United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 11-616**
	)	**Issued: October 17, 2011**
DEPARTMENT OF THE NAVY, MARINE CORPS AIR STATION, Beaufort, SC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 19, 2011 appellant filed a timely appeal from the August 25, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which awarded schedule compensation on a November 29, 2010 nonmerit decision denying appellant's request for an oral hearing. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 has more than an eight percent impairment of her right upper extremity, for which she received a schedule award; and (2) whether OWCP properly denied her request for an oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 9, 2008 appellant, a 45-year-old security clerk, sustained an injury in the performance of duty when she picked up a box and felt pain in her back and neck. OWCP accepted her claim for brachial neuritis or radiculitis not otherwise specified (cervical radiculopathy) and for right shoulder impingement syndrome. Appellant underwent surgery on her cervical spine and right shoulder.

Appellant filed a claim for a schedule award. On November 23, 2009 her orthopedic spine surgeon, Dr. Jeffrey Reuben, rated a 26 percent impairment of the whole person under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001). On November 30, 2009 Dr. Leland Stoddard, appellant's orthopedic shoulder surgeon, reported a "remarkable relief of pain to the point that she is nearly asymptomatic now." Appellant was still 20 percent short of full abduction, forward flexion and internal rotation, with no impingement sign. Dr. Stoddard rated a 10 percent impairment of the shoulder or upper extremity as a result of limitation of motion and mild impingement pain under the sixth edition of the A.M.A., *Guides*. On April 12, 2010 Dr. Reuben reported a 16 percent impairment of the whole person under the sixth edition of the A.M.A., *Guides*. He did not evaluate the impairment himself; he borrowed figures from an evaluation performed on January 7, 2010 by Dr. Stephen C. Allen, an orthopedic surgeon and second-opinion physician, who offered whole-person ratings -- 11 percent due to impairment of the cervical spine and 8 percent due to shoulder deficit and pain -- but he also indicated that appellant had a 13 percent impairment of her right upper extremity due to shoulder pain and motion deficit.[2]

An OWCP medical adviser noted that appellant underwent cervical surgery with good results as electrodiagnostic studies found no evidence of radiculopathy. Using Dr. Stoddard's report on range of motion, the medical adviser found an eight percent impairment of the right upper extremity resulting from the accepted impingement.

OWCP referred appellant to Dr. H. Clark Deriso, an orthopedic surgeon, for an evaluation of impairment under the sixth edition of the A.M.A., *Guides*. Dr. Deriso examined appellant and found no residual radiculopathy of a true nature. He determined that appellant had a 6 percent impairment of the cervical spine and a two percent impairment of the right upper extremity due to a mild loss of internal shoulder rotation (50 to 70 degrees).

A second OWCP medical adviser noted no postoperative motor or sensory deficit of the upper extremity. He also noted that electrodiagnostic studies revealed no evidence of cervical radiculopathy or brachial plexopathy, so there was no impairment of the upper extremities due to the accepted cervical condition or surgery. The second medical adviser agreed with the first medical adviser that appellant had an eight percent impairment of the right upper extremity due to loss of motion.

On August 25, 2010 OWCP issued a schedule award for an eight percent impairment of appellant's right upper extremity.

[2] Dr. Allen cited Table 15-5, page 402 of the A.M.A., *Guides* (Shoulder Regional Grid for diagnosis-based estimates) and Table 15-9, page 410 (clinical studies adjustment).

In a letter dated September 7, 2010 but postmarked October 15, 2010, appellant requested an oral hearing before an OWCP hearing representative.

In a decision dated November 29, 2010, OWCP denied appellant's request for an oral hearing. It found that she was not entitled to a hearing as a matter of right because her request was untimely. OWCP considered the request and determined that appellant could equally well address the issue in her case by requesting reconsideration. OWCP therefore denied her request for an oral hearing.

On appeal, appellant argued that Dr. Stoddard and Dr. Reuben reexamined her on September 8 and 9, 2010, and still stood behind their impairment rating of her upper extremity. She contended that the second-opinion physician saw her for only 15 minutes.

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.[3] Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[4]

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[5] Because neither FECA nor the regulations authorize the payment of a schedule award for the permanent loss of use of the back or spine,[6] no claimant is entitled to such an award.[7]

Amendments to FECA modified the schedule award provisions to authorize an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA 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.[8]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[5] *William Edwin Muir*, 27 ECAB 579 (1976).

[6] FECA specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[7] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

[8] *Rozella L. Skinner*, 37 ECAB 398 (1986).

