

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

T.K., Appellant

and

**DEPARTMENT OF THE AIR FORCE, TRAVIS
AIR FORCE BASE, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1930
Issued: August 11, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2008 appellant filed a timely appeal from January 11, 2008 schedule award decisions of the Office of Workers' Compensation Programs and a May 6, 2008 nonmerit decision, denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 510.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant has more than 32 percent impairment to his left upper extremity, for which he received schedule awards; (2) whether appellant has any impairment of his right upper extremity; and (3) whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

The Office accepted that appellant, then a 43-year-old aircraft overhaul supervisor, sustained left shoulder adhesive capsulitis and lateral epicondylitis of the left elbow as a result of an April 28, 2003 employment injury.¹

On May 23, 2004 Dr. Leonard Simpson, an Office medical adviser found that appellant had four percent left upper extremity impairment due to the accepted conditions. He rated sensory impairment to the left shoulder due to the axillary nerve, noting that Table 16-15, page 492, provided a maximum impairment of five percent. Under Table 16-10, page 482, appellant had a Grade 4 (25 percent) sensory deficit. Dr. Simpson multiplied the 5 percent maximum by the 25 percent deficit, to find 1.25 percent impairment for shoulder pain (rounded to 1 percent). He rated sensory impairment to the left elbow from the radial nerve, noting that Table 16-15 provided a maximum impairment of five percent. This was multiplied by the 25 percent grade sensory deficit to also find a 1 percent sensory loss. The medical adviser noted that 160 degrees of shoulder joint abduction was one percent impairment under Table 16-43, page 477. One hundred and sixty degrees of shoulder flexion was also one percent impairment under Table 16-40, page 476. Dr. Simpson added the range of motion impairments (two percent) and then combined this with the impairments for sensory loss to the shoulder and elbow to find four percent total loss to the left upper extremity.

On June 3, 2004 the Office issued a schedule award for a four percent impairment of the left upper extremity. The period of the award was from May 7 to August 2, 2004.

Appellant sustained a traumatic injury to his neck on January 5, 2005 while lifting and moving heavy furniture from his office.² The Office accepted the claim for a neck strain and herniated discs at C5-6 and C6-7. It authorized anterior cervical discectomy and fusion surgery with internal fixation at C6-7, which was performed on September 21, 2005. Appellant returned to regular duty work on January 2, 2006.

In a decision dated March 7, 2005, an Office hearing representative set aside the June 3, 2004 schedule award and remanded the case for further development of the extent of appellant's impairment.

On June 13, 2005 Dr. Simpson again reviewed the medical evidence and found that appellant had 23 percent permanent impairment to the left upper extremity. He noted the previous rating of four percent based on sensory loss to the left arm and loss of range of motion. Dr. Simpson advised that appellant also had 32 percent loss of grip strength, which under Table 16-13, page 509, was 20 percent impairment. Using the Combined Values Chart, he combined the 20 percent grip strength loss with the prior 4 percent impairment for pain and loss of range of motion to total 23 percent left upper extremity impairment.

¹ The Office assigned claim file number xxxxxx804.

² Office claim file number xxxxxx519.

In a July 20, 2005 decision, the Office granted a schedule award for an additional 19 percent impairment. As appellant previously received a 4 percent award, this amount was deducted from the 23 percent impairment rating. The period of the award was from August 8, 2004 to September 26, 2005.

On August 16, 2006 appellant filed a claim for an increased schedule award.

On October 2, 2006 the Office referred appellant to Dr. Moola P. Reddy, a Board-certified physiatrist, for a second opinion evaluation. On October 6, 2006 Dr. Reddy noted appellant's complaint of pain radiating into the left upper extremity. Motor strength was reported as 5/5 to bilaterally, with some atrophy noted of the left arm. He diagnosed left C7 radiculopathy due to the accepted cervical disc herniation. Physical examination revealed slightly limited cervical range of motion and no significant neck tenderness on palpation.

In an October 25, 2006 report, Dr. Arthur S. Harris, an Office medical adviser, reviewed the medical evidence. He found 12 percent impairment to the left upper extremity caused by sensory and motor loss of the C7 nerve root. Under Table 16-13, page 489, the maximum sensory loss of the C7 nerve root was five percent. Dr. Harris rated the extent of sensory loss under Table 16-10 as Grade 3 (60 percent). When multiplied, this resulted in three percent sensory loss. Under Table 16-13, the maximum loss for motor deficit was 35 percent. Dr. Harris used Table 16-11, page 484, to rate the extent of loss of strength as Grade 4 (25 percent). When multiplied, this resulted in 8.75 percent, rounded to 9 percent. He then used the Combined Values Chart to find a total 12 percent left upper extremity impairment due to sensory and motor loss of the C7 nerve root.

