

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

R.H., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Worth, TX, Employer**)

**Docket No. 11-1754
Issued: April 24, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2011 appellant filed a timely appeal of the January 14, 2011 Office of Workers' Compensation Programs (OWCP) merit schedule award decision and March 14, 2011 nonmerit decision denying review of the written record. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than five percent impairment of each upper extremity, due to his accepted condition of carpal tunnel syndrome, for which he received schedule awards; and (2) whether the Branch of Hearings and Review properly denied appellant's request for review of the written record as untimely.

On appeal, appellant alleged that his request for an oral hearing was mailed within 30 days of the postmark of the merit decision. He further argued that OWCP delayed in issuing his

¹ 5 U.S.C. § 8101 *et seq.*

schedule award decision in order to issue a reduced award under the sixth edition rather than the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).²

FACTUAL HISTORY

On February 12, 1997 appellant, then a 39-year-old mail handler, filed a traumatic injury alleging that he injured his elbows on January 27, 1997 while pulling heavy wire cages. OWCP accepted this claim, under File No. xxxxxx706, for bilateral/lateral epicondylitis of the elbows, left elbow lateral release on February 27, 1998 and right elbow lateral release on January 16, 1998, right elbow collateral ligament reconstruction on July 5 and November 19, 1999. Appellant underwent a surgical exploration and debridement of the right elbow extensor mass and lateral epicondyle on September 18, 1998. On October 15, 1998 OWCP granted him schedule awards for one percent impairment of his right upper extremity and four percent impairment of his left upper extremity. On March 26, 1999 appellant underwent a repair of the right ulnar collateral ligament using a Palmaris longus graft and imbrication of the capsule. He underwent additional left elbow surgery on June 2, 2000 consisting of the removal of a loose interarticular body and repair of the lateral collateral ligament using an autograft from his right leg. On January 31, 2003 OWCP granted appellant a schedule award for nine percent impairment of his left upper extremity. It granted him a schedule award for eight percent of his right upper extremity on September 17, 2003.

Appellant filed a claim for left knee injury on July 16, 1997, assigned OWCP File No. xxxxxx718, alleging on July 10, 1997 he struck his left knee on a postal machine. He underwent excising of a loose fragment of his patella on September 5, 1997. On April 15, 1998 appellant received a schedule award for 17 percent impairment of his left lower extremity.

On August 1, 1999 appellant filed a notice of occupational disease, assigned OWCP File No. xxxxxx990, alleging that he developed pain in his right knee due to pushing and pulling in the performance of duty. OWCP accepted his right knee claim for aggravation of preexisting internal derangement of the right knee on November 30, 1999. Appellant underwent right knee surgery on May 9, 2001 to repair chronic anterior cruciate ligament insufficiency, as well as a partial medial and lateral meniscectomy, abrasion chondroplasty, drilling of the medial femoral condyle and synovectomies. On March 25, 2004 he received a schedule award for 24 percent impairment of the right lower extremity.³

Appellant filed an occupational disease claim on July 9, 2006 alleging a sharp pain in both hands with a severe burning sensation in his forearms while trying to sleep.⁴ He underwent electromyelograms (EMGs) on December 16, 2003 and on June 13, 2006, which demonstrated significant bilateral median motor distal latencies. OWCP accepted this claim for bilateral carpal tunnel syndrome on July 26, 2006. On May 21, 2007 it combined this file with appellant's

² A.M.A., *Guides* (6th ed. 2009).

³ OWCP File Nos. xxxxxx718 and xxxxxx990 were combined under Master File No. xxxxxx706.

⁴ OWCP assigned File No. xxxxxx080.

Master File No. xxxxx706. Appellant underwent a right carpal tunnel release on July 13, 2007 and a left carpal tunnel release on August 24, 2007.

Dr. Christopher R. Mann, an osteopath, examined appellant on December 28, 2007. He diagnosed bilateral carpal tunnel syndrome. Dr. Mann found that appellant reached maximum medical improvement on November 14, 2007. He found that under the fifth edition of the A.M.A., *Guides* appellant had 25 percent impairment of the right upper extremity due to median nerve root sensory and motor impairments. Dr. Mann found that appellant had 25 percent of the left upper extremity due to median nerve root impairments. Appellant requested a schedule award on January 30, 2008.

OWCP's medical adviser reviewed appellant's claim on February 19, 2008. He noted that bilateral carpal tunnel syndrome was not an accepted condition based on the information provided him. He requested that OWCP inform him if bilateral carpal tunnel syndrome was accepted and if so, provide him with the previous impairments to the upper extremities.

OWCP's medical adviser reviewed the case on February 19, 2008 and stated that bilateral carpal tunnel syndrome had not been accepted. He again requested information regarding whether bilateral carpal tunnel syndrome was an accepted condition and copies of previous determinations of upper extremity impairments.

