



related to his accepted employment injury of herniated lumbar discs and affirmed the September 5, 2002 decision of the Office.<sup>1</sup> The facts and circumstance of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant's attending physician, Dr. Gregory Ward, Board-certified in physical medicine and rehabilitation, opined that he reached maximum medical improvement in 1997. Dr. David N. Hastings, a Board-certified urologist, opined on June 11, 1998 that appellant's urinary symptoms were due to benign prostate enlargement. Dr. Sandra Mundine, a podiatrist, completed a note on January 27, 2000 finding foot pain and lower extremity discomfort due to spinal injury.

Dr. Jorge E. Isaza, a Board-certified orthopedic surgeon, completed a report on May 1, 2000 and opined that appellant had reached maximum medical improvement. On October 18, 2000 he provided physical findings noting decreased range of motion in the lumbar spine. Dr. Isaza stated, "In the lower extremities he had decreased quads[riceps], hamstrings, plantar and dorsiflexion of the feet on the left leg, normal on the right."

On January 19, 2002 Dr. Ward diagnosed low back pain with degenerative disc and spine disease. Appellant also reported some radicular pain as well as concerns with respect to sexual performance. In a report dated March 21, 2002, Dr. Ward stated, "We are currently looking at impairment rating." He diagnosed degenerative spine disease and low back pain with generalized weakness, but provided no specific findings. On December 4, 2002 Dr. Ward noted appellant's history of injury and diagnosed chronic degenerative spine disease at L3 through L5-S1 as well as lumbar disc disease with spondylolisthesis. He opined that appellant had grounds for disability from heavy duty and medium activities of duty. Dr. Ward stated that appellant experienced constant pain and stated that his disability rating was 15 percent or less. He also noted that appellant had right hip surgery as a result of degenerative disc disease.

The Department of Veterans Affairs issued a rating decision on May 20, 2002 finding that appellant had degenerative joint disease and lumbar spondylosis with radiculopathy, which was 60 percent disabling. The Department of Veterans Affairs determined that appellant was 100 percent disabled and he elected these benefits on June 30, 2003.

In support of his claim for a schedule award due to his back injury, appellant submitted extensive medical records from the Department of Veterans Affairs diagnosing left leg radiculopathy beginning on March 16, 1994. He underwent right hip surgery on January 22, 2003.

Appellant initially requested a schedule award on February 7, 2003. In a letter dated March 13, 2003, the Office informed him that a schedule award due to his back injury was compensable under the Federal Employees' Compensation Act<sup>2</sup> only if his back injury resulted in permanent impairment to a scheduled member. The Office requested medical evidence from Dr. Ward supporting a schedule award claim on June 19, 2003. By decision dated July 15, 2003,

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<sup>1</sup> Docket No. 03-305 (issued April 14, 2003).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8107

the Office denied appellant's claim for a schedule award, finding that he failed to submit medical evidence in support of his claim.

Appellant requested an oral hearing on September 5, 2003. By decision dated November 10, 2003, the Branch of Hearings and Review denied his request for an oral hearing as untimely.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Act<sup>4</sup> and its implementing regulation<sup>5</sup> set 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulation. As neither the Act, nor the regulation provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.<sup>6</sup>

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must

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<sup>3</sup> On November 19, 2003 appellant requested reconsideration of the July 15, 2003 decision by the Office. By decision dated December 12, 2003, issued after the docketing of appellant's appeal with the Board on November 25, 2003, the Office conducted a merit review. The Board and the Office may not simultaneously have jurisdiction over the same case. Because the Office must review its prior decision in order to consider the merits of appellant's claim, the Office may not issue a decision regarding the same issue on appeal before the Board. The Office therefore did not have the authority to issue its December 12, 2003 decision. *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993). The December 12, 2003 decision is null and void and will not be addressed on appeal. Following the July 15, 2003 merit decision of the Office, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *George E. Williams*, 44 ECAB 530, 533 (1993).

be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant's employment injury resulted in herniated lumbar discs. He then filed a claim requesting a schedule award. As noted above, the spine is not a scheduled member under the Act and appellant is entitled to a schedule award due to his spine injury only to the extent that this spine injury impacts other scheduled members.

Appellant has submitted medical reports suggesting that his accepted spine injury resulted in radiculopathy in this left lower extremity, a scheduled member. However, the medical evidence submitted by appellant lacks the necessary specificity to support his claim for a schedule award.

