United States Department of Labor
Employees' Compensation Appeals Board

LEON DAVIS, Appellant	)	
and	)	**Docket No. 04-1888**
	)	**Issued: October 17, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Orangeburg, SC, Employer	)	

Appearances:
Leon Davis, pro se
Thomas G. Giblin, Esq., for the Director

Oral Argument September 7, 2005

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs decision dated May 24, 2004, denying his request for a hearing and a January 23, 2004 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment to each leg, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

FACTUAL HISTORY

On March 1, 1999 appellant, then a 32-year-old distribution clerk, filed a traumatic injury claim for continuation of pay/compensation (Form CA-1), alleging that he sustained a low back injury on February 25, 1999 while lifting at work. The Office accepted the claim for a lumbar

strain. Appellant was off work intermittently through September 25, 1999. His employment was terminated in August 2000.

In a report dated January 15, 2003, Dr. William Miles, a family practitioner, reported that appellant was having chronic low back pain radiating into both legs. He reported a 15 percent impairment to each leg "due to extension and flexion." Dr. Miles did not provide range of motion results for the leg. In a report dated February 13, 2003, an Office medical adviser indicated that appellant's impairment was not ratable.

In a report dated May 19, 2003, Dr. Miles provided results on examination, including lumbar range of motion. He stated that appellant had sensory changes and weakness at S1, which was "graded at four according to the table." Dr. Miles referred to Tables 17.2 and 17.3 and stated that appellant had leg impairments of 38 percent or 15 percent of the whole person. He also stated, "both legs loss due to extension and flexion." An Office medical adviser reviewed the medical evidence and in a June 5, 2003 report, indicated that Dr. Miles needed to further explain his findings.

In a report dated July 22, 2003, Dr. Mark Triana, an osteopath, stated that appellant would qualify for a diagnosis-related estimate of category four for the lumbosacral spine. He opined that appellant had a 20 percent whole person impairment, divided by the conversion factor of 0.75 for a 27 percent impairment.

The Office referred appellant, with medical records and a statement of accepted facts, to Dr. Gerald Schuster, a Board-certified orthopedic surgeon. In a report dated October 30, 2003, he provided a history and results on examination. Dr. Schuster opined that appellant had a 3.5 percent impairment to each leg for sensory deficit under the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* He explained that the impairment was calculated by grading the impairment at 70 percent of the maximum 5 percent for S1 sensory deficit or pain. Dr. Schuster also reported finding no motor weakness and accordingly found no impairment for motor loss.

In a report dated November 20, 2003, an Office medical adviser reviewed the evidence and found that Dr. Schuster had properly applied the A.M.A., *Guides.* He rounded the 3.5 percent impairment estimate up to 4 percent and opined that appellant had a 4 percent impairment to each leg.

On January 19, 2004 the Office received a January 14, 2004 letter requesting a hearing with respect to a schedule award. Appellant indicated that he disagreed with the impairment rating.

By decision dated January 23, 2004, the Office granted a schedule award for a four percent impairment to each leg. The period of the award was 23.04 weeks commencing May 19, 2003.

By letter dated March 3, 2004, the Office's Branch of Hearings and Review addressed appellant's January 14, 2004 hearing request and advised him that the case was not in posture for oral hearing as no final decision had been issued.

In a letter dated March 22, 2004, appellant requested a hearing before an Office hearing representative. He enclosed a copy of a January 14, 2004 letter requesting a hearing. Appellant indicated that he had mailed the January 14, 2004 letter before receiving the schedule award decision on February 3, 2004.

