U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROOSEVELT WALKER and DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Memphis, Tenn.

Docket No. 96-1272; Submitted on the Record;
Issued March 27, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issues are: (1) whether appellant has greater than a seven percent permanent impairment of his right lower extremity, for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as being untimely made.

On September 14, 1990 the Office accepted that on July 18, 1990 appellant sustained an avulsion fracture of his distal lateral calcaneal process in his right ankle as he was performing obstacle course SWAT team training. He was treated with cast immobilization, was totally disabled through August 20, 1990 and was partially disabled through October 23, 1990.

Appellant continued to be symptomatic and on June 19, 1991 underwent surgical excision of the fracture fragment.

On March 12, 1994 Dr. David Moinester, appellant's treating podiatrist, noted that appellant could dorsiflex to 15 degrees, could plantar flex to 45 degrees, could invert from neutral to 25 degrees, could evert from neutral to 10 degrees and had additional impairment of function due to weakness, atrophy, pain or anesthesia of 20 percent. He opined that appellant therefore had a 20 percent impairment rating of his right lower extremity. In a March 12, 1994 narrative, Dr. Moinester stated that over the preceding two years appellant had developed traumatic arthritis of the calcaneal cuboid joint and experienced some discomfort on extreme activity such as running and standing all day. He again recommended a 20 percent disability.

On March 25, 1994 an Office medical adviser referred to Table 42, page 3/78 of the A.M.A., *Guides*, (4th ed. 1993) and noted that plantar flexion of more than 20 percent was not an impairment and that appellant had plantar flexion of 45 degrees. The Office medical adviser noted that dorsiflexion of more than 10 percent was not an impairment and that appellant had dorsiflexion of 15 degrees. He concluded that therefore appellant had no impairment for ankle plantar and dorsiflexion. The Office medical adviser noted that as per Table 43, page 3/78,

inversion of more than 20 degrees was not an impairment and that appellant had inversion of 25 degrees. He noted that eversion from 0 to 10 degrees was a 1 percent permanent impairment of the lower extremity and that appellant had eversion of 10 degrees. The Office medical adviser concluded that appellant had a one percent impairment and that Dr. Moinester's report did not support any other impairment. He opined that basically appellant had a bone chip removed and that an impairment would not be expected.

On April 1, 1994 the Office requested that Dr. Moinester explain how he calculated a 20 percent impairment due to weakness, atrophy, pain or anesthesia.

By report dated June 15, 1994, Dr. Moinester replied that post-surgically appellant continued to have pain that was worsening and making it difficult for him to walk quickly and run. Dr. Moinester noted that appellant had continued tenderness at the surgical site, that the bone fragment removal created irritation which set off a cycle ending in traumatic arthritis and that his condition was exacerbated by weight bearing and running. He opined that "this is the basis for our rating of 20 percent disability."

On August 2, 1994 another Office medical adviser reviewed the complete record and opined that the 20 percent impairment rating was not sufficiently explained, with reference to the A.M.A., *Guides*.

Appellant was referred to Dr. K. Blake Ragsdale, III, a Board-certified orthopedic surgeon, for a second opinion on the extent of appellant's permanent impairment according to the A.M.A., *Guides.*

By report dated May 31, 1995, Dr. Ragsdale reviewed appellant's history, noted his active ranges of motion, found no effusion and a negative Homan's sign and found no evidence of ankle instability. He noted that x-rays demonstrated no significant traumatic arthritis but some decrease in the calcaneal cuboid space. Dr. Ragsdale referred to the A.M.A., *Guides*, (4th ed.) and noted that an intraarticular fracture of either the calcaneal or cuboid bone at the level of the calcaneal cuboid joint was a 10 percent impairment of the foot or a 7 percent impairment of the lower extremity, which he indicated took into account any mild limitation of range of motion, such as appellant's 1 percent range of motion limitation. He opined that appellant could do whatever he wanted to insofar as full activities and opined that he did not feel the process would worsen significantly.

