U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY KENNEDY and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 98-1056; Submitted on the Record;
Issued February 1, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she has more than a 16 percent permanent impairment of her right lower extremity for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On March 12, 1982 appellant, then a 32-year-old carrier, filed a claim for a traumatic injury to the right ankle in the performance of duty. The Office accepted appellant's claim for a sprain of the right foot and ankle, and an aggravation of a right calcaneal navacular coalition. The Office authorized a November 1982 right ankle surgery and a triple arthrodesis in February 1986.

By decision dated September 4, 1997, the Office issued appellant a schedule award for a 16 percent permanent impairment of her right lower extremity. The period of the award ran for 46.08 weeks from April 9, 1997 to February 25, 1998.

In a letter dated October 5, 1997 and postmarked October 8, 1997, appellant requested a hearing before an Office hearing representative. By decision dated January 13, 1998, the Office denied appellant's request for a hearing as untimely.

The Board has duly reviewed the case record and finds that appellant has not established that she has more than a 16 percent permanent impairment of her right lower extremity for which she received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act,[1] and section 10.304 of the implementing federal regulations,[2] 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 under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[3]

In a report dated April 9, 1997, Dr. Grant A. Dona, an orthopedic surgeon and appellant's attending physician, opined that appellant had reached maximum medical improvement prior to June 1995. He listed the range of motion measurements of her right ankle as follows: 10 degrees dorsiflexion; 30 degrees plantar flexion; and 0 to 5 degrees ankylosis in the varus position. Dr. Dona found that range of motion findings for inversion and eversion were not applicable and listed no additional impairment due to pain or weakness. He concluded that appellant had a 12 percent impairment of the lower extremity. In an office visit note of the same date, Dr. Dona noted that appellant had undergone a triple arthrodesis and had zero to five degrees varus. He found that, according to the A.M.A., *Guides* (4th ed. 1993), mild varus constituted a 12 percent impairment of the lower extremity.

By letter dated July 14, 1997, the Office requested that Dr. Dona evaluate appellant to determine the extent of any permanent impairment of her lower extremity in accordance with the A.M.A., *Guides*. The Office requested that Dr. Dona provide a percentage of impairment and describe any subjective complaints.

In a report dated August 1, 1997, Dr. Dona stated:

> "[Appellant's] impairment should be assessed according to her surgical procedure which was a triple arthrodesis. The impairment for mild varus is 17 percent of the foot, 12 percent of the lower extremity, and 5 percent of the whole person.
>
> "Her subjective complaints have been variable, but have primarily been that of hind foot pain, as well as ankle pain, pain beneath the second and fifth metatarsal heads, pain at the medial eminence of a bunion, [and] pain at the tip of the great toe."

On August 11, 1997 an Office medical adviser reviewed Dr. Dona's reports. He found that, according to the A.M.A., *Guides*, 10 degrees of extension of the right ankle constituted a 7 percent impairment of the right lower extremity and 30 degrees of plantar flexion constituted no

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *James J. Hjort*, 45 ECAB 595 (1994).

impairment.[4] He further found that ankle ankylosis in the neutral position of between 0 and 5 degrees varus constituted a 10 percent impairment of the right lower extremity.[5] The Office medical adviser combined the 7 percent impairment due to loss of range of motion with the 10 percent impairment due to ankylosis and concluded that appellant had a 16 percent impairment of the right lower extremity.[6] The Office medical adviser explained that his impairment determination varied from Dr. Dona's finding because he used a different interpretation of the A.M.A., *Guides*.

The Board finds that the Office properly relied upon the recommendations of the Office medical adviser, who applied Dr. Dona's findings for range of motion and ankylosis to the appropriate tables and pages of the A.M.A., *Guides* and concluded that appellant had a 16 percent impairment of the right lower extremity. Appellant has not submitted any evidence which would establish that she has a greater impairment.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[8]

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 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,[9] when the request is made after the 30-day period established for requesting a hearing,[10] or when the request is for a second hearing on the same issue.[11] The Office's procedures, which require the Office to exercise its discretion

[4] A.M.A., *Guides* at 78, Table 42.

[5] *Id*. at 80.

[6] *Id*. at 322.

[7] 5 U.S.C. § 8124(b)(1).

[8] *Frederick D. Richardson*, 45 ECAB 454 (1994).

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

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

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

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.[12]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 4, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated October 5, 1997 and postmarked October 8, 1997. Hence, the Office was correct in stating in its January 13, 1998 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's September 4, 1997 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its January 13, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that she had an additional impairment of the right lower extremity. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[13] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated January 13, 1998 and September 4, 1997 are hereby affirmed.

Dated, Washington, D.C.
February 1, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[12] *Sandra F. Powell*, 45 ECAB 877 (1994).

[13] *Daniel J. Perea*, 42 ECAB 214 (1990).