On July 23, 2008 OWCP's medical adviser noted appellant's accepted conditions as bilateral epicondylitis contusion of the left knee and derangement of the right medial meniscus. He noted that on September 21, 1998 he had recommended a schedule award for one percent impairment to the right upper extremity due to loss of elbow motion and a schedule award for four percent impairment of the left upper extremity based on synovial hypertrophy of the proximal radioulnar joint. The medical adviser related that on June 13, 2001 he recommended a schedule award based on six percent impairment of the right upper extremity due to loss of elbow motion with an additional two percent impairment due to sensory loss in the medial antebrachial cutaneous nerve for a total of eight percent impairment of the right upper extremity and a schedule award for nine percent impairment of the left upper extremity based on loss of elbow motion of five percent and four percent sensory loss in the medial antebrachial cutaneous nerve. He requested information regarding the status of appellant's claim for bilateral carpal tunnel syndrome. On September 4, 2009 the claims examiner determined that bilateral carpal tunnel syndrome was an accepted condition.

OWCP's medical adviser reviewed the claim on September 24, 2009 and requested a report in accordance with the sixth edition of the A.M.A., *Guides*.

In a letter dated October 14, 2009, OWCP requested that Dr. Mann provide an impairment rating consistent with the sixth edition of the A.M.A., *Guides*. Dr. Mann completed a report on January 18, 2010 regarding appellant's impairment for schedule award purposes. He noted appellant's upper extremity injuries including bilateral carpal tunnel syndrome and found that, under the sixth edition of the A.M.A., *Guides*, he should utilize Table 15-23, Entrapment/Compression Neuropathy Impairment.⁵ Dr. Mann applied the grade modifier for test

⁵ A.M.A., *Guides* 449, Table 15-23.

finding, reaching grade 1 based on appellant's EMG findings, history grade modifier 2 based on significant intermittent problems with swelling, loss of functional strength, paraesthesia and reduced endurance. He found that appellant's physical findings resulted in grade modifier 2 due to decreased sensation. Dr. Mann reached an average modifier of 1.66 based on the procedures specified in the A.M.A., *Guides*⁶ and noted appellant's Disabilities of the Arm, Shoulder and Hand (*QuickDASH*) score was 62 or severe. He added one to the grade modifiers determination based on appellant's functional scale to reach six percent of each upper extremity.

On March 11, 2010 the claims examiner referred appellant's medical evidence to OWCP's medical adviser. In a report dated April 26, 2010, OWCP's medical adviser based his impairment rating on the sixth edition of the A.M.A., *Guides*. He utilized the Entrapment/Compression Neuropathy Table 15-23 on page 449 of the A.M.A., *Guides* and determined that appellant's *QuickDASH* score was 62, a grade modifier 3 for functional scale, that electrodiagnostics, consisting of the June 13, 2006 test which demonstrated significant bilateral median nerve distal motor latencies prolonged with decreased amplitudes and markedly slow conduction velocities resulted in a grade modifier 2 for test findings, that physical examination demonstrated sensory loss in the distribution of the median nerve, grade modifier 2 for physical findings and that history indicated complaints of significant intermittent tingling and pain, also grade modifier 2 for an average final rating category of 2. Due to the increased functional scale score, he determined that appellant's impairment rating was increased to six for each upper extremity.

An OWCP medical adviser reviewed the medical evidence on November 2, 2010 noting that appellant's previous schedule awards were based on problems related to his elbow and not related to his accepted carpal tunnel syndrome. He stated that current cumulative impairment in the right upper extremity should be 9 percent combined with 6 percent for 14 percent impairment of the right upper extremity. The medical adviser further found that appellant's left upper extremity impairment should be 13 percent from the prior awards combined with 6 percent or 18 percent total impairment.

In a decision dated January 14, 2011, OWCP granted appellant a schedule award for five percent impairment of each upper extremity. Appellant requested a review of the written record through a form dated February 15, 2011 and postmarked February 18, 2011.

By decision dated March 14, 2011, the Branch of Hearings and Review denied appellant's request for a review of the written record, finding that the request was not timely. The Branch of Hearings and Review noted that OWCP issued its decision on January 14, 2011 and his request was postmarked on February 18, 2011 more than 30 days later. The Branch of Hearings and Review considered appellant's request and determined that the issue could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

⁶ *Id.* at 448, Rating Process.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁹

Under the sixth edition of the A.M.A., *Guides*, impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23, Entrapment/Compression Neuropathy Impairment and the accompanying relevant text.¹⁰ In Table 15-23 grade modifiers are described for test findings, history and physical findings. A survey completed by a given claimant, known by the name *QuickDASH* is used to further modify the grade and to choose the appropriate numerical impairment rating.¹¹

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.¹² 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.¹³

ANALYSIS -- ISSUE 1

The medical evidence in the record, consisting of the reports of Dr. Mann and OWCP's medical adviser, agrees on the extent of appellant's impairment under the sixth edition of the A.M.A., *Guides* due to his accepted condition of bilateral carpal tunnel syndrome. Both physicians applied the appropriate table of the A.M.A., *Guides*, Table 15-23¹⁴ and reached the

⁷ 5 U.S.C. §§ 8101-8193, 8107.

