

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

C.B., Appellant

and

DEPARTMENT OF THE NAVY, NAVAL AIR
STATION, Key West, FL, Employer

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**Docket No. 08-1762
Issued: February 4, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2008 appellant timely appealed the December 20, 2007 merit decision of the Office of Workers' Compensation Programs, which denied an additional schedule award. He also timely appealed the May 28, 2008 decision denying his request for a review of the written record. 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 appellant is entitled to an additional schedule award for permanent impairment of his right lower extremity; and (2) whether the Branch of Hearings & Review properly denied appellant's April 3, 2008 request for a review of the written record.

FACTUAL HISTORY

Appellant, a 50-year-old material handler leader, sustained a right ankle injury on August 20, 2004. The Office initially accepted this traumatic injury claim for fracture of the right navicular bone. Appellant resumed his regular employment duties on November 9, 2004.

On September 29, 2005 appellant received a schedule award for 20 percent impairment of the right lower extremity. The award was based on the May 26, 2005 report of the district medical adviser. The overall rating was a combination of impairments due to nerve deficits (5 percent) and loss of ankle motion (16 percent).¹ Appellant subsequently requested reconsideration, which the Office denied by decision dated October 13, 2006.

In February 2007, appellant received a diagnosis of right talonavicular osteoarthritis with bone spur (exostosis). He was advised to undergo surgery to remove the bone spur, which the Office approved. Additionally, the Office expanded appellant's claim to include benign neoplasm of short bones of lower limb (dorsal exostosis and bone overgrowth) as an accepted condition.

On June 14, 2007 Dr. Dmitry Sandler, a podiatric surgeon, performed a right talonavicular exostectomy. Appellant returned to work in a limited-duty capacity on July 13, 2007.

On September 27, 2007 appellant filed a claim for an additional schedule award. In a September 20, 2007 report, Dr. Sandler indicated that appellant had reached maximum medical improvement. He also stated that appellant had 14 percent impairment of the right foot due to arthritis in the talonavicular joint. In a November 6, 2007 report, Dr. Sandler explained that his impairment rating was based on the cartilage interval of the talonavicular joint, citing Table 17-31, American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

Another district medical adviser, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon, reviewed the case file on November 19, 2007, and found that Dr. Sandler had not identified an abnormality that would qualify as a basis of impairment. Although Dr. Sandler recently indicated that the impairment was based on cartilage interval of the talonavicular joint, the district medical adviser noted that, when appellant underwent surgery in June 2007, the joint space was noted to be "well preserved."² Because there was no evidence of joint space narrowing or any other identified abnormalities, the district medical adviser found zero percent impairment of the right lower extremity.

In a decision dated December 20, 2007, the Office denied appellant's claim for an additional schedule award. It explained that appellant had already received an award for 20 percent impairment and the district medical adviser's recent review found no medical evidence to support an increased impairment.

¹ In a report dated July 29, 2005, appellant's podiatrist, Dr. Bradley J. Makimaa, agreed with the district medical adviser's 20 percent impairment rating.

² Dr. Sandler's June 14, 2007 operative report indicated that "[t]he joint space itself is well preserved with no secondary changes such as cystic or erosive joint changes." He further stated that, due to the "excellent preservation of the space," it was felt that appellant should undergo a talonavicular joint exostectomy rather than talonavicular joint arthrodesis.

On April 3, 2008 appellant requested a review of the written record.³

By decision dated May 28, 2007, the Branch of Hearings & Review denied appellant's request for a review of the written record. Appellant's April 3, 2008 request was untimely, and therefore, he was not entitled to a hearing as a matter of right. Furthermore, in denying a discretionary hearing, the Branch of Hearings & Review advised appellant that he could pursue the issue by requesting reconsideration before the district Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act 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.⁴ 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 the appropriate standard for evaluating schedule losses.⁵ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁶

ANALYSIS -- ISSUE 1

Dr. Sandler reported that appellant had 14 percent impairment of the right foot based on the cartilage interval of the talonavicular joint under A.M.A., *Guides* 544, Table 17-31. This particular table provides for impairment ratings for arthritis as demonstrated by x-ray evidence of decreased cartilage intervals in various affected joints. To qualify for a 14 percent impairment of the foot (10 percent lower extremity), the cartilage interval in the talonavicular joint must be no greater than one millimeter (mm). Dr. Sandler did not identify any particular x-rays that supported this impairment rating. In fact, the latest x-rays of record were obtained at the time of appellant's June 14, 2007 right ankle surgery. As previously reported, Dr. Sandler at that time described appellant's talonavicular joint space as "well preserved with no secondary changes such as cystic or erosive joint changes." There are no x-rays of record that quantify or otherwise reveal a one mm cartilage interval of the right talonavicular joint. As such, the district medical adviser properly found that Dr. Sandler had not identified an abnormality that would qualify as a basis for impairment. Accordingly, the Office properly denied appellant's claim for an additional schedule award.

³ Appellant claimed to have filed an earlier request, but the Office had no record of receiving such a request.

⁴ The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

⁵ 20 C.F.R. § 10.404 (2008).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.⁷ A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁸ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Office regulations further provide that the “claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”⁹ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹⁰

ANALYSIS -- ISSUE 2

Appellant’s request for a review of the written record was postmarked April 3, 2008, which is more than 30 days after the Office issued its December 20, 2007 decision. The regulations clearly specify that “[t]he 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.”¹¹ Appellant’s request was, therefore, untimely and as such, he was not entitled to a review of the written record as a matter of right. In its May 28, 2008 decision, the Branch of Hearings & Review also denied his request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative’s discretionary authority.¹² Moreover, there is no evidence indicating that the Branch of Hearings & Review otherwise abused its discretion in denying appellant’s request. Accordingly, the Board finds that the Branch of Hearings & Review properly exercised its discretion in denying his April 3, 2008 request for a review of the written record.

CONCLUSION

Appellant has not demonstrated that he has greater than 20 percent impairment of the right lower extremity. Therefore, he is not entitled to an additional schedule award. The Board further finds that the Branch of Hearings & Review properly denied appellant’s request for a review of the written record.

⁷ 20 C.F.R. § 10.615.

⁸ 20 C.F.R. § 10.616(a).

⁹ *Id.*

¹⁰ See *Herbert C. Holley*, 33 ECAB 140 (1981).

¹¹ 20 C.F.R. § 10.616(a).

¹² *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2008 and December 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2009
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