U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLY J. GAGE, JR. and DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

Docket No. 00-1632; Submitted on the Record;
Issued January 10, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a one percent permanent impairment of the right lower extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On July 27, 1988 appellant, then a 34-year-old electrical-lineman, sustained an injury to his left knee and lower back while in the performance of duty. The Office accepted appellant's claim for left knee strain and lumbar disc herniation at L5-S1, right. Additionally, the Office authorized a laminectomy, which was performed on June 8, 1989. Appellant had previously sustained an employment-related left shoulder injury on November 8, 1985. This condition was aggravated during physical therapy following appellant's June 1989 laminectomy. Accordingly, the Office accepted the aggravation of appellant's left shoulder condition as a consequential injury. Appellant subsequently requested a schedule award for his accepted injuries.

On February 4, 1997 the Office granted appellant a schedule award for a 57 percent permanent impairment of his left upper extremity. The award covered a period of 164.16 weeks. Appellant also received a schedule award on November 3, 1999 for a 1 percent permanent impairment of his right lower extremity, which covered a period of 2.88 weeks. With respect to the latter decision, appellant requested a review of the written record, which was postmarked December 7, 1999.

By decision dated February 2, 2000, the Office found that appellant did not submit his request for review of the written record within 30 days of the Office's November 3, 1999 decision and therefore, he was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he had greater than a one percent permanent impairment of the right lower extremity could equally well be addressed through the reconsideration process.

The Board finds that appellant failed to establish he has more than a one percent permanent impairment of the right lower extremity.

Section 8107 of the Federal Employees' Compensation Act[1] 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. 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 Act's implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[2]

In August 1996, appellant's treating physician, Dr. Ludwig G. Kempe, a Board-certified neurosurgeon, calculated a 10 percent whole-person impairment under Table 13 (Station and Gait Impairment Criteria), page 148 of the A.M.A., *Guides*. Upon reviewing Dr. Kempe's findings, the Office medical adviser could not clearly ascertain the basis for Dr. Kempe's assessment. Consequently, the Office medical adviser recommended that appellant be referred to an orthopedic surgeon for further evaluation regarding the extent of any right lower extremity impairment. In a report dated March 19, 1997, Dr. William B. Jones, a Board-certified orthopedic surgeon, diagnosed "some mild residual right leg pain" as a consequence of appellant's 1989 back surgery. He further noted that examination of both knees revealed a normal range of motion. Dr. Jones calculated a 5 percent whole person permanent impairment due to "some periodic episodes of back and right leg pain." However, he did not specifically reference the A.M.A., *Guides.* The Office medical adviser reviewed Dr. Jones' findings and in a report dated September 26, 1997 determined that appellant had a one percent permanent impairment of his right lower extremity due to pain.

The Office medical adviser calculated a 1 percent impairment due to pain in accordance with Tables 20 and 83 of the A.M.A., *Guides*, at pages 150 and 130, respectively. He classified appellant's pain as Class 2 under Table 20 based upon Dr. Jones' notation of "some numbness extending into and paresthesias extending into the distal portion of [appellant's] right lateral thigh" and "periodic episodes of back and right leg pain." Under Table 20, a Class 2 rating corresponds to a maximum percentage sensory impairment of 25. Table 83 at the corresponding L5 and S1 nerve roots indicates a maximum 5 percent loss of function due to sensory deficit or pain. In accordance with the procedures identified under Table 20, the Office medical adviser multiplied the two figures (25 percent times 5 percent), which resulted in a product of 1.25 percent. This figure was properly rounded down to one percent.[3] Inasmuch as the Office medical adviser's calculation of appellant's right lower extremity impairment conforms to the A.M.A., *Guides* (4th ed. 1993), his finding constitutes the weight of the medical evidence.[4]

Dr. Kempe's August 1996 report did not provide a sufficiently detailed description of appellant's impairment and therefore, was of limited probative value in determining the extent of

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (September 1994).

[4] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

appellant's impairment under the A.M.A., *Guides*.[5] Additionally, as Dr. Jones failed to reference the A.M.A., *Guides*, his March 19, 1997 report is of diminished probative value.[6] Accordingly, appellant has failed to provide any probative medical evidence that he has greater than a one percent impairment of the right lower extremity.[7]

The Board also finds that the Office properly denied appellant's request for a review of the written record.

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. 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 issuance of the decision. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of issuance of the decision.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[10]

As previously noted, the Office issued a schedule award on November 3, 1999. Appellant's request for a review of the written record postmarked December 7, 1999, which is more than 30 days after the Office's November 3, 1999 decision. As such, appellant is not entitled to an oral hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he had greater than a one percent permanent impairment of the right lower extremity could equally well be addressed by requesting reconsideration.[11] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

[5] *Noe L. Flores*, 49 ECAB 344, 347 (1998).

[6] *Paul R. Evans Jr.*, 44 ECAB 646, 651 (1993).

[7] The Act provides that for a total, or 100 percent loss of use of an arm, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c)(2). In the instant case, appellant does not have a total, or 100 percent loss of use of his left lower extremity, but rather a 3 percent loss. As such, appellant is entitled to 3 percent of the 288 weeks of compensation, which is 8.64 weeks.

[8] 20 C.F.R. § 10.616(a).

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

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

[11] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated February 2, 2000 and November 3, 1999 are hereby affirmed.

Dated, Washington, DC
January 10, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member