

FACTUAL HISTORY

Appellant, an 80-year-old retired aircraft environmental systems mechanic, has an accepted traumatic injury claim for right shoulder strain and disc herniations at C4-5 and C5-6, which arose on October 9, 1992. He underwent an April 9, 1993 anterior cervical discectomy at C4-5 and C5-6 with interbody fusion. On October 4, 1995 the Office granted appellant a schedule award for 25 percent impairment of the right upper extremity. The impairment was based on motor and sensory deficits involving the C5-6 nerves.

Appellant underwent a second surgical procedure on March 14, 2003 for an anterior cervical discectomy and interbody fusion at the C6-7 level. The procedure also involved the removal of instrumentation from the previous surgery at C5-6 with exploration and fusion.

On May 3, 2006 appellant filed a claim (Form CA-7) for an additional schedule award.

Dr. Maria Parris, a family practitioner, provided a September 8, 2006 impairment rating. Her diagnoses included bilateral carpal tunnel syndrome, right greater than left, and right rotator cuff tendinitis. Dr. Parris also noted radicular symptoms related to appellant's cervical spine injury. She advised that appellant's right rotator cuff tendinitis was unrelated to his employment injury.² Dr. Parris found 14 percent impairment of the right upper extremity due to motor (7.5 percent) and sensory (8.75 percent) deficits involving the C5-6 nerves. As to the left upper extremity, she found no motor deficit, but she did identify a sensory deficit involving the C5-6 nerves, which corresponded to 6.5 percent impairment of the left upper extremity.

In a report dated November 2, 2006, Dr. James W. Dyer, a Board-certified orthopedic surgeon and district medical adviser, found a combined 18 percent right upper extremity impairment. The overall rating included impairment for motor (seven percent) and sensory (three percent) deficits involving the C5-6 nerves. Dr. Dyer also provided an impairment rating for right shoulder loss of motion (nine percent). Based on Dr. Parris' examination findings, the medical adviser concluded that appellant reached maximum medical improvement on September 8, 2006. The Office subsequently asked Dr. Dyer to address whether the left upper extremity impairment (6.5 percent) noted by Dr. Parris was causally related to the October 9, 1992 employment injury. In a January 19, 2007 report, Dr. Dyer found that there was no impairment to the left upper extremity causally related to the accepted employment injury. He reviewed medical records dating back to 1993 and cited several references to right-side cervical involvement but no prior evidence of left-side involvement. Dr. Dyer reiterated that appellant had 18 percent impairment of the right upper extremity.

In a decision dated October 23, 2008, the Office denied an additional schedule award for the right upper extremity.

Appellant subsequently requested a review of the written record. He utilized the appeal request form that accompanied the October 23, 2008 decision. Appellant signed, dated and mailed the form on March 16, 2009.

² Although she provided range of motion measurements (ROM) for the shoulders, Dr. Parris did not rate appellant's right shoulder.

By decision dated July 23, 2009, the Branch of Hearings & Review denied appellant's request for a review of the written record. Appellant's March 16, 2009 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.³ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁴ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁵

The Act and implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.⁶ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁷

ANALYSIS -- ISSUE 1

Appellant previously received a schedule award for 25 percent impairment of the right upper extremity. This award was based on medical evidence from 1995 that demonstrated a combination of motor and sensory deficit involving the C5-6 nerves. More than a decade later, appellant filed a claim for an additional schedule award. In the interim period, he had a second anterior cervical discectomy and interbody fusion. The medical evidence submitted in support of

³ For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

⁴ 20 C.F.R. § 10.404.

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003). While the fifth edition of the A.M.A., *Guides* was in effect when the Office issued the October 23, 2008 decision, the Office has since adopted the sixth edition of the A.M.A., *Guides* (6th ed. 2008) for all schedule award determinations issued on or after May 1, 2009. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Example 1 (January 2010).

⁶ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c).

⁷ 20 C.F.R. § 10.404(c)(1), (c)(2).

his recent claim for a schedule award does not establish any greater permanent impairment.⁸ Dr. Parris' September 8, 2006 impairment rating of the right upper extremity was less than the 25 percent rating appellant previously received. Both the 1995 rating and Dr. Parris' right upper extremity rating were based on motor and sensory deficit involving the C5-6 nerves. Dr. Parris did not rate loss of right shoulder motion, presumably because she did not find that this impairment was employment related. Even after Dr. Dyer took the right shoulder loss of motion measurements into account (9 percent), the right upper extremity rating still did not exceed the 25 percent rating previously awarded on October 4, 1995.⁹ Consequently, appellant has not established that he has greater than 25 percent impairment of the right upper extremity.¹⁰

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.¹¹ 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.¹² 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."¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

Appellant's request for a review of the written record was dated and postmarked March 16, 2009, which is more than 30 days after the Office issued its October 23, 2008 decision. The Office's implementing 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."¹⁵ Appellant's request was untimely by more than

⁸ An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. *Amelia S. Jefferson*, 57 ECAB 183, 187 (2005).

⁹ Dr. Parris calculated appellant's C5-6 sensory (8.75 percent) and motor (7.5 percent) deficits. These figures are rounded-up to 9 percent and 8 percent, respectively, and then combined with Dr. Dyer's 9 percent right shoulder ROM deficit. The overall rating is 24 percent of the right upper extremity. *See Combined Values Chart, A.M.A., Guides 604-05.*

¹⁰ Because the October 23, 2008 decision did not make specific findings with respect to appellant's left upper extremity, the issue of whether he has an employment-related impairment of the left upper extremity is not before the Board.

¹¹ 20 C.F.R. § 10.615.

¹² *Id.* at § 10.616(a).

¹³ *Id.*

¹⁴ *See Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁵ 20 C.F.R. § 10.616(a).

three months. Therefore, he was not entitled to a review of the written record as a matter of right. The Branch of Hearings & Review also denied appellant's request on the basis that his claim for an increased schedule award could be addressed by requesting reconsideration before the district Office. The Board finds that the hearing representative properly exercised his discretionary authority in denying appellant's request for a review of the written record.¹⁶

CONCLUSION

The Office properly denied appellant's claim for an additional schedule award for the right upper extremity. The Board further finds that the Branch of Hearings & Review properly denied appellant's March 16, 2009 request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2009 and October 23, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 12, 2010
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

¹⁶ *Mary B. Moss*, 40 ECAB 640, 647 (1989).