U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA GIBSON and FEDERAL DEPOSIT INSURANCE CORPORATION, Oklahoma City, Okla.

Docket No. 96-343; Submitted on the Record;
Issued March 24, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has any permanent impairment of her right upper extremity due to her accepted employment injury which would entitle her to a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

On August 14, 1991 appellant, then a 32-year-old liquidation technician, filed a notice of occupational disease alleging that she developed bilateral tendinitis and carpal tunnel syndrome as a result of factors of her federal employment. On December 27, 1991 after appropriate medical and factual development the Office accepted appellant's claim for tenosynovitis, both wrists. The Office paid appropriate compensation and medical benefits until May 18, 1992, when, based on appellant's April 7, 1992 release to full duty, the Office terminated appellant's benefits on the grounds that the medical evidence of record established that she was no longer totally disabled due to her accepted conditions.[1]

On May 8, 1992 appellant completed a Form CA-7 requesting a schedule award.

In support of her claim, appellant submitted several medical reports from her attending physicians.

In a report dated April 14, 1992, Dr. Mark F. Kowalski, a Board-certified orthopedic surgeon and appellant's attending physician, stated, in pertinent part, that when he last saw appellant on April 6, 1992 she was complaining of some numbness and tingling on the dorsum of her right thumb; however, her range of motion and strength were good. He stated that since her

[1] On June 18, 1992 appellant, through her representative, requested an oral hearing on the issue of the Office's decision to terminate her benefits. At the prehearing conference held on December 14, 1992, however, appellant, represented by counsel, withdrew her request for a hearing on the issue of termination. Consequently, on January 22, 1993 the hearing was formally canceled.

strength and range of motion were basically within normal limits, he found that she had only a five percent permanent impairment of the right upper extremity for the involvement of the superficial branch of the radial nerve. He concluded that appellant had been released from his active care and would be seen as needed.

Appellant was subsequently evaluated by Dr. Kenneth A. Hieke, a Board-certified general surgeon, on April 20, 1992. In his report of the same day, Dr. Hieke listed his findings on examination and testing and concluded that appellant had reached maximum medical improvement but had sustained a 10 percent permanent impairment of the right hand and a 2 percent permanent impairment of the left hand. Dr. Hieke did not indicate the source of his ratings.

By letter dated May 21, 1992, the Office requested that Dr. Kowalski examine appellant in order to determine the extent of permanent partial impairment of her hands and wrists, utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

In a letter dated June 9, 1992, Dr. Kowalski responded to the Office's request. Dr. Kowalski recounted his care and treatment of appellant and reiterated his earlier finding that appellant had a five percent loss of function due to sensory deficit from the injury to her dorsal sensory branch of her radial nerve, which gave her a five percent permanent impairment of the upper extremity. He again noted that, at the time of his evaluation, appellant had good range of motion, good grip and pinch strength and no atrophy or ankylosis. Dr. Kowalski did not reference the A.M.A., *Guides*, or otherwise indicate the source of his ratings.

On June 16, 1992 at the request of her attorney appellant was examined and evaluated by Dr. Richard W. Loy, a physician specializing in diagnostic radiology. In his report dated June 26, 1992, Dr. Loy listed the results of his examination and testing. The physician concluded that, pursuant to the third edition of the A.M.A., *Guides*, appellant had a 35 percent permanent impairment of her right upper extremity and a 30 percent permanent impairment of her left upper extremity.

On July 26, 1993 the Office forwarded appellant's medical records to the Office medical adviser, together with a statement of accepted facts, for an opinion as to whether additional medical evaluation was necessary.

In his report dated August 1, 1993, Dr. Sheff D. Olinger, a Board-certified neurologist and Office medical adviser, noted that, while the reports of Drs. Kowalski, Hieke and Roy are all in reference to examinations performed after April 8, 1992, the date of appellant's maximum medical improvement and all contain impairment ratings with some description of rationale and basis of calculation, the reports differ significantly in the ratings derived. Dr. Olinger further noted that, while the ratings of Drs. Kowalski and Hieke were relatively close, with Dr. Hieke's ratings being slightly higher seemingly to account for complaints of pain not represented in Dr. Kowalski's calculations, the ratings given by Dr. Loy were very different and took into account additional findings of weakness of grip and wrist. Dr. Olinger concluded that as it was not reasonably possible to reconcile the different observations and calculations from a simple record review, it was recommended that appellant be referred to a specialist for a second opinion

evaluation. Accordingly, on September 14, 1993 the Office referred appellant to Dr. Donald R. Chadwell, a Board-certified physiatrist.

