United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 08-2402**
	)	**Issued: June 11, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Rockford, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 3, 2008 appellant filed a timely appeal of a May 2, 2008 decision of the Office of Workers' Compensation Programs which denied her claim for a schedule award. She also appealed the July 11, 2008 decision denying her request for a hearing. 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 met her burden of proof in establishing that she is entitled to a schedule award; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On November 15, 2006 appellant, then a 42-year-old automation clerk filed an occupational disease claim, alleging that she sustained a painful wrist condition in the performance of duty. She alleged that she realized the condition was caused or aggravated by her employment on September 19, 2006. Appellant stopped work on November 10, 2006 and had right carpal tunnel release surgery on that date. The Office accepted the claim for carpal

tunnel syndrome (CTS) on the right and authorized right carpal tunnel release surgery. Appellant received appropriate compensation benefits.

On February 14, 2008 appellant filed a claim for a schedule award. In a report dated January 8, 2008, Dr. Sean MacKenzie, a Board-certified physiatrist, diagnosed carpal tunnel syndrome on the right. He advised that appellant had some residual paresthesia from her carpal tunnel syndrome, no true sensory loss, and no range of motion or strength deficit. Dr. MacKenzie utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (hereinafter A.M.A., *Guides*). He indicated that he would give a 10 percent sensory loss for the paresthesias, with the median nerve being a maximum of 39 percent upper extremity impairment. Dr. MacKenzie determined that this would equate to a 3.9 percent impairment, which would be rounded to 4 percent. He opined that this would translate to a whole-body impairment rating of two percent.

By letter dated March 3, 2008, the Office requested that appellant obtain additional information from her physician.

On April 1, 2008 Dr. MacKenzie completed the Office's impairment rating form and provided range of motion findings for the wrist, which were in the normal range. They included dorsiflexion of 60 degrees, palmar-flexion of 70 degrees, radial deviation of 20 degrees, and ulnar deviation of 30 degrees. Dr. MacKenzie advised that appellant did not have ankylosis, but noted some tenderness and median nerve paresthesias. He noted that pain was localized in the right wrist, forearm and neck pain.

In an April 14, 2008 report, the Office medical adviser noted appellant's history of injury and treatment and utilized the A.M.A., *Guides.* He referred to Dr. MacKenzie's findings which included subjective complaints of neck pain as well as tingling in the median innervated digits; however, noted that he found no true sensory loss and no strength deficit findings. The Office medical adviser explained that paresthesias (tingling) was a "very subjective finding, and the PPI rating for residual median neuropathy at the wrist is based on more objective measurable criteria such as sensation and grip strength." He concluded that, because appellant displayed normal strength and sensation, there was no objective basis for right upper extremity impairment. The Office medical adviser indicated that appellant reached maximum medical improvement on February 10, 2007, three months after her surgery.

By decision dated May 2, 2008, the Office denied appellant's claim for a schedule award. It found that the medical evidence was insufficient to establish permanent impairment of a scheduled member.

On June 6, 2008 appellant requested a hearing. She also forwarded a copy of Dr. MacKenzie's January 8, 2008 report.

By decision dated July 11, 2008, the Office found that appellant was not entitled to a hearing as her request was not made within 30 days of its May 2, 2008 decision. It exercised its discretion and determined that the case could equally well be addressed by requesting reconsideration and submitting new evidence pertaining to her claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[1] 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.[2] 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.[3] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4]

The fifth edition of the A.M.A., *Guides*, regarding carpal tunnel syndrome, provides that if, after an optimal recovery time following surgical decompression, an individual continues to complain of pain, paresthesias and/or difficulties in performing certain activities, three possible scenarios can be present: (1) positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTS is rated according to the sensory and/or motor deficits; (2) normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal EMG testing of the thenar muscles: a residual CTS is still present and an impairment rating not to exceed five percent of the upper extremity may be justified; and (3) normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies, in which case there is no objective basis for an impairment rating.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained right carpal tunnel syndrome in the performance of duty and authorized right wrist carpal tunnel release.

