

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOLORES ALFONSO and DEPARTMENT OF THE ARMY,
HQDA USAADACENFB, FORT BLISS, TX

*Docket No. 98-645; Submitted on the Record;
Issued August 11, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a review of the written record under 5 U.S.C. § 8124; and (2) whether appellant is entitled to a schedule award for permanent impairment as a result of her employment-related back strain injury or her disc herniation.

The Office accepted that on June 27, 1992 appellant, then a 40-year-old nurse, sustained a lumbar strain and a subsequent herniated nucleus pulposus at L5-S1. Appropriate benefits were paid. Appellant stopped working on the date of injury and has not returned.

Appellant requested a schedule award for impairment of her right lower extremity and the Office reviewed the medical evidence on file from appellant's treating physician, Dr. Rogelio Gonzales, a family practitioner. By decision dated November 22, 1996, the Office denied the claim for a schedule award.

In an undated letter, which the Office received on February 19, 1997, appellant requested an examination of the written record by a hearing representative. She submitted medical reports dated February 4, 1997 and June 29, 1992 from Dr. Gonzales and a report of a magnetic resonance imaging (MRI) scan of the lumbar spine dated July 7, 1992.

In his medical report of February 4, 1997, Dr. Gonzales stated that appellant obviously had a lot of involvement of the right lower extremity, both from direct sprain and also now indirectly from nerve root entrapment. He stated that she has a herniated disc at the levels of L4-5 and L5-S1. He noted that the MRI of July 7, 1992 showed degenerative changes in the discs at those levels. He also stated there is a bulging of disc at L5-S1 and a small central and right paracentral dysherniation in L4-5. He stated that this was in keeping with the problems that she has in the right lower extremity as this nerve was affected as the nerve supply to the right lower extremity. Dr. Gonzales noted that appellant was evaluated for surgery, but after a myelogram was performed, the surgery was canceled. Dr. Gonzales stated that appellant

obviously has severe weakness and loss of muscle strength and sensation to the right lower extremity because of the nerve entrapment at the lumbar spine. Therefore, her right lower extremity is affected, both directly and indirectly because of her injury on the original date of June 25, 1992. Dr. Gonzalez stated that it should be quite obvious that her right lower extremity was directly and indirectly injured because of her back injury and leg injury on the date of June 25, 1992.

By decision dated April 17, 1997, the Office denied appellant's request for a review of the written record finding that it was not requested within 30 days of November 22, 1996 decision and that the issue could be equally well addressed through a request for reconsideration accompanied by new evidence submitted to the Office.

Appellant requested reconsideration and resubmitted the evidence she had previously sent to the Board of Hearings and Review. Also submitted was an undated Form CA-20 from Dr. Gonzalez in which he stated that appellant had permanent right leg weakness; permanent foot drop on the right; and intractable low back pain and post-traumatic arthritis of the lumbar back which is all causally related to her original injury.

The Office referred appellant, along with the medical record and a statement of accepted facts, to Dr. Thomas Alost, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the percentage of permanent impairment to her right lower extremity as a result of her accepted low back condition. By report dated August 13, 1997, Dr. Alost reviewed the medical evidence of record and the statement of accepted facts. He diagnosed chronic lumbosacral paraspinal musculature strain with chronic lumbar disc herniations at L4-5, L5-S1. Based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (Fourth Edition), Tables 81 and 82, Dr. Alost opined that appellant retained no less than a 10 percent impairment of the whole body.

The case was referred to the Office medical adviser who reviewed the case record and Dr. Alost's report. The medical adviser noted that Dr. Alost reported status/post spinal cord stimulator, chronic lumbosacral strain with chronic disc herniation at L4-5 and L5-S1, pain in the low back with radiation into the right leg, pain aggravated by activity, electromyography (EMG) with no evidence of abnormalities with the left lower extremity, limited lumbar spine range of motion, neurologically intact, and a whole body impairment of 10 percent based upon limited lumbar spine range of motion. The medical adviser further noted that Dr. Alost's report indicates that there is no impairment of the lower extremities. He stated that since this is a critical determination for a schedule award, he asked the Office to write Dr. Alost and have him provide comment on two questions: (1) Is there any evidence from your examination of any impairment of the lower extremities that can be attributed to the job accepted condition; and (2) Please describe the distribution of any pains that radiate into the legs, so that any radiculopathy (subjective or objective) can be ascribed to a spinal nerve root and a left, right, or both legs.

In a letter dated August 18, 1997, the Office submitted the Office medical adviser's questions to Dr. Alost. Dr. Alost responded to the Office's questions in a letter dated September 2, 1997. Dr. Alost stated:

- 1) There was no evidence on my physical examination objectively to show that there was any impairment of the lower extremities that can be attributed to the accepted herniated nucleus pulposus at L5-S1. Based on my physical examination, her motor and sensory examination to the lower extremities were normal.
- 2) The patient gives a history of giving away within her right lower extremity when doing activities. This is a subjective complaint and could be attributed to the L4-5, L5-S1 disc nerve roots. Again, it should be noted that she had an EMG/nerve conduction study in the past which showed no evidence of radiculopathy affecting the lower spinal roots.