By decision dated May 24, 2004, the Office's Branch of Hearings and Review denied appellant's request for a hearing. The Branch found that the request was untimely and, therefore, he was not entitled to a hearing as a matter of right. The hearing request was further denied on the grounds that the issue in the case could be equally well addressed through a reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[3]

ANALYSIS -- ISSUE 1

The schedule award in this case was based on the findings of the second opinion physician, Dr. Schuster, who determined that appellant had an impairment of the lower extremities from sensory deficit or pain in the S1 nerve root. Under the A.M.A., *Guides,* the maximum impairment for sensory deficit or pain in the S1 nerve root is five percent.[4] The impairment is graded according to Table 15-15; Dr. Schuster classified the impairment as a Grade 2 impairment of 70 percent of the maximum for each leg or 3.5 percent.[5] The Office medical adviser properly rounded the impairment to four percent for each leg.[6]

Appellant argues that Dr. Miles and Dr. Triana found greater than four percent impairments to each leg. In order to be of probative value, however, the impairments must be calculated by a proper application of the A.M.A., *Guides.* Dr. Miles reported a 15 percent

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *Id.*

[4] A.M.A., *Guides* 424, Table 15-18.

[5] *Id* at Table 15-15. A Grade 2 impairment is described as "decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensations or moderate pain, that may prevent some activity."

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards,* Chapter 3.700.3(b) (June 2003).

impairment without providing any explanation as to how this was calculated. He referred to pain, but did not discuss the relevant tables regarding sensory deficit or pain. Dr. Miles also referred to extension and flexion, without recording actual range of motion results or otherwise providing evidence sufficient to establish the degree of impairment.

With respect to Dr. Triana, he noted the lumbar categories under the diagnosis-related estimates method for lumbar impairments.[7] It is well established that neither the Act nor its regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.[8] Dr. Triana did not provide a reasoned medical opinion regarding an impairment to a scheduled member of the body.

Appellant also argued that a four percent impairment to each leg did not adequately represent the lifestyle changes caused by the employment injury. The degree of impairment, however, is determined by application of the A.M.A., *Guides.* The amount payable pursuant to a schedule award does not take into account that effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.[9]

The weight of the medical evidence in this case rests with Dr. Schuster and the Office medical adviser. The finding that appellant had a four percent impairment to each leg was based on application of Tables 15-18 and 15-15 of the A.M.A., *Guides.* Since this is the only medical evidence of record that properly applied the A.M.A., *Guides,* the Office properly issued a schedule award for a four percent impairment to each leg. The maximum impairment for the leg is 288 weeks of compensation;[10] therefore, appellant received 8 percent of 288 or 23.04 weeks of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides in pertinent part:

> "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 title 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."[11]

[7] A.M.A., *Guides* 384, Table 15-3.

[8] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

[9] *Harry D. Butler*, 43 ECAB 859 (1992).

[10] 5 U.S.C. § 8107(c)(2).

[11] 5 U.S.C. § 8124(b)(1).

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.[12]

ANALYSIS -- ISSUE 2

Appellant, in this case, initially sent a letter dated January 14, 2004 requesting a hearing. At that time, however, no final decision on the schedule award had been issued. The January 14, 2004 letter, therefore, cannot be considered a request for a hearing with respect to the January 23, 2004 decision. Although appellant argued that the January 23, 2004 decision was not timely issued, there is no evidence of record to substantiate this allegation and he did acknowledge receiving the decision on February 3, 2004. His letter requesting a hearing on the January 23, 2004 decision was dated and postmarked March 22, 2004. Since this is more than 30 days after the decision, it is considered untimely and appellant is not entitled to a hearing as a matter of right.

The Board has held that the Office, in its broad discretionary authority to administer the Act, has power to hold hearings in circumstances where no legal provision is made for such hearings and the Office must exercise its discretion in such circumstances.[13] In this case, the Office 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.[14] The Board finds that the Office properly exercised its discretion in this case.

CONCLUSION

The Board finds that appellant did not establish more than a four percent impairment for each leg, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for a hearing.

[12] *See William F. Osborne*, 46 ECAB 198 (1994).

[13] *Mary B. Moss*, 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 24 and January 23, 2004 are affirmed.

Issued: October 17, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board