Appellant's attending physician, Dr. Ward, Board-certified in physical medicine and rehabilitation, opined that appellant reached maximum medical improvement in 1997. On January 19, 2002 he diagnosed low back pain with degenerative disc and spine disease. Appellant also reported some radicular pain as well as concerns with respect to sexual performance. In a report dated March 21, 2002, Dr. Ward stated, "We are currently looking at impairment rating." He diagnosed degenerative spine disease and low back pain with generalized weakness, but provided no specific findings. On December 4, 2002 Dr. Ward noted appellant's history of injury and diagnosed chronic degenerative spine disease at L3 through L5-S1 as well as lumbar disc disease with spondylolisthesis. He opined that appellant had grounds for disability from heavy duty and medium activities of duty. Dr. Ward stated that appellant experienced constant pain and stated that his disability rating was 15 percent or less. He also noted that appellant had right hip surgery as a result of degenerative disc disease.

The Act distinguishes between disability for work, defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury;<sup>8</sup> and impairment, which is defined as any anatomic or functional abnormality or loss.<sup>9</sup> It appears that Dr. Ward was offering his opinion regarding appellant's disability for work rather than an opinion that appellant had 15 percent impairment of any scheduled member. For this reason the December 4, 2002 report is insufficient to meet appellant's burden of proof.

Furthermore, Dr. Ward's reports are insufficient to meet appellant's burden of proof in establishing impairment to a scheduled member even if the 15 percent rating was an impairment rating. He did not provide specific findings in regard to appellant's left lower extremities, including the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. There is no description in sufficient detail so that

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<sup>7</sup> *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

<sup>8</sup> 20 C.F.R. § 10.5(f).

<sup>9</sup> 20 C.F.R. § 10.5(m).

the claims examiner and others reviewing the file will be able to clearly visualize the impairment of the left lower extremity with its resulting restrictions and limitations. Dr. Ward also failed to provide any specific findings with regard to the loss of functions of appellant's penis, a scheduled member.

Dr. Hastings, a Board-certified urologist, opined on June 11, 1998 that appellant's urinary symptoms were due to benign prostate enlargement. This report does not support a schedule award due to impairment of the penis, as Dr. Hastings indicated that appellant's urinary symptoms were not due to his accepted spine injury, but instead to the nonemployment-related condition of prostate enlargement.

Dr. Mundine, a podiatrist, completed a note on January 27, 2000 finding foot pain and lower extremity discomfort due to spinal injury. She did not provide any specific findings relating to appellant's foot pain or lower extremity discomfort, indicating that she did not provide any treatment for him. While her report suggests that appellant's back injury may impact his lower extremities she did not provide the necessary detail to support a claim for a schedule award.

Dr. Isaza completed a report on May 1, 2000 and opined that appellant had reached maximum medical improvement. On October 18, 2000 he provided physical findings, noting decreased range of motion in the lumbar spine. Dr. Isaza stated, "In the lower extremities he had decreased quads[riceps], hamstrings, plantar and dorsiflexion of the feet on the left leg, normal on the right." While Dr. Isaza did provide findings in the lower extremities, he failed to provide the necessary detail to enable the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations. Therefore this report is insufficient to meet appellant's burden of proof in establishing permanent impairment of a scheduled member.

The remainder of the medical evidence, consisting of appellant's health records from the Department of Veterans Affairs, is insufficient to meet his burden of proof due to either a lack of detailed physical findings, the fact that much of this evidence predated appellant's date of maximum medical improvement or the lack of the signature from an appropriate physician certifying the findings as medical evidence.<sup>10</sup>

In regard to the conclusions of the Department of Veterans Affairs regarding the extent of disability due to appellant's back injury. As noted above these findings appear to relate to his disability for work, rather than a permanent impairment to any scheduled member under the Act. Furthermore, the Board has held that a finding of another administrative agency is not determinative of the extent of physical disability or impairment for compensation purposes under the Act.<sup>11</sup> Therefore, appellant has not submitted the necessary medical evidence to establish permanent impairment of a scheduled member.

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<sup>10</sup> *Merton J. Sills*, 39 ECAB 572 (1988). (Reports not signed by a physician lack probative value).

<sup>11</sup> *James E. Norris*, 52 ECAB 93, 103 (2000)

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b) of the Act,<sup>12</sup> concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... 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."<sup>13</sup>

The Board has held that, section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.<sup>14</sup> Even where the hearing request is not timely filed, the Office may, within its discretion, grant a hearing and must exercise this discretion.<sup>15</sup>

## **ANALYSIS -- ISSUE 2**

The Office denied appellant's claim for a schedule award by decision dated July 15, 2003. Appellant then requested an oral hearing from the Branch of Hearings and Review by letter dated September 5, 2003. By decision dated November 10, 2003, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely.

In the instant case, the Office properly determined that appellant's September 5, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's July 15, 2003 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

## **CONCLUSION**

The Board finds that appellant failed to meet his burden of proof in establishing that he had permanent impairment to a scheduled member due to his accepted spine injury entitling him to a schedule award. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

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<sup>12</sup> 5 U.S.C. §§ 8101-8193.

<sup>13</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

<sup>14</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 10 and July 15, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 12, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member