In his report dated October 4, 1994, Dr. Chadwell documented his findings on physical examination and noted that although appellant was essentially ambidextrous, her left hand was her dominant hand. He stated that appellant had no muscle atrophy or edema, negative Tinel's sign and intact sensation. He recorded that in her right hand appellant retained 80 degrees of flexion, 70 degrees of extension, 30 degrees of ulnar deviation and 20 degrees of radial deviation. With respect to her left hand, appellant had 85 degrees of flexion, 75 degrees of extension, 40 degrees of ulnar deviation and 30 degrees of radial deviation. The physician also recorded appellant's grip strength, on 3 attempts, to be 52 pounds, 58 pounds and 58 pounds for the right hand and 53 pounds, 60 pounds and 58 pounds for the left. The physician concluded that when these measurements were applied to Tables 32 and 34 on page 65 of the fourth edition of the A.M.A., *Guides*, appellant had a 10 percent left upper extremity impairment and no right upper extremity impairment.

By report dated January 28, 1994, Dr. H. Mobley, an Office medical adviser, reviewed the figures provided by Dr. Chadwell. Dr. Mobley concurred with Dr. Chadwell's assessment that pursuant to the fourth edition of the A.M.A., *Guides*, appellant had a 10 percent permanent impairment of the left upper extremity and a 0 percent impairment of the right upper extremity.

In a decision dated February 7, 1994, the Office granted appellant a schedule award for a 10 percent permanent impairment of the left upper extremity.[2]

In a decision dated December 5, 1994, the Office determined that appellant had not established any impairment of her right upper extremity which would entitle her to a schedule award.

The Board finds that appellant has not established that she has a permanent impairment of the right upper extremity such that she is entitled to a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.304 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimant's seeking schedule

[2] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2). As appellant filed her appeal with the Board on November 8, 1995, the Office's February 7, 1994 decision is not properly before the Board.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.304.

awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[5]

In the present case, as the record contained the markedly differing opinions of Drs. Kowalski, Hieke and Loy, the Office properly referred appellant to Dr. Chadwell for a comprehensive examination.[6] Following Dr. Chadwell's examination, the Office forwarded the physician's report to Dr. Mobley, an Office medical adviser, who wholly concurred with Dr. Chadwell's conclusions. The Board finds that as the reports of Drs. Chadwell and Mobley are based on the most recent examination of appellant, appropriately utilize the fourth edition of the A.M.A., *Guides*[7] and are well rationalized, these reports represent the weight of the evidence and establish that appellant has not sustained any percent permanent impairment of the right upper extremity which would entitle her to a schedule award.[8]

The Board further finds that the Office properly denied appellant's request for a hearing.

Following the Office's February 7, 1994 decision awarding appellant a schedule award for a 10 percent permanent impairment for her left upper extremity, by letter dated March 8, 1994, appellant, through counsel, requested an oral hearing before an Office representative. Appellant specifically contested the 10 percent award for her left upper extremity and the fact that she had not been granted any impairment for her right upper extremity.[9]

A memorandum to the file dated August 29, 1994 indicates that on that day appellant spoke to the Office hearing representative and indicated to him that she did not wish to contest the 10 percent schedule award for her left upper extremity, but was seeking an award for her right upper extremity. The hearing representative explained to appellant that a formal decision on the issue of whether appellant had any permanent impairment of the right upper extremity had not yet been issued and appellant agreed that the case should be returned to the district Office for a decision on that issue. Accordingly, appellant's hearing request was deemed withdrawn.

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[5] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

[6] An Office medical adviser may not selectively choose the impairment findings he favors with respect to a specific organ or member of the body from different medical reports of several physicians in calculating a schedule award. The proper procedure requires obtaining or selecting a single medical report regarding the organ or member of the body that contains all of the essential information such as ranges of motion, pain, loss of strength, etc; *see Robert N. Snow*, 33 ECAB 656 (1982).