On August 29, 1995 an Office medical adviser reviewed Dr. Ragsdale's report and opined that Table 64, page 86 of the A.M.A., *Guides*, (4th ed.), supported the 7 percent impairment rating. He noted that this impairment rating included mild limitation of motion, pain and possible future development of traumatic arthritis.

On October 4, 1995 the Office granted appellant a schedule award for a seven percent permanent impairment of his right lower extremity.

On November 9, 1995 appellant requested a hearing on the amount of his schedule award.

By decision dated February 15, 1996, the Branch of Hearings and Review denied appellant's request finding that it was untimely made and that the issue could be equally well addressed by appellant requesting reconsideration by the Office and by submission of further medical evidence in support of the request.

The Board finds that appellant has no greater than a seven percent permanent impairment of his right lower extremity, for which he has received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3] However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (4th ed.) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[4]

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[5] Chapter 3.2i of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the lower extremity on diagnosis-based estimates which consider all of these factors.[6] Impairment ratings of diagnosis-based estimates take into account the claimant's clinical manifestation, which were in this case considered by Dr. Ragsdale. The absence of radiographic evidence of arthritis was noted and the range of motion restriction was rated as very mild.

Dr. Moinester's impairment rating opinion did not refer to or utilize the A.M.A., *Guides* and hence is of diminished probative value.[7] Because Dr. Moinester did not use the uniform standards adopted by the Office and approved by the Board, it was proper for an Office medical adviser to apply the A.M.A., *Guides* in concluding that appellant had a seven percent permanent impairment of his right lower extremity. As the Office medical adviser's report provides the

[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *James J. Hjort*, 45 ECAB 595 (1994); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

[5] *See Paul A. Toms*, 28 ECAB 403 (1987).

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Table 64, pp.3/85-3/86 (4th ed. 1993).

[7] *See, i.e., Lena P. Huntley*, 46 ECAB 643 (1995).

only evaluation that conforms with the A.M.A., *Guides* it constitutes the weight of the medical evidence.[8]

Therefore, the Office's schedule award determination is correct.

Further, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing before an Office hearing representative.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[9]

The regulations implementing the Act further provide that any claimant not satisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or for review of the written record. A hearing must be requested in writing within 30 days of the date of issuance of the decision. A claimant is not entitled to a review if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[10]

The Board has held that 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 that the Office must exercise its discretionary authority in deciding whether to grant a hearing.[11] The Board has specifically held that the Office has the discretion to grant or deny a hearing request when the request is made after the 30-day period for requesting a hearing.[12] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely, are a proper interpretation of the Act and Board precedent.[14]

The record shows that the Office rendered its final decision on October 4, 1995 and that appellant's request for a hearing was postmarked November 9, 1995. Because he did not request a hearing within 30 days of the Office's final decision, appellant is not entitled to a hearing on

---

[8] *Id.; see also Michael C. Norman*, 42 ECAB 768 (1991).

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.131(a)-(b).

[11] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[12] *Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *Rudolph Bermann*, 26 ECAB 354 (1975).

[14] *See Henry Moreno*, 39 ECAB 475 (1988); *Shirley A. Jackson*, 39 ECAB 540 (1988).

his case as a matter of right under the Act. In its February 15, 1996 decision, the Office considered the matter in relation to the issue involved and it exercised its discretion by denying appellant's request on the grounds that appellant could adequately address the issue involved by submitting medical evidence in conjunction with a request for reconsideration. As appellant may indeed pursue his claim and address the issue in this case by submitting to the Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office properly exercised is discretionary authority in denying appellant's request for a hearing.[15]

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 15, 1996 and October 4, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 27, 1998

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] The Board has previously held that the denial of an oral hearing on this ground is a proper exercise of the Office's discretionary authority; *see Robert Lombardo*, 40 ECAB 1038 (1989); *Jeff Micono*, 39 ECAB 617 (1988).