U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALMA C. CHENEY and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket No. 03-185; Submitted on the Record;
Issued May 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than an eight percent permanent impairment of his right upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

The Office accepted appellant's claim for a laceration to the head and a cervical strain. On April 3, 2002 appellant filed a claim for a schedule award.

In a report dated March 26, 2002, appellant's treating physician, Dr. Bruce A. Lockwood, a Board-certified physiatrist, considered appellant's history of injury, and noted that appellant underwent discography and in January 2001 underwent a discectomy and fusion at C3-4 and C6-7. He also performed a physical examination. Dr. Lockwood diagnosed chronic cervical complaints with cervicogenic headaches, intermittent right upper extremity dysfunction without evidence of neuropathic dysfunction on examination and status post anterior discectomy and fusion at C3-4 and C6-7.

Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), with reference to the range-of-motion model, he stated that, on page 404, under II-E and F, appellant had a 10 percent cervical rating. He also found that appellant had a six percent loss of cervical range of motion. Dr. Lockwood stated that appellant had a 15 percent whole person rating.

In a report dated May 5, 2002, the district medical adviser, applying Tables 16-10 and 16-13 of the A.M.A., *Guides* (5th ed. 2001), calculated a rating for sensory loss associated with the right C4 nerve distribution by multiplying the maximum value of 5 percent times an 80 percent grade level to yield a 4 percent impairment and calculated a rating for sensory loss associated with the right C5 nerve distribution by multiplying the maximum value of 5 percent times an 80

percent grade level to yield a 4 percent impairment.[1] The district medical adviser found that the total impairment to appellant's right upper extremity was eight percent and stated that the Office did not accept cervical pain impairments. In a note dated July 2, 2002, when asked by the Office to further review his or her prior rating, the district medical adviser stated that appellant had C4-5 radiculopathy and the May 5, 2002 rating of eight percent was appropriate.

By decision dated July 18, 2002, the Office issued appellant a schedule award for an 8 percent permanent impairment to the right arm. By letter dated October 16, 2002, appellant requested an oral hearing before an Office hearing representative. By decision dated November 12, 2002, the Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked October 16, 2002, more than 30 days after the Office issued the July 18, 2002 decision, and that, therefore, appellant's request was untimely. The Branch of Hearings and Review informed appellant that he could request reconsideration by the Office and submit additional evidence.

The Board finds that appellant is not entitled to more than an eight percent permanent impairment for which she received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[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 regulation as the appropriate standard for evaluating schedule losses.[4]

In this case, appellant's treating physician, Dr. Lockwood, applied the A.M.A., *Guides* (5th ed. 2001), Table 15-7, II (E) and (F) and determined, with reference to the range of motion, that appellant had a 10 percent cervical rating and a 6 percent loss of range of cervical range of motion and a 15 percent whole person rating. Under the Act, however, the neck is not a schedule injury and whole person ratings are not accepted.[5] Therefore, his ratings are not probative in establishing the amount of appellant's schedule award.

In an Office schedule award worksheet dated May 5, 2002, the district medical adviser applied the A.M.A., *Guides* (5th ed. 2001), and determined that, pursuant to Table 16-10, page 482, and Table 16-13, page 489, appellant's cervical radiculopathy resulted in a four percent

[1] A.M.A., *Guides* 482, 489, Tables 16-10, 16-13.

[2] 5 U.S.C. § 8107 *et seq.*

[3] 20 C.F.R. § 10.404.

[4] *See id*.; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[5] *See Jay K. Tomokiyo*, 51 ECAB 361, 366-67 (2000); *Ann L. Teague*, 49 ECAB 453, 454 (1998). 5 U.S.C. § 8107. Disfigurement of the neck may form the basis of an award if certain criteria are met but that is not the case here. *Ann L. Teague* at 454-55. *See* 5 U.S.C. § 8107(c)(21).

impairment for sensory loss associated with the right C4 nerve distribution and a four percent impairment for sensory loss associated with the right C5 nerve distribution, which equaled a total impairment of eight percent to the right upper extremity. The district medical adviser obtained 4 percent for each cervical level by multiplying a maximum value of 5 percent by an 80 percent grade level.

In the July 2, 2002 note, the district medical adviser stated that appellant had C4 and C5 sensory radiculopathy, and the rating of May 5, 2002 was appropriate. The finding of a four percent impairment related to the C4 nerve and a four percent impairment to the C5 nerve, resulting in an eight percent impairment to the right upper extremity based on Tables 16-10 and 16-13, pages 482 and 489, is consistent with the A.M.A., *Guides* (5th ed. 2001). No evidence of record shows that appellant had more than an eight percent impairment to her right arm. Moreover, it is proper for the Office to issue a schedule award for permanent impairment to an upper or lower extremity, even though the cause of the impairment originated in the neck.[6]

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."[7] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.[8] The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.[9]

Section 10.616(a) of the Office's regulations[10] provides in pertinent part:

> "[A] claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. 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."

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 for such hearings, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] Specifically, the Board has held that the

[6] *See Thomas J. Engelhart*, 50 ECAB 319, 321 (1999).

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. § 10.615.

[9] *Id*.

[10] 20 C.F.R. § 10.616(a).

[11] *Henry Moreno*, 39 ECAB 475, 482 (1988).

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 to a hearing,[12] when the request is made after the 30-day period for requesting a hearing,[13] and when the request is for a second hearing on the same issue.[14]

In this case, appellant's hearing request, which was dated October 16, 2002,[15] was made more than 30 days after the Office issued the July 18, 2002 decision and, therefore, the Branch of Hearings and Review was correct in stating in its decision that appellant was not entitled to a hearing. The Branch of Hearings and Review exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The November 12 and July 18, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[12] *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

[13] *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

[14] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[15] Evidence of the postmark date is not in the record so it is appropriate to use the date of the letter requesting the hearing.