United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant **and** **DEPARTMENT OF VETERANS AFFAIRS, VETERANS HOSPITAL, Miami, FL, Employer**	)	**Docket No. 08-1891** **Issued: June 1, 2009**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument April 15, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 14, 2008 denying a schedule award and a nonmerit decision dated May 29, 2008 denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained any permanent impairment of a scheduled member entitling her to a schedule award; and (2) whether the Branch of Hearings and Review properly denied her request for an oral hearing as untimely.

FACTUAL HISTORY

On September 19, 2005 appellant, then a 53-year-old medical support assistant, filed an occupational disease claim alleging that she developed severe pain in the neck, cervical spine, left shoulder, left arm, left knee and lower spine. She attributed her condition to answering the telephone in the performance of her duties.

Appellant underwent a cervical magnetic resonance imaging (MRI) scan on October 29, 2004 which demonstrated multilevel degenerative disc disease resulting in mild canal stenosis from C3-5. The Office accepted her claim for aggravation of spinal stenosis.

On July 27, 2006 appellant requested an impairment rating for her neck, cervical spine and back. On December 17, 2006 she stated that her work-related injury was a herniated disc resulting in headaches. Appellant again requested a schedule award. In a report dated October 27, 2006, Dr. Ronald B. Tolchin, Board-certified in physical medicine and rehabilitation, diagnosed advanced generalized spondylosis and posterior disc herniation extending from C3-4 through C6-7, who found that appellant had 8 percent impairment of the whole body due to cervical stenosis with herniated discs and myelopathy, 10 percent impairment of each upper extremity due to carpal tunnel syndrome or 11 percent of the whole person, 10 percent of the lower extremities bilaterally due to chondromalacia of the patella or 8 percent of the whole person, bilaterally shoulder impingement of 3 percent bilaterally or 4 percent of the whole person and greater occipital neuralgia bilaterally 10 percent impairment of the whole body for 35 percent impairment of the whole body. He attached an addendum to his report on February 9, 2007 stating that he was correlating his findings with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Tolchin concluded that appellant had 12 percent impairment to the whole person due to cervical stenosis and myelopathy involving the upper extremities.

The Office referred appellant's records to an Office medical adviser. In a report dated June 1, 2007, he stated that Dr. Tolchin's report did not provide the necessary objective neurological findings to support a schedule award due to spinal stenosis.[1]

The Office accepted appellant's claim for the conditions of displacement of cervical intervertebral discs at C3-7 and cervical spinal stenosis. It found a conflict of medical opinion evidence between Dr. Tolchin, appellant's physician, and the Office medical adviser regarding the nature and extent of any permanent impairment. The Office referred appellant for an impartial medical evaluation by letter dated September 12, 2007.

In a report dated October 24, 2007, Dr. Holley Crowley, a Board-certified neurologist, opined that appellant reached maximum medical improvement on that date. She found that there was no impairment of appellant's upper extremities due to loss of strength, sensory deficit, pain or discomfort due to the accepted employment injury. Dr. Crowley noted that appellant had no significant findings of cervical spine dysfunction or radiculopathies. She stated that appellant had giveaway weakness and that her reflexes were intact.

By decision dated March 14, 2008, the Office denied appellant's claim for a schedule award finding that the medical evidence did not establish that she sustained any permanent impairment to a scheduled member as a result of her accepted employment injuries.

[1] The Office noted that appellant's bilateral carpal and cubital tunnel syndromes and releases were accepted conditions under a separate claim. Appellant's case files have not been combined and the Board will not address any permanent impairment of her upper extremities due to these additional accepted conditions.

Appellant requested an oral hearing in a form dated April 2, 2008 and postmarked April 21, 2008. By decision dated May 29, 2008, the Branch of Hearings and Review denied her request for an oral hearing as untimely and stated that the issue in her case could be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations 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.[6] However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant developed cervical spinal stenosis and herniated discs as a result of her employment activities. Appellant submitted an October 27, 2006 report from Dr. Tolchin, Board-certified in physical medicine and rehabilitation. He diagnosed advanced generalized spondylosis and posterior disc herniation extending from C3-4 through C6-7. Dr. Tolchin found that appellant had 12 percent impairment of the whole body due to cervical stenosis with herniated discs and myelopathy extending to the upper extremities. The Office medical adviser reviewed this report and found that there were not sufficient findings to reach an impairment rating under the A.M.A., *Guides*. The Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the

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[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id.*

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims,* Chapter 2.808.6(a) (August 2002).

[6] *George E. Williams,* 44 ECAB 530, 533 (1993).

[7] *Id.*

employee, the Secretary shall appoint a third physician who shall make an examination.[8] The implementing regulations states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and it will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[9] The Office properly found a conflict of medical opinion evidence regarding whether appellant had a permanent impairment of a scheduled member entitling her to a schedule award and referred her to Dr. Crowley, a Board-certified neurologist, to resolve this conflict.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[10]

Dr. Crowley reviewed the statement of accepted facts and performed a physical examination. She noted that appellant had no sensory or motor deficits in the upper extremities as a result of her accepted cervical condition. Dr. Crowley explained that appellant had normal reflexes with only give away weakness of no clinical significance. She concluded that appellant had no impairment of her upper extremities due to her accepted cervical spine condition.

The Board finds that the special weight of the medical evidence, as represented by the impartial medical specialist Dr. Crowley, establishes that appellant has no impairment of her upper extremities due to her cervical condition and that therefore she is not entitled to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

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

> "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 or her claim before a representative of the Secretary."[11]

The claimant can choose between two formats: an oral hearing or a review of the written record.[12] The requirements are the same for either choice.[13] The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings or

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[8] 5 U.S.C. §§ 8101-8193, 8123.

[9] 20 C.F.R. § 10.321.

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[11] 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

[12] 20 C.F.R. § 10.615.

[13] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking[14] and before the claimant has requested reconsideration.[15] However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.[16]

ANALYSIS -- ISSUE 2

The Office issued its decision in this case on March 14, 2008. Appellant requested an oral hearing in materials postmarked on April 21, 2008. As she did not timely request an oral hearing within the 30 days provided by regulation she is not entitled to an oral hearing as a matter of right. The Branch of Hearings and Review proceeded to properly exercise its discretion in denying appellant's untimely request for an oral hearing by determining that the issue in her case could be addressed through the reconsideration process.

CONCLUSION

The Board finds that the medical evidence does not establish permanent impairment of a scheduled member entitling appellant 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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[14] 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

[15] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

[16] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 29 and March 14, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 1, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board