On May 30, 2007 the Office requested that Dr. Harris address whether appellant had any permanent impairment to his right arm due to the accepted injuries. On June 9, 2007 Dr. Harris advised that the medical evidence of record established impairment only to appellant's left arm. He noted that Dr. Reddy did not address any impairment to the right upper extremity from the accepted cervical condition. Dr. Harris found that appellant had a total 32 percent left upper extremity impairment. He used the Combined Values Chart to combine the 23 percent loss previously awarded with the 12 percent impairment based on loss at the C7 nerve root.

In a June 13, 2007 treatment record, Dr. Santi Rao, a treating physician, noted that appellant reported increased neck and arm symptoms on the right side. Appellant complained of burning pain to his right and left upper back which went into both shoulders. He also reported right hand numbness, decreased right side dexterity and some right arm weakness.

On August 27, 2007 Dr. Harris reviewed the medical evidence, including Dr. Rao's report. He noted that Dr. Rao did not provide any specific findings relevant to the right upper extremity, which would allow for rating permanent impairment to the extremity. Dr. Rao did not list any findings to support neurologic deficit to either upper extremity. Dr. Harris stated that appellant did not have greater than the 32 percent left arm impairment previously addressed.

In decisions dated January 11, 2008, the Office denied a schedule award for appellant's right arm. It found the medical evidence was insufficient to establish any permanent impairment due to his accepted claims. The Office granted a schedule award for an additional nine percent

impairment to his left arm. The period of the award was from March 1 to September 13, 2006. The Office noted that appellant had 32 percent total left upper extremity impairment and previously received awards for 23 percent impairment. Therefore, appellant was entitled to the difference of nine percent.

In an appeal request form dated February 8, 2008, postmarked March 6, 2008 and date stamped as received March 11, 2008, appellant requested an oral hearing before an Office hearing representative.

By decision dated May 6, 2008, the Office Branch of Hearings and Review denied appellant's request as untimely. It found that his claim could be addressed through the reconsideration process.³

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act⁴ and section 10.404 of the implementing federal regulations,⁵ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁶ has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

No schedule award is payable for a member, function or organ of the body not specified in the Act or the implementing regulations.⁷ Neither the Act nor the Office's regulations provide for the payment of a schedule award for permanent loss of use of the back or the body as a whole.⁸ The Board notes that section 8101(2) specifically excludes the back from the definition of organ.⁹ However, a claimant may be entitled to a schedule award for permanent impairment

³ The Board notes that, following the May 6, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence for the first time on appeal. *See* 20 C.F.R. §§ 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁷ *See Joseph Lawrence, Jr.*, *supra* note 6; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *See* 5 U.S.C. § 8101(20). *See also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.

ANALYSIS -- ISSUE 1

On appeal, appellant contends that he should have received a schedule award for the full 12 percent impairment rated by Dr. Harris in 2006. However, in light of the prior schedule awards granted for impairment to his left arm, he is not entitled to an award in that amount.

The Office accepted left shoulder adhesive capsulitis and left elbow lateral epicondylitis as a result of the April 28, 2003 employment injury. It also accepted herniated discs at C5-6 and C6-7 as a result of a January 5, 2005 employment injury. Appellant initially received a schedule award of four percent impairment to the left arm based on loss of range of motion to the shoulder and sensory loss to the shoulder and elbow. Following remand of the case, he was also rated with impairment of 20 percent based on loss of grip strength.¹⁰ These impairment ratings, when combined by Dr. Simpson on June 13, 2005, totaled 23 percent. Appellant's schedule award of July 20, 2005 compensated him for the additional 19 percent impairment to his left arm. This decision took into account the prior schedule award of four percent.

The present appeal is based on appellant's contention of increased impairment to his left upper extremity. Dr. Harris, on October 25, 2006, rated impairment to the arm based on sensory and motor loss from the C7 nerve root. As noted, he was found to have an additional 12 percent impairment to the upper extremity. This does not mean, as appellant's contends on appeal, that he is entitled to the full 12 percent rating based on C7 nerve dysfunction. Rather, this rating must be combined with the impairments to the arm as represented in the prior schedule awards he received. This was addressed by Dr. Harris in a June 9, 2007 report. Appellant previously received two schedule awards for a total 23 percent impairment. Dr. Harris noted that, by using the Combined Values Chart, 12 percent (based on C7 nerve sensory and motor loss) combined with 23 percent (based on loss of shoulder range of motion, axillary and radial nerve sensory loss and grip strength) totaled 32 percent.

Appellant previously received schedule awards for 23 percent impairment of his left arm. He was therefore entitled to the difference between the current rating, 32 percent and the prior awards. Subtracting 23 percent from 32 percent is 9 percent, the award granted by the Office on January 11, 2008. There is no medical evidence establishing greater impairment of his left arm. The Board will affirm the schedule impairment rating for appellant's left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

The Act¹¹ provides compensation for both disability and physical impairment. Disability means the incapacity of an employee, because of an employment injury, to earn the wages the

¹⁰ The Board notes that the A.M.A., *Guides* provide at Chapter 16.8, page 508, that loss of strength "cannot be rated in the presence of decreased motion" that prevents effective application of maximal force in the region being evaluated.

