United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-2196**
	)	**Issued: June 8, 2011**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, UT, Employer	)	

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 August 24, 2010 appellant filed a timely appeal from a May 25, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The Board also has jurisdiction over a July 12, 2010 Office decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant has more than a 31 percent permanent impairment to his left leg; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

FACTUAL HISTORY

Appellant has two claims for left knee injuries. The Office accepted a torn medial meniscus as a result of a slip and fall on December 15, 1980. Appellant underwent arthroscopic

[1] 5 U.S.C. § 8101 *et seq.*

surgery on March 31, 1981 and received a schedule award for a 10 percent permanent impairment to the left leg by decision dated March 25, 1983. On February 3, 1997 appellant slipped and fell in the performance of duty and the Office accepted the claim for a left knee sprain and left medial meniscus tear. He underwent left knee surgery on September 29, 1998. On August 4, 1999 the Office issued a schedule award for an additional four percent permanent impairment to the left leg. Appellant retired from federal employment in February 1999.

On July 22, 2008 and February 18, 2009 appellant underwent left knee total arthroplasty surgery performed by Dr. Raphael Klug, an osteopath. In a report dated September 29, 2009, Dr. Robert Burger, an orthopedic surgeon, provided a history that appellant had multiple prior surgeries on his left knee. He did not specifically discuss appellant's employment injuries. Dr. Burger provided results on examination and opined that appellant had a 75 percent left leg impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). He found appellant had a poor result from a total knee replacement for a 75 percent impairment under Table 17-35.

The case was referred to an Office medical adviser for review. In a report dated February 20, 2010, the medical adviser stated that, based on the clinical findings and description of pain, appellant would be assigned a diagnosis class (CDX) 3, for a fair result from a total knee replacement. The default impairment for a fair result is a 37 percent leg impairment. With respect to grade modifiers, the medical adviser assigned a two (moderate problem) for functional history, a one (mild problem) for physical examination. He indicated that clinical studies adjustment was not applicable. According to the medical adviser, the net adjustment resulted in a grade A impairment, or a 31 percent left leg impairment.

By decision dated May 25, 2010, the Office issued a schedule award for an additional 17 percent left impairment (31 percent minus a previously awarded 14 percent). The period of the award was 48.96 weeks of compensation from September 29, 2009.

In a letter dated June 25, 2010 and postmarked June 26, 2010, appellant requested a hearing before an Office hearing representative. By decision dated July 12, 2010, the Office found the request was untimely. It further determined that appellant could equally well pursue his claim by requesting reconsideration and submitting relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[2] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[3]

[2] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[3] *A. George Lampo*, 45 ECAB 441 (1994).

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.[4] Any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.[5]

ANALYSIS -- ISSUE 1

An attending physician, Dr. Burger, submitted a September 29, 2009 report with respect to a left knee permanent impairment. However, he provided an opinion under the fifth edition of the A.M.A., *Guides*. As noted above, schedule awards after May 1, 2009 must be based on the sixth edition.

The only opinion applying the sixth edition is the February 20, 2010 report from the Office medical adviser. Under the sixth edition, a total knee replacement is evaluated under Table 16-3, and a CDX is determined based on the severity of the problem. The Office medical adviser noted that a fair result (class 3 severe problem) involves a "fair position, mild instability and/or mild motion deficit."[6] He referred to Dr. Burger's clinical findings and found that this best represented appellant's impairment. The default impairment (grade C) is a 37 percent leg impairment, which may be adjusted based on grade modifiers for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[7] Applying the adjustment formula, the medical adviser found the adjustment was -2, or grade A, which is a 31 percent leg impairment under Table 16-3.[8]

The Board finds that the Office medical adviser's report represents the weight of the medical evidence. The medical adviser provided a rationalized medical opinion under the sixth edition of the A.M.A., *Guides*. Since appellant had received schedule awards for 14 percent left leg impairment based on left knee impairment, he was entitled to an additional 17 percent. The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was 17 percent, he is entitled to 17 percent of 288 weeks, or 48.96 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.[9] In this case, the Office medical adviser concluded that the date of maximum medical improvement was September 29,

[4] FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

[5] *Id.*

[6] A.M.A., *Guides* 511, Table 16-3.

[7] The net adjustment formula is (GMFH-CDX) + (GMPE – CDX) + (GMCS-CDX). The adjustment can be no more than -2 (grade A) or +2 (grade E). A.M.A., *Guides* 521.

[8] A.M.A., *Guides* 511, Table 16-3. The medical adviser found of GMFH of 2, a GMPE of 1, and found clinical studies were not applicable at the time of maximum medical improvement.

[9] *Albert Valverde*, 36 ECAB 233, 237 (1984).

2009, the date of examination by Dr. Burger. The award therefore properly runs for 48.96 weeks commencing on September 29, 2009.