⁸ 20 C.F.R. § 10.404.

⁹ For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); *see also*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ See A.M.A., *Guides* 449, Table 15-23.

¹¹ *Id.* at 448.

¹² 5 U.S.C. § 8108, 20 C.F.R. § 10.404(c).

¹³ *Id.* at § 10.404(c)(1), (2).

¹⁴ *Supra* note 10.

same conclusions regarding the grade modifiers for test findings, history and physical findings. Both physicians averaged the grades to reach a final rating category of two. Dr. Mann explained the basis for his determinations noting that appellant's EMG findings, significant intermittent problems with swelling, loss of strength, paraesthesia and reduced endurance and decreased sensation resulted in grade modifiers of 2 for history and physical findings while test findings of motor and sensory conduction delay resulted in a test findings of grade modifier 1. The physicians averaged the grade modifiers of 2, 2 and 1 to reach 5 and divided by 3 to reach 1.67 or 2. Both Dr. Mann and OWCP's medical adviser found that appellant's *QuickDASH* score of 62, a severe impairment on the functional scale, resulted in an increase from the default score of 5 to appellant's rating of six percent of each upper extremity.

OWCP's medical adviser noted that appellant had previously received multiple schedule awards for his upper extremities due to his previously accepted condition of bilateral lateral epicondylitis. Appellant previously received schedule awards totaling 9 percent of his right upper extremity and 13 percent of his left upper extremity. OWCP's medical adviser determined that appellant's schedule award for carpal tunnel syndrome did not duplicate the previously received awards. The A.M.A., *Guides* provides that if there are multiple upper extremity impairments they are combined.¹⁵ For the right upper extremity the previous schedule awards of 9 percent were combined with 6 percent for carpal tunnel syndrome to reach 14 percent total impairment or an additional schedule award of 5 percent.¹⁶ In regard to appellant's left upper extremity, 13 percent combined with 6 percent is 18 percent or an additional schedule award of 5 percent as received by appellant.¹⁷

On appeal, appellant contends that his schedule award should not have been calculated under the sixth edition of the A.M.A., *Guides* as he submitted medical evidence regarding his condition well before the effective date of the sixth edition of the A.M.A., *Guides*. Pursuant to OWCP's procedure manual, all schedule award decisions after May 1, 2009 must utilize the sixth edition of the A.M.A., *Guides*.¹⁸ The schedule award was not issued until January 14, 2011 and OWCP properly based its decision on the sixth edition of the A.M.A., *Guides*.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of FECA,¹⁹ concerning a claimant's entitlement to a hearing before an OWCP representative, states: "Before review under section 8128(a) of this title, a claimant ...

¹⁵ *Id.* at 419, 15.3f Combining and Converting Impairments.

¹⁶ *Id.* at 604, Combined Values Chart.

¹⁷ *Id.*

¹⁸ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 3.700; *B.M.*, (Docket No.09-2231, issued May 14, 2010) (for decisions issued beginning May 1, 2009, the sixth edition of the A.M.A., *Guides* will be used).

¹⁹ 5 U.S.C. §§ 8101-8193.

not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”²⁰ OWCP’s regulations provide that the request must be sent within 30 days, as determined by postmark, from the date of the decision.²¹

The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.²² Even where the hearing request is not timely filed, OWCP may within its discretion, grant a hearing and must exercise this discretion.²³

ANALYSIS -- ISSUE 2

In the instant case, the Board finds that OWCP properly determined appellant’s February 18, 2011 request for a review of the written record was not timely filed as it was postmarked more than 30 days after the issuance of OWCP’s January 14, 2011 decision. OWCP therefore properly denied appellant’s request for review of the written record as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a review of the written record in this case. It determined that a review of the written record was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Board further finds that OWCP properly denied appellant’s request for a review of the written record as untimely and properly exercised its discretion in determining to deny appellant’s request as he had other review options available.

CONCLUSION

The Board finds that appellant has no more than five percent impairment of his upper extremities due to his accepted condition of bilateral carpal tunnel syndrome. The Board further finds that the Branch of Hearings and Review properly denied appellant’s request for a review of the written record as a matter of right.

²⁰ *Id.* at § 8124(b)(1); 20 C.F.R. § 10.616(a).

²¹ 20 C.F.R. § 10.616(a).

²² *Tammy J. Kenow*, 44 ECAB 619 (1993).

²³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 14 and January 14, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 24, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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