As noted above, the A.M.A., *Guides* provide three scenarios for determining the permanent impairment due to carpal tunnel syndrome after an optimal recovery time following surgical decompression.[6] Utilizing these scenarios, the Board finds that the medical evidence does not establish that appellant was entitled to a schedule award.

In support of her claim for a schedule award, appellant submitted a January 8, 2008 report from her treating physician, Dr. MacKenzie, who noted that appellant had some residual paresthesia from her CTS, but he also indicated that she had no true sensory loss and no range of motion or strength deficit. Although, Dr. MacKenzie utilized the A.M.A., *Guides* and indicated that he would provide appellant with an impairment of four percent for sensory loss for the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Id.* at § 8107.

[3] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[4] 20 C.F.R. § 10.404.

[5] *Silvester DeLuca*, 53 ECAB 500 (2002). A.M.A., *Guides* 495.

[6] *See supra* note 5.

paresthesias, the Board is unclear how he arrived at this determination, in light of his findings noted above, which included no true sensory loss, range of motion or strength deficit. The Board also notes that he did not explain how he calculated this impairment with reference to particular tables or pages in the A.M.A., *Guides,* nor did he explain why he rated sensory impairment when he found that appellant had no true sensory loss. Furthermore, Dr. MacKenzie provided range of motion findings for the wrist in his April 1, 2008 report, and the findings were normal. As he did not provide any objective findings to justify his conclusion or explain how this determination comported with the A.M.A., *Guides,* the Board finds that this report is insufficient to establish entitlement to a schedule award.

In an April 14, 2008 report, the Office medical adviser noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*.[7] He indicated that appellant reached maximum medical improvement on February 10, 2007. The Office medical adviser explained that the findings provided by Dr. MacKenzie included subjective complaints of neck pain and tingling in the median innervated digits; however, he also indicated that appellant had no true sensory loss no strength deficit findings. He explained that paresthesia was a "very subjective finding" and there were no objective findings for the wrist. The Office medical adviser also noted that appellant had normal strength and sensation, and opined that there was no objective basis for right upper extremity impairment.

The Board finds that the weight of the medical evidence, as represented by the opinion of the Office medical adviser, establishes that appellant has not shown that she is entitled to a schedule award. Appellant has the burden of proof to submit medical evidence supporting that she has permanent impairment of a scheduled member of the body.[8] As such evidence has not been submitted, appellant has not established entitlement to a schedule award. Accordingly, the Office properly denied her claim for a schedule award.

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.[9] 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."[10]

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

[7] It is well established that, when the examining physician does not provide an estimate of impairment conforming to the A.M.A., *Guides*, the Office may rely on the impairment rating provided by a medical adviser. *J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008).

[8] *See Annette M. Dent*, 44 ECAB 403 (1993).

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.615.

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]

The Office's regulations provide that a request received more than 30 days after the Office's decision is subject to the Office's discretion[12] and the Board has held that the Office must exercise this discretion when a hearing request is untimely.[13]

ANALYSIS -- ISSUE 2

Appellant's request for a hearing was made on June 6, 2008. The Board notes that the request for a hearing was more than 30 days after the Office issued its May 2, 2008 decision. Appellant was not entitled to a hearing as a matter of right.

The Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing by noting 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 from known facts.[14] There is no evidence of record that the Office abused its discretion in denying appellant's requests for a hearing under these circumstances.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for a schedule award. The Board also finds that the Office properly denied his request for a hearing.[15]

[11] *Id.* at § 10.616(a).

[12] *Id.* at § 10.616(b).

[13] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[14] 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 from known facts. *See Daniel J. Perea*, 42 ECAB 214 (1990). There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

[15] On appeal, appellant submitted new evidence. The Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT decisions of the Office of Workers' Compensation Programs dated July 11 and May 2, 2008 are affirmed.

Issued: June 11, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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