulation,³ 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 for all claimants, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.⁴ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.⁵

It is well established that the period covered by the schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The Board has explained that MMI means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician, which is accepted as definitive by the Office.⁶

ANALYSIS -- ISSUE 1

The Board finds that the district medical adviser properly applied the fifth edition of the A.M.A., *Guides* in determining that appellant had a 10 percent impairment of his right upper extremity.

In an October 27, 2004 report, Dr. McAlister utilized and referenced the appropriate tables and figures in the A.M.A., *Guides*. He found no instability in the MP or IP joint, but

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ 20 C.F.R. § 10.404(a).

⁵ See FECA Bulletin No. 01-5 (issued January 29, 2001).

⁶ See D.R., 57 ECAB ____ (Docket No. 06-668, issued August 22, 2006); see also Mark A. Holloway, 55 ECAB 321 (2004).

found some decreased sensation to the area of the ulnar aspect of the thumb. Range of motion testing at the carpometacarpal joint revealed opposition of seven cm, resulting in an impairment rating of one percent, pursuant to Table 16-9 at page 460; abduction of 55 degrees and adduction of 0 degrees, resulting in an impairment rating of 0 percent, pursuant to Table 16-8A at page 459; IP joint motion of +10 to 35 degrees, resulting in an impairment rating of 4 percent, pursuant to Table 16-12; and MCP joint motion of 10 to 60 degrees, for an impairment rating of 1 percent, pursuant to Table 16-15 at page 457. Dr. McAlister concluded that appellant had a combined six percent range of motion deficit of the left thumb, which equated to a two percent impairment of his hand pursuant to Table 16-1 at page 438. Testing of the left index finger revealed range of motion of 0 to 40 degrees at the DIP joint, resulting in a 15 percent impairment rating pursuant to Table 16-21 at page 461. PIP joint motion of 0 to 105 degrees yielded a zero percent rating per Table 16-23 at page 463. MP joint motion of +20 to 75 degrees resulted in a nine percent impairment pursuant to Table 16-25 at page 464. Combining these ratings pursuant to page 604, Dr. McAlister concluded that appellant had a 23 percent range of motion impairment of his index finger. Testing of the wrist revealed 65 percent flexion and extension, resulting in a 0 percent impairment pursuant to Table 16-28 at page 467. Radial deviation of 25 percent and ulnar deviation of 45 percent resulted in a 0 percent impairment according to Table 16-31 at page 469. Dr. McAlister concluded that appellant's seven mm, two-point deficit constituted a partial sensory deficit on the ulnar aspect of the left thumb pursuant to Table 16-5 at page 447, which yielded an eight percent sensory loss of the thumb. However, in order to award the largest rating as directed by the A.M.A., *Guides*, he referred to Table 16-10 at page 482, finding that appellant had a Grade 3 deficit, which he rated at 40 percent. Referring to Table 16-15 at page 492, he found that the ulnar digital nerve showed a total sensory deficit of 11 percent, yielding a 4 percent upper extremity sensory loss of the thumb (40 percent x 11 percent). Referring to Table 16-1 at page 438, Dr. McAlister found that the 6 percent impairment for range of motion of the thumb yielded a 2 percent hand impairment and that the 23 percent impairment of the index finger yielded a 5 percent impairment of the hand, for a total range of motion deficit of 7 percent of the hand. Referring to Table 16-2, he concluded that appellant had a four percent impairment of the upper extremity due to range of motion. Referring to the Combined Values Chart at page 604, Dr. McAlister combined appellant's four percent range of motion deficit with his four percent sensory deficit and concluded that appellant had an eight percent left upper extremity impairment.

The district medical adviser concurred with Dr. McAlister's findings. Applying the appropriate Tables of the A.M.A., *Guides* he concluded that appellant had a 10 percent impairment of his left upper extremity. After reviewing the medical reports of Dr. Dennie and Dr. McAlister, the medical adviser properly chose to rely on Dr. McAlister's report because his impairment rating was higher than that of Dr. Dennie. In determining an impairment rating for range of motion for the left thumb, he referred to the following pages and figures of the A.M.A., *Guides*: pages 456, 457, 459 and 460; Figures 16-12, 16-15, 16-16, 16-8a, 16-8b and 16-9. He found that IP flexion was 35 percent, resulting in an impairment rating of 4 percent. IP extension was +10, which is not ratable. MP flexion was six percent, resulting in an impairment rating of 1 percent. MP extension was 60, which is not ratable. CMC adduction and abduction were 0 cm and 55 percent respectively and, therefore, were not ratable. Opposition was seven cm, for a one percent impairment rating. He found that total impairment for the left thumb was six percent, which equated to a two percent impairment rating for the left hand, pursuant to Table 16-1 at page 438. In determining an impairment rating for range of motion for the index finger, the