[7] In the present case, the fourth edition of the A.M.A., *Guides* provides the appropriate standards for evaluating appellant's right upper extremity impairment in that the Office's decision pertaining to appellant's right upper extremity was issued by the Office after November 1, 1993, the effective date of the fourth edition of the A.M.A., *Guides; see* FECA Bulletin No. 94-4 (issued November 1, 1993).

[8] *See Melvina Jackson*, 38 ECAB 443 (1987); *Robert N. Snow*, *supra* note 6.

[9] This was appellant's second attempt to request a hearing on the issue of permanent impairment. By letter dated February 9, 1993, appellant, through her representative, requested an oral hearing on the issue of whether she had any permanent impairment as a result of her accepted injuries. As no formal decision had yet been issued on the issue of permanent impairment, the Office informed appellant's counsel that his request was premature.

On December 2, 1994 appellant contacted the Office by telephone and advised them that her representative had recently informed her that by letter dated November 29, 1994 he had requested an oral hearing on the issue of the 10 percent schedule award for appellant's left upper extremity and the fact that she had not been granted an award for her right upper extremity. Appellant memorialized her conversation in a letter dated the same day in which she stated that she wished to counteract her representative's request for a hearing as she understood that a formal decision on the issue of right upper extremity impairment had not yet been issued and that therefore a request for a hearing was premature. The letter from appellant's representative requesting a hearing, referenced in appellant's December 2, 1994 letter, was received by the Office on December 5, 1994.

In a decision dated December 5, 1994, the Office determined that appellant had no permanent impairment of her right upper extremity which would entitle her to a schedule award. Appeal rights accompanying the decision advised appellant that she had 30 days in which to request an oral hearing.

By letter dated January 5, 1995, the Office informed appellant's representative that appellant had counteracted his November 29, 1994 request for an oral hearing.

In a letter dated January 24, 1995, appellant wrote:

> "Please find enclosed the most recent request for an oral hearing regarding my case listed above. As you will notice, this request is dated December 19, 1994 and is very specific in pointing out our desire to have an oral hearing regarding both my left and right upper extremities.
>
> "You will also notice this letter is dated after my previous instructions of December 2, 1994.
>
> "Please forward my file to the Washington, D.C. office so my case may finally be scheduled for this oral hearing."

Appellant enclosed a letter dated December 19, 1994 from her attorney to the Office in which he acknowledged receipt of the Office's December 5, 1994 decision and requested an oral hearing on both this decision finding appellant not entitled to a schedule award for her right upper extremity and the Office's prior decision granting appellant a schedule award for a 10 percent permanent impairment of the left upper extremity. Both appellant's letter and the enclosed request from her representative were received by the Office on January 30, 1995. There are no additional copies of the December 19, 1994 letter from appellant's counsel in the file.

By letter dated February 10, 1995, appellant's representative responded to the Office's January 5, 1995 letter. Appellant's representative stated that he was not aware that appellant had ever withdrawn her request for a hearing.

In a decision dated August 22, 1995, the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office informed appellant that should she have additional evidence, she could request reconsideration.

On October 18, 1995 appellant's counsel again requested a hearing before an Office representative.

The Board finds that the Office properly denied appellant's request for an oral hearing before an Office representative.

Section 8124(b) of the Act, concerning entitlement to a hearing before an Office representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[10]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[11]

In this case, the Office issued its decision granting appellant a 10 percent schedule award for her left upper extremity on February 7, 1994. Although appellant requested an oral hearing on March 8, 1994, on August 29, 1994 appellant contacted the Office and withdrew her request. With respect to the Office's December 5, 1994 decision denying appellant a schedule award for her right upper extremity, appellant's first request following the issuance of the decision, although dated December 19, 1994, was mailed by appellant on January 26, 1995. Because appellant did not request a hearing within 30 days of the Office's December 5, 1994 decision, she was not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting additional relevant medical evidence. Consequently, the Office properly denied appellant's hearing request.

[10] 5 U.S.C. § 8124(b)(1).

[11] *Henry Moreno*, 39 ECAB 475 (1988).

The decisions of the Office of Workers' Compensation Programs dated August 22, 1995 and December 5, 1994 are affirmed.

Dated, Washington, D.C.
March 24, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member