

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, EASTMONT
STATION, Oakland, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1413
Issued: November 21, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2007 appellant timely appealed the February 9, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which found that she had abandoned her hearing request and the September 13, 2006 merit decision which denied appellant's request for an increase in her schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

ISSUES

The issues are: (1) whether the Office properly found that appellant abandoned her request for a hearing; and (2) whether appellant is entitled to an additional schedule award for permanent impairment of the right upper extremity.

FACTUAL HISTORY

On January 25, 1988 appellant filed an occupational disease claim for a pinched nerve in her wrist and loss of feeling in her hands. Her claim was accepted for bilateral carpal tunnel syndrome on June 8, 1988. On November 9, 1989 appellant filed a recurrence of disability

claim. On February 2, 1990 she had right carpal tunnel release surgery. On March 29, 1990 appellant's claim was also accepted for bilateral carpal tunnel syndrome.

On February 28, 2000 appellant requested a schedule award. On July 5, 2000 appellant underwent an examination with Dr. Audrey Swartz at the request of the Office. In her August 7, 2000 report, Dr. Swartz found that appellant had reached maximum medical improvement on January 1, 1994.

In the February 25, 2001 report, the district medical adviser found impairment due to loss of range of motion for bilateral wrists for loss of flexion to be six percent, loss of extension to be seven percent, loss of radial deviation to be two percent and loss of ulnar deviation to be four percent. For the right wrist, the district medical adviser also found impairment due to sensory deficit or pain the level of impairment on the right was a Grade 4, which allowed up to 20 percent, but multiplied by the maximum impairment based on median nerve of 39 percent, totaling an additional 8 percent impairment.¹ The district medical adviser based her findings on Dr. Swartz's August 7, 2000 report.

On March 2, 2001 the Office awarded appellant a schedule award for 25 percent permanent impairment of the right upper extremity and 19 percent permanent loss of the left upper extremity based on the district medical adviser's opinion.

On August 31, 2004 appellant had a left open carpal tunnel release performed by Dr. George Pugh, an orthopedic surgeon. On February 2, 2005 Dr. Pugh opined that appellant's symptoms had resolved and that appellant did not have any additional permanent impairment.

On April 1, 2005 appellant filed a claim for compensation for a schedule award. On April 19, 2006 the Office sent appellant to be evaluated for permanent impairment by Dr. Alan Kimelman, who, on May 2, 2006, conducted motor nerve and sensory nerve studies. Dr. Kimelman found that the right and left median nerves showed findings of mononeuropathy at the wrist and the right ulnar nerve showed findings of mild mononeuropathy at the elbow from neurodiagnostic electromyography. On August 21, 2006 the Office sent Dr. Kimelman's report to the district medical adviser for review. In the September 2, 2006 report, the district medical adviser noted that at the time of the more recent evaluation by Dr. Kimelman appellant's condition did appear to be improved and had normal range of motion with only minimal median nerve deficits following carpal tunnel release. The district medical adviser found that appellant had a five percent impairment for both the right and left upper extremities as a result of having satisfactory results following carpal tunnel release based on Chapter 16, page 495 of the A.M.A., *Guides*. The district medical adviser found appellant's situation fit under option two on page 495 as appellant had optimal recovery time following surgical decompression resulting in normal sensibility with abnormal sensory. On September 13, 2006 the Office denied appellant's claim for additional schedule award based on the district medical adviser's calculations which did not find a worsening of appellant's bilateral hand impairment.

¹ The district medical adviser stated that she used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, but she did not use the methodology described for carpal tunnel on page 495. It appears she used the methodology from the fourth edition of the A.M.A., *Guides*.

On September 28, 2006 appellant requested an oral hearing. On December 13, 2006 the Office informed appellant of the oral hearing scheduled on January 23, 2007. On February 9, 2007 the Office found that appellant had abandoned her request for a hearing as she failed to appear at the hearing and failed to contact the Office prior or subsequent to the hearing to explain her failure to appear.

LEGAL PRECEDENT -- ISSUE 1

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: “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 entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on [her] claim before a representative of the Secretary.”