By letter dated September 12, 1997, the Office medical adviser stated that he reviewed all the evidence of record including the most recent report of Dr. Alost. He noted that Dr. Alost had reported a chronic lumbosacral strain with chronic disc herniation at L4-5 and L5-S1, pain in the low back with radiation into the right leg aggravated by activity, EMG/nerve conduction with no evidence of radiculopathy and a 10 percent impairment based upon the range of motion of the lumbar spine. The medical adviser noted that Dr. Alost in his supplemental report clearly stated that there is no physical evidence of impairment of the lower extremities that can be attributed to the job accepted injury. He did mention that there was subjective "giving away" of the right lower extremity with activity, but emphasized that the EMG/nerve conduction did not show any evidence of radiculopathy. Based upon the available medical evidence, Office regulations, and the fourth edition of the A.M.A., *Guides*, the medical adviser opined that there was no impairment of the lower extremities. He stated that no consideration was given for impairment of the back, because the spine is not a scheduled member under Office regulations. He further stated that no consideration was given for the "giving away" or leg pain because the examining physician did not. The medical adviser stated that the "giving way" or leg pain is subjective with no corroborative physical signs, they are not described as significant, and, in his opinion, "giving away" is unlikely to be caused by the work-related injury as described by Dr. Alost.

By decision dated September 12, 1997, the Office denied modification of its prior decision finding that the weight of the medical evidence did not establish that appellant has any permanent impairment to her lower extremities as a result of her accepted injury-related back condition.

The Board initially finds that the Office properly denied appellant's request for a review of the written record before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Federal Employees' Compensation 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 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.”¹

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

“A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and section 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained.”²

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.³ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right for a hearing,⁴ when the request is made after the 30-day period for requesting a hearing⁵ and when the request is for a second hearing on the same issue.⁶ In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁷ 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.⁸

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131(a).

³ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *Johnny S. Henderson*, *supra* note 3.

⁷ *Id.*; *Rudolph Bermann*, *supra* note 4.

⁸ *See Herbert C. Holley*, *supra* note 5.

In the present case, the Office issued its decision denying appellant's claim on November 22, 1996. Appellant requested a hearing in an undated letter, which the Office received on February 19, 1997. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.⁹ Since appellant did not request a review of the written record within 30 days of the Office's November 22, 1996 decision, she was not entitled to a written review of the record under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's request for a written review of the record in its April 17, 1997 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence that she suffered permanent impairment to a scheduled member under section 8107 of the Act. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁰ There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's request for a review of the written record.

Additionally, the Board finds that appellant is not entitled to a schedule award for permanent impairment as a result of her employment-related back strain injury or her disc herniation.

Section 8107 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.¹¹ The schedule award provisions of the Act¹² and its implementing federal regulations¹³ provide for payment of compensation for the permanent loss or loss of use of specified members, functions and organs of the body. No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.¹⁴ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹⁵ no claimant is entitled to such an

⁹ 20 C.F.R. § 10.131(a).

¹⁰ See *Daniel J. Perea*, 42 ECAB 214 (1990).

¹¹ 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; see *Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

¹² 5 U.S.C. § 8107(a).

¹³ 20 C.F.R. § 10.304.

¹⁴ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); see also *Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

¹⁵ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

award.¹⁶ Therefore, appellant in this case is not entitled to such an award. However, if injury to the back results in permanent impairment of a schedule member, then a claimant may be entitled to an award for permanent impairment of that member.

In this case, appellant's accepted conditions were back conditions, back strain and disc herniation. However, none of the medical evidence submitted which relates impairment of appellant's right lower extremity to her accepted conditions is supported by objective evidence. Although Dr. Gonzalez, appellant's treating physician, cites various problems with appellant's lower extremities, there are no objective findings to support his opinion that they are causally related to appellant's original injury. Dr. Alost examined appellant and did not find any of the conditions which Dr. Gonzales noted to exist. Moreover, Dr. Alost concluded that the appropriate testing, which would have confirmed the existence of the problems which Dr. Gonzalez described, were normal, thereby, supporting his opinion that appellant did not have these problems or any permanent impairment associated with her right lower extremity. As Dr. Gonzalez offered no rationale or objective testing to support his opinion, Dr. Alost's opinion, which is fully explained and based upon sound rationale and objective testing, represents the weight of the medical evidence. The Office medical adviser also agreed with Dr. Alost's opinion and found that appellant did not have any permanent impairment to her lower extremities as a result of her accepted injury-related back condition.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 12 and April 17, 1997 are hereby affirmed.

Dated, Washington, D.C.
August 11, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).