

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

M.M., Appellant)

and)

DEPARTMENT OF THE ARMY, U.S. ARMY)
CORPS OF ENGINEERS, New Orleans, LA,)
Employer)

**Docket No. 08-473
Issued: June 19, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from a September 6, 2007 decision of the Office of Workers' Compensation Programs which denied his request for a hearing and a May 31, 2007 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant has more than five percent permanent impairment of his right 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 July 31, 2006 appellant, then a 48-year-old rigging worker, sustained injury to the tip of his right pinky finger in the performance of duty. On October 17, 2006 the Office accepted

his claim for a crushing injury of the right pinky finger, traumatic amputation,¹ partial, without complication of the right pinky. Appellant received appropriate compensation benefits. On December 21, 2006 he requested a schedule award.

In a December 14, 2006 report, Dr. Eric R. George, a Board-certified hand surgeon, noted that appellant was four weeks past an osteotomy of the finger and excision of the nail plate. He opined that appellant's amputation of the distal interphalangeal joint of the small finger would entitle appellant to 45 percent impairment of the small finger, which translated to 5 percent impairment of the upper extremity and 3 percent of the whole person.

In a January 9, 2007 report, the Office medical adviser noted appellant's history of injury and treatment and advised that he had utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). He indicated that appellant's condition was accepted for a crushing injury to right little finger and amputation of right little finger and that appellant achieved maximum medical improvement on December 14, 2006. Regarding the amputation of the right little finger through the distal phalanx, the Office medical adviser referred to Figure 16-3² and determined that this would warrant 45 percent impairment of the finger. He noted that according to Table 16-1,³ 45 percent of the finger was equivalent to 5 percent of the hand. The Office medical adviser referred to Table 16-2⁴ and opined that it translated to five percent right upper extremity impairment.

On May 31, 2007 the Office granted appellant a schedule award for five percent impairment of the right upper extremity. The award covered a period of 15.6 weeks from December 15, 2006 to April 30, 2007.

On August 17, 2007 the Office received a request for hearing from appellant. The request was postmarked August 7, 2007.

By decision dated September 6, 2007, the Office denied appellant's request for a hearing on the grounds that the request was untimely. It found that he did not submit his request for an oral hearing within 30 days of the Office's May 31, 2007 decision and, therefore, he was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue could equally well be addressed through the reconsideration process.

¹ Dr. Eric George performed surgery on November 15, 2006.

² A.M.A., *Guides* 442.

³ *Id.* at 438.

⁴ *Id.* at 439.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act⁵ sets 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.⁶ 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁷ The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁸

ANALYSIS -- ISSUE 1

In the present case, appellant's claim was accepted for crushing injury of the finger, right pinky, traumatic amputation, partial without complication of the right pinky. The record contains reports from appellant's treating physician and the Office medical adviser. Both physicians determined that appellant sustained five percent impairment of the right upper extremity. In a December 14, 2006 report, Dr. George, appellant's physician, opined that appellant had five percent impairment of the arm due to his amputation of the distal interphalangeal joint of the right little finger. He did not provide reference to the A.M.A., *Guides* in making his impairment rating.⁹ The Office medical adviser concurred with Dr. George's assessment of five percent impairment of the right arm.

The Board finds that the Office properly rated the impairment related to appellant's right pinky partial amputation. In a January 9, 2007 report, the Office medical adviser utilized the A.M.A., *Guides* and referred to Figure 16-3¹⁰ for the amputation of the right little finger through the distal phalanx which provides 45 percent impairment. He referred to Table 16-1,¹¹ and advised that 45 percent of the finger was equal to 5 percent of the hand. The Office medical adviser then referred to Table 16-2¹² and determined that this also represented five percent right upper extremity impairment. The Board finds that the medical evidence establishes that appellant has five percent permanent impairment of the right upper extremity.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8107.

⁷ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁸ A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

⁹ Although Dr. George also expressed appellant's impairment in terms of whole person impairment, schedule awards are not payable for impairment of the whole person. See *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁰ A.M.A., *Guides* 442.

¹¹ *Id.* at 438.

¹² *Id.* at 439.

On appeal, appellant alleged that he had greater impairment and listed items that were bothersome with regard to his injury. The medical record establishes that he has no more than five percent permanent impairment of the right upper extremity.¹³

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 an Office final decision.¹⁴

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”¹⁵

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.”¹⁶

The Office’s regulations provide that a request received more than 30 days after the Office’s decision is subject to the Office’s discretion¹⁷ and the Board has held that the Office must exercise this discretion when a hearing request is untimely.¹⁸

ANALYSIS -- ISSUE 2

Appellant’s request for a hearing was postmarked August 7, 2007. The Board notes that the request for a hearing was more than 30 days after the Office issued its May 31, 2007 decision. Appellant was not entitled to a hearing as a matter of right.

The Office also properly exercised its discretion in denying a hearing upon appellant’s untimely request by determining that the issues could be equally well addressed by requesting reconsideration and submitting new evidence. The only limitation on the Office’s authority is reasonableness. 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 deductions

¹³ A claimant may seek an increased schedule award if the evidence establishes that progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. § 10.615.

¹⁶ 20 C.F.R. § 10.616(a).

¹⁷ 20 C.F.R. § 10.616(b).

¹⁸ *Samuel R. Johnson*, 51 ECAB 612 (2000).

from known facts. There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds that appellant has no more than five percent permanent impairment of the right upper extremity for which he received a schedule award. The Board also finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 6 and May 31, 2007 are affirmed.

Issued: June 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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