On appeal, appellant states that the Office based its decision only on the last page of Dr. Burger's report and that his activities have been impaired by his knee injury. The record indicated that the Office medical adviser reviewed the entire report and considered the clinical findings. Dr. Burger's report was of diminished probative value because his opinion as to the degree of permanent impairment was based on the fifth edition of the A.M.A., *Guides* rather than the sixth edition. The impairment found by the Office medical adviser was based on the clinical findings and was considered a "severe problem" under Table 16-3. The Board reiterates that the weight of the medical evidence rests with the Office medical adviser as he is the only physician providing a rationalized opinion under the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT -- ISSUE 2

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows: "Before review under [s]ection 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 issuance of the decision, to a hearing on his claim before a representative of the Secretary…."

If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing as a matter of right.[10] The Board has held that the Office, in its broad discretionary authority in the administration of the Act,[11] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[12] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[13]

ANALYSIS -- ISSUE 2

The Office decision was dated May 25, 2010. The 30-day period to timely request a hearing expired on June 24, 2010. The request for a hearing in this case was dated June 25 and postmarked June 26, 2010.[14] It is therefore not timely filed and appellant does not have a statutory right to a hearing.

[10] *Claudio Vazquez*, 52 ECAB 496 (2001).

[11] 5 U.S.C. §§ 8101-8193

[12] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[13] *Claudio Vazquez, supra* note 10. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

[14] The date of the request is determined by the postmark. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(a) (June 1997).

As noted, the Office must exercise its discretion with respect to an untimely hearing request. In this case, it advised appellant that he could submit additional relevant evidence on the issue through the reconsideration process. This is considered a proper exercise of the Office's discretionary authority.[15] The Board accordingly finds that the Office properly found the request for a hearing was untimely and properly exercised its discretion in denying the untimely hearing request.

CONCLUSION

The Board finds that the evidence does not establish more than a 31 percent permanent impairment to the left leg. The Board further finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 12 and May 25, 2010 are affirmed.

Issued: June 8, 2011
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

[15] *See Mary E. Hite*, 42 ECAB 641, 647 (1991).

United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 10-2199**
	)	**Issued: June 28, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sheridan, WY, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On August 27, 2010 appellant, through his attorney, filed a timely appeal from the July 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which terminated his compensation under 5 U.S.C. § 8106(c)(2) for refusing an offer of suitable work.[1]

The Board has duly considered the matter and finds that the termination must be reversed. A partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[2]

On November 13, 2009 OWCP gave appellant 15 additional days to accept the offered position and arrange for a report date. Appellant accepted the offered position on November 24, 2009: "I will except the job offer -- for better or worse. I would like to start -- Jan-4-2010.

[1] In 1974 appellant filed a claim alleging that his back and leg pain was a result of lifting patients in the performance of duty. OWCP accepted his claim for mid-back pain, bulging lumbosacral disc and degenerative arthritis at the L5-S2 level. On the prior appeal, the Board reversed the termination of appellant's compensation. The Board found an unresolved conflict in medical opinion. Docket No. 08-690 (issued March 16, 2009).

[2] 5 U.S.C. § 8106(c)(2).

Please provide details if this accepted." The employing establishment acknowledged to OWCP that it had received the letter, but it gave appellant no response. Noting that appellant had failed to make arrangements to report to work, OWCP terminated compensation on January 14, 2010. OWCP's hearing representative affirmed on July 16, 2010.

The Board has held that without a specific date and time to report to work, a claimant's absence from the employing establishment cannot be viewed as a refusal or neglect to work after suitable work was offered to, procured by or secured for him.[3] As it appears the employing establishment made no effort to arrange for a report date and time following appellant's November 24, 2009 acceptance, the Board finds that OWCP improperly terminated compensation. Appellant's response was not a conditional or ambivalent acceptance.[4] His was an unequivocal acceptance with a suggested start date the employing establishment never confirmed. Without an established date and time to report to work, the record on appeal does not support OWCP's finding of refusal.

[3] *Susan M. Spooner*, Docket No. 96-833 (issued October 19, 1998); *see Judith A. Boyle*, Docket No. 99-533 (issued November 23, 1999) (as there was no evidence that the claimant refused the offered position or that she refused to report to work at a time set by the employing establishment, the Board found that OWCP failed to meet its burden of proof to establish that the claimant refused an offer of suitable work); *Katherine Bocko*, Docket No. 97-77 (issued December 28, 1998) (as the claimant had stated she would accept the position, the Board found that before OWCP could terminate compensation for refusing suitable work, it would have to wait until she did not appear to work at the offered position on the date set by the employing establishment or until she abandoned the position shortly after taking it).

[4] *Diane M. Clark*, Docket No. 98-1348 (issued June 2, 1999) (condition and ambivalent responses to OWCP's notices held insufficient to show that the claimant did not refuse an offer of suitable work).

IT IS HEREBY ORDERED THAT the July 16, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board