¹¹ 5 U.S.C. §§ 8101-8193.

employee was receiving at the time of injury.¹² In such cases, the Act compensates an employee for loss of wage-earning capacity. For permanent physical impairment section 8107 compensates an employee under the schedule for loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.¹³

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence. An employee has the burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of his or her employment injury.¹⁴ This is a medical issue and must be support by probative medical opinion evidence. The claimant must submit a rationalized medical opinion that supports impairment caused by the accepted employment injury or condition.¹⁵ The medical opinion must be based on a complete factual and medical background, an accurate history of the claimant's employment injury and an explanation describing the impairment.¹⁶

ANALYSIS -- ISSUE 2

On January 11, 2008 the Office denied appellant's claim for a schedule award for his right arm, finding that the medical evidence failed to establish that he sustained permanent impairment to that extremity. Appellant was referred for examination to Dr. Reddy. On October 6, 2006 Dr. Reddy diagnosed left C7 cervical radiculopathy, which he attributed to the accepted injury. He did not make any diagnosis of impairment to the right upper extremity.

Appellant submitted a June 13, 2007 treatment record from Dr. Rao, an attending physician, who noted that appellant had complaints regarding his right upper extremity, but provided no findings sufficient on which to base a schedule award. Dr. Rao did not address the issue of whether appellant sustained any permanent impairment to his right arm due to the accepted conditions.¹⁷ He did not list any findings from physical examination or diagnostic testing that could be used by an Office medical adviser to rate permanent impairment.

On August 27, 2007 Dr. Harris addressed the deficiencies in the medical evidence. He advised that the report of Dr. Rao did not provide objective support for any right upper extremity impairment. The Board notes that Dr. Harris properly reviewed the medical evidence of record

¹² C.S., 59 ECAB ____ (Docket No. 08-736, issued September 3, 2008); *Lyle E. Dayberry*, 49 ECAB 369 (1998).

¹³ *Renee M. Straubinger*, 51 ECAB 667 (2000); *see also B.K.*, 59 ECAB ____ (Docket No. 07-1545, issued December 3, 2007).

¹⁴ *See D.H.*, 58 ECAB ____ (Docket No. 06-2160, issued February 12, 2007); *Veronica Williams*, 56 ECAB 367 (2005).

¹⁵ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁶ *Yvonne R. McGinnis*, 50 ECAB 272 (1999).

¹⁷ *See E.A.*, 58 ECAB ____ (Docket No. 07-1145, issued September 7, 2007) (to establish entitlement to workers' compensation benefits, a claimant must submit an affirmative opinion on causal relationship from a physician who supports the opinion with sound medical reasoning).

and found that it did not establish permanent impairment to appellant's right arm pursuant to the A.M.A., *Guides*. The Office evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that he sustained impairment to the right arm.¹⁸ As such evidence has not been submitted, the Board finds that he is not entitled to a schedule award for his right upper extremity.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) 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.¹⁹ A claimant is not entitled to a hearing as a matter of right if the request is not made within 30 days of the date of the decision as determined by the postmark of the request.²⁰ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.²¹ In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.²²

ANALYSIS -- ISSUE 3

The Office issued decisions concerning appellant's right and left upper extremities on January 11, 2008. Appellant's request for a hearing before an Office hearing representative was dated February 8, 2008; however, it was not postmarked until March 6, 2008. The date of filing of his hearing request is determined by the date of the postmark.²³ His March 6, 2008 hearing request was made more than 30 days after the date of the Office's January 11, 2008 decisions. Therefore, appellant was not entitled to a hearing as a matter of right.

The Office has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its May 6, 2008 decision, the Office properly exercised its discretion. It considered the issues involved and had denied appellant's request for a review of the written record on the basis that his claim could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that 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

¹⁸ See *D.H.*, *supra* note 14; *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁹ 5 U.S.C. § 812(b)(2). See *A.B.*, 58 ECAB ____ (Docket No. 07-387, issued June 4, 2007).

²⁰ 20 C.F.R. § 10.616(b).

²¹ *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

²² *Teresa M. Valle*, 57 ECAB 542 (2006).

²³ See *N.M.*, 59 ECAB ____ (Docket No. 07-1432, issued May 5, 2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking).

taken which are contrary to both logic and probable deduction from established facts.²⁴ In the present case, the evidence did not abuse its discretion in denying a discretionary hearing.

CONCLUSION

The Board finds that appellant has no more than 32 percent impairment of the left arm, for which he received schedule awards. The amounts paid under the awards properly accounted for the combined impairments for which he has been rated. The Board finds that the Office properly denied his claim for a schedule award for his right upper extremity, as appellant failed to establish permanent impairment to that member. The Board finds that the Office properly denied appellant's request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the May 6 and January 11, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 11, 2009
Washington, DC

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

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

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

²⁴ *Teresa M. Valle*, *supra* note 22; *Daniel J. Perea*, 42 ECAB 214 (1990).