With respect to abandonment of hearing requests, Chapter 2.1601.6(e) of the Office’s procedure manual provides in relevant part:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, [the Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the [district Office].”²

The Office has the burden of proving that it mailed the claimant a notice of the date and time of the scheduled hearing.³

ANALYSIS -- ISSUE 1

By decision dated September 13, 2006, the Office denied appellant’s claim for an increase in schedule award. Appellant timely requested an oral hearing. In a December 13, 2006 letter, the Office notified appellant that an oral hearing was to be held on January 23, 2007. On appeal, she claimed that she did not attend the scheduled hearing as she did not receive notice of the hearing.

Although appellant asserts that she did not receive notice of the hearing, the Board finds that notice of the hearing was sent to appellant’s address of record. There is no record of appellant having a change of address. Additionally, the return address used in appellant’s appeal is identical to her address of record where the notice was sent. In the absence of evidence to the

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999). See also *Chris Wells*, 52 ECAB 445 (2001).

³ *Nelson R. Hubbard*, 54 ECAB 156, 157 (2002).

contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.⁴

The evidence establishes that appellant did not request a postponement of the hearing, failed to appear at the hearing and failed to provide adequate explanation for her failure to appear within 10 days. The Board therefore finds that appellant abandoned her request for a hearing in this case.

LEGAL PRECEDENT -- ISSUE 2

A claim for an increased schedule award may be based on new exposure.⁵ Absent any new exposure to employment factors, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.⁶

In determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.⁷ Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.⁸

Section 8107 of the Federal Employees' Compensation Act set forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁹ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as

⁴ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003). This presumption is commonly referred to as the mailbox rule. It arises when the record reflects that the notice was properly addressed and duly mailed. *Nelson R. Hubbard*, *id.*

⁵ *Linda T. Brown*, 51 ECAB 115 (1999).

⁶ *Id.*

⁷ *Carol A. Smart*, 57 ECAB ___ (issued January 24, 2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

⁹ For total loss of use of an arm (100 percent), an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2000). Compensation for less than 100 percent impairment is determined by multiplying the percentage impairment by the maximum number of weeks' compensation authorized for the particular schedule member. For example, 20 percent permanent impairment of the arm warrants 62.4 weeks' compensation (20 percent x 312 weeks).

the appropriate standard for evaluating schedule losses.¹⁰ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).¹¹

ANALYSIS -- ISSUE 2

On March 2, 2001 the Office awarded appellant a schedule award of 25 percent for the right upper extremity and 19 percent for the left upper extremity. Appellant thereafter had a left carpal tunnel release on August 31, 2004. On April 1, 2005 appellant requested an increase in her schedule award.

Appellant's claim is based on medical evidence. On May 2, 2006 appellant was evaluated by Dr. Kimelman. The district medical adviser reviewed Dr. Kimelman's evaluation and determined that appellant had a five percent impairment rating for both the right and the left upper extremities respectively. The district medical adviser properly applied option two on page 495 of the A.M.A., *Guides* which allows for an impairment rating not to exceed five percent in situations where a person has normal sensibility and abnormal sensory with optimal recovery time after surgical decompression. Except in rare circumstances, ratings based on loss of motion or grip strength are not allowed in carpal tunnel award cases, unless the medical evidence clearly establishes why such additional award is necessary.¹² Appellant's current impairment rating of 5 percent each for both the right and left upper extremities is less than her previously awarded rating of 25 percent and 19 percent respectively therefore there has not been a worsening of appellant's condition.

Since the evidence does not establish more than the 25 percent right upper extremity and 19 percent left upper extremity impairments previously awarded, the Office properly found that appellant was not entitled to an increased schedule award based on the evidence of record.

CONCLUSION

The Board finds that the Office properly determined that appellant had abandoned her hearing request and that the Office properly denied appellant's request for an increase in schedule award.

¹⁰ 20 C.F.R. § 10.404 (2007).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹² *Cristeen Falls*, 55 ECAB 420 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2007 and September 13, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 21, 2007
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