FECA does not authorize the payment of schedule awards for the permanent impairment of the "whole person."[9] Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

ANALYSIS -- ISSUE 1

Appellant's surgeons offered several ratings of impairment. Dr. Reuben, the spine surgeon, initially rated a 26 percent impairment of the whole person under the fifth edition of the A.M.A., *Guides*. FECA, however, does not authorize schedule awards for impairment of the "whole person." Further, the fifth edition of the A.M.A., *Guides* was no longer applicable. Regardless of which edition Dr. Reuben actually used (he cited no tables or page numbers), appellant may not receive a schedule award for impairment to the cervical spine, as was rated. His initial impairment rating of 26 percent is of diminished weight.

Dr. Reuben later reported a 16 percent whole-person impairment, but explained that he was borrowing figures from Dr. Allen, an orthopedic surgeon and second-opinion physician. FECA does not authorize schedule awards for impairments of the whole person. Dr. Allen did indicate that appellant had a 13 percent impairment of her right upper extremity. His citations to the sixth edition of the A.M.A., *Guides* do not show how he calculated this figure. Table 15-5, page 402 of the A.M.A., *Guides* is the Shoulder Regional Grid for diagnosis-based impairment ratings. It shows the accepted diagnosis of impingement syndrome, but the highest impairment rating listed for that medical condition is five percent. An adjustment for moderate pathology shown on clinical studies (Table 15-9, page 410) would increase the default impairment value to only four percent. Dr. Reuben did not explain how he used the A.M.A., *Guides* to rate a 13 percent impairment of the right upper extremity. That rating is also of reduced probative weight.

Dr. Stoddard, the shoulder surgeon, noted that appellant's range of motion was 20 percent short of full abduction, forward flexion and internal rotation. The Shoulder Regional Grid at page 405 notes that one may assess impairment alternatively using range of motion, though a range of motion impairment stands alone and is not combined with diagnosis-based impairment. Retained motion of 80 percent is classified as a mild impairment, and a mild impairment to should abduction, flexion and internal rotation represents impairments of 3, 3 and 2 percent respectively.[10] These figures are added[11] for a total upper extremity impairment of eight percent.[12]

Dr. Stoddard did not explain how he used the A.M.A., *Guides* to find a 10 percent impairment of appellant's right upper extremity, but provided findings from examination that support a rating of eight percent due to loss of shoulder motion. Dr. Deriso, the orthopedic surgeon and second-opinion physician, noted that appellant's range of motion had improved; he

[9] *Ernest P. Govednick*, 27 ECAB 77 (1975).

[10] A.M.A., *Guides* 475 (Table 15-34); *see also id*. at 465 (motion loss as grade modifiers).

[11] *Id*. at 473 (if range of motion is used as a stand-alone approach, all values for the joint are added).

[12] As appellant's functional history was considered to reflect a mild problem, no adjustment is warranted under Table 15-36, page 477.

found only a slight decrease in internal rotation. OWCP awarded schedule compensation based on Dr. Stoddard's earlier findings. As there is no other impairment rating that is both authorized under FECA and supported by the proper application of the sixth edition of the A.M.A., *Guides,* the Board finds that appellant has no more than an eight percent impairment of her right upper extremity due to her accepted employment injury. The Board will affirm OWCP's August 25, 2010 decision.

Appellant argued that Dr. Stoddard and Dr. Reuben reexamined her on September 8 and 9, 2010, but the Board has no jurisdiction to review those findings. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP when it issued its August 25, 2010 decision.[13] Evidence not before OWCP on August 25, 2010 will not be considered by the Board for the first time on appeal. Appellant argued that the second-opinion physician, presumably Dr. Deriso, saw her for only 15 minutes. OWCP did not issue the schedule award based on Dr. Deriso's evaluation. It based the award on the findings of Dr. Stoddard, appellant's shoulder surgeon.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides:

> "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 section 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."[14]

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[15] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[16] In such a case, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[17]

[13] 20 C.F.R. § 501.2(c)(1).

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.616(a).

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

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

ANALYSIS -- ISSUE 2

Because appellant made her October 15, 2010 request for an oral hearing (as determined by postmark) more than 30 days after OWCP's August 25, 2010 schedule award decision, she is not entitled to a hearing as a matter of right. OWCP duly considered the matter and correctly advised appellant that she could equally well pursue the issue through the reconsideration process. As appellant may effectively address the schedule award issue by alternative means, the Board finds that OWCP did not abuse its discretion in denying her untimely request for an oral hearing.[18] The Board will affirm OWCP's November 29, 2010 decision.

CONCLUSION

The Board finds that appellant has no more than an eight percent impairment of her right upper extremity. The Board also finds that OWCP properly denied her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the November 29 and August 25, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 17, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

[18] The Board has held that the denial of a hearing on these grounds is a proper exercise of OWCP's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).