medical adviser referred to the following pages and figures of the A.M.A., *Guides*: Figures 16, 21, 16-23 and 16-25 at pages 461, 463 and 464. DIP flexion was 40 degrees, resulting in a 15 percent rating. DIP extension was 0 degrees, which was not ratable. PIP flexion and extension were 105 degrees and 0 degrees respectively, resulting in a 0 percent rating. MP flexion and extension were 75 degrees and +20 degrees respectively, resulting in a combined 9 percent impairment rating. Pursuant to the Combined Values Chart at page 604, the medical adviser found that appellant had a 23 percent impairment rating for the left index finger (9 percent + 15 percent = 23 percent), which equated to a 5 percent impairment of the left hand pursuant to Table 16-1 at page 435. Referring to Table 16-2 at page 439, he concluded that the combined impairment rating for range of motion for the left hand was seven percent (five percent + two percent), resulting in a six percent impairment of the left upper extremity. Referring to Table 15-16 at page 492, the medical adviser determined that appellant had an 11 percent sensory deficit. Pursuant to Table 16-10 at page 482, he found that appellant's pain or sensory deficit was a Grade 3/40 percent, resulting in a 4 percent (40 percent x 11 percent = 4 percent) left upper extremity impairment for pain or sensory deficit. According to the Combined Values Chart at page 604, the medical adviser concluded that appellant had a combined left upper extremity impairment of 10 percent (4 percent + 6 percent = 10 percent). The Board finds that the Office medical adviser correctly applied the appropriate tables of the A.M.A., *Guides* and properly concluded that appellant had a 10 percent impairment of his left upper extremity.

The Board finds that there is no other probative medical evidence of record to establish that appellant has more than a 10 percent impairment of his left upper extremity, for which he received a schedule award. Accordingly, the Board finds that appellant has no more than a 10 percent permanent impairment of his left upper extremity.

The Office medical adviser found that appellant reached MMI on October 27, 2004, the date of Dr. McAlister's examination. It is well established that the period of a schedule award commences on the date that the employee reaches MMI from the residuals of the accepted employment injury. The determination of whether MMI has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.⁷ The Board finds that the Office correctly determined that the date of MMI was October 27, 2004.

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 a final decision by the Office.⁸ The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁹

⁷ See *Mark Holloway*, *supra* note 6.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, “A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. 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.”¹⁰

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, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹¹ In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹²

ANALYSIS -- ISSUE 2

The Office issued a decision on December 30, 2005 granting appellant a schedule award for a 10 percent impairment of his right upper extremity. The record reflects that appellant sought an oral hearing by submitting an undated request that was delivered by certified mail on January 31, 2006, more than 30 days after the Office issued its December 30, 2005 decision. The 30-day period for determining the timeliness of appellant’s hearing request commenced on the first day following the issuance of the Office’s decision.¹³ As the Office’s decision was issued on December 30, 2005, the 30-day period began to run on December 31, 2005. The 30th day following the Office’s decision was January 29, 2006. However, since January 29, 2006 fell on a Sunday, appellant had until January 30, 2006 to submit his request for an oral hearing.¹⁴ The record does not include a copy of the envelope in which appellant submitted his hearing request or any other evidence of mailing that would otherwise establish a timely filing. As the request was undated and the record is devoid of any additional information that would render appellant’s request timely, the Office properly relied on the January 31, 2006 date of receipt, rendering the request untimely.

As appellant’s hearing request was untimely, he was not entitled to a hearing as a matter of right. The Office properly exercised its discretion in denying a hearing upon appellant’s untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence on the issue of his termination.¹⁵ The Board has

¹⁰ 20 C.F.R. § 10.616(a). See also *Gerard F. Workinger*, 56 ECAB ____ (Docket No. 04-1028, issued January 18, 2005).

¹¹ *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

¹² *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹³ See *John B. Montoya*, 43 ECAB 1148, 1151-52 (1992). (In computing a time period, the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period shall be included, unless it is a Saturday, Sunday or a holiday.)

¹⁴ *Id.*

¹⁵ See *Joseph R. Giallanza*, 55 ECAB 186 (2003).

held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and probable deduction from established facts.¹⁶ In the present case, the evidence of record does not establish that the Office abused its discretion in denying appellant's hearing request.

CONCLUSION

The Board finds that appellant failed to establish that he has greater than a 10 percent impairment of his left upper extremity. The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 5, 2006 and December 30, 2005 are affirmed.

Issued: December 8, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ See *André Thyratron*, 54 ECAB 257 (2002).