

FACTUAL HISTORY

On January 15, 2002 appellant, then a 61-year-old maintenance mechanic, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on March 1, 2001 he sustained pain and numbness in his buttock and leg while in the performance of duty. The Office accepted the claim for a herniated L5-S1 disc and S1 impingement. Appellant underwent lumbar surgery on October 10, 2001; he returned to work on December 10, 2001.

Appellant submitted reports from an attending neurosurgeon, Dr. Calvin Kam, with respect to his continuing treatment. In a report dated August 30, 2002, Dr. Kam reported low back pain, noted slight decreased sensation of the medial two toes of the left foot, with no weakness or atrophy in the legs.

On March 13, 2003 appellant submitted a claim for compensation (Form CA-7) indicating that he claimed entitlement to a schedule award. The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Emerson Jou, a specialist in physical medicine and rehabilitation. In a report dated April 21, 2003, Dr. Jou provided a history and results on examination. He noted bilateral low back and buttocks pain with no radiating pain or numbness in the right leg, but numbness on the one and two of the left foot. Dr. Jou diagnosed chronic moderate pain in low back and pelvis with limited trunk mobility, chronic secondary postural deviation with spinal rotation and chronic radiculopathy with mild sensory deficits in left toes. Dr. Jou completed a lower extremity form report identifying the L5 nerve root and finding mild sensory deficits in left toes one and two, with moderate pain.

In a report dated May 5, 2003, an Office medical adviser reviewed the medical record and opined that appellant had a three percent permanent impairment to the left leg under the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed.). The Office medical adviser identified the L5 nerve root and noted pain/decreased sensation that interfered with some activity. The medical adviser graded the severity of the impairment at 60 percent of the 5 percent maximum impairment, for a 3 percent impairment to the left leg.

By decision dated May 16, 2003, the Office issued a schedule award for a three percent permanent impairment to the left leg. The period of the award was 8.64 weeks from April 12, 2003.

In a letter postmarked June 20, 2003, appellant requested a review of the written record by an Office hearing representative. He submitted additional medical evidence, including a June 17, 2003 report from Dr. Kam. In the June 17, 2003 report, Dr. Kam stated that the three percent impairment did not take into account the L5-S1 herniated disc; he opined that under the A.M.A., *Guides* appellant had a diagnosis-related estimate for the lumbar spine of Category 3, for a 10 to 13 percent whole person impairment.

In a decision dated July 17, 2003, the Office determined that the request for a review of the written record was untimely and therefore appellant was not entitled to a review of the written record as a matter of right. The Office further stated that in its discretion the request had

been considered and it was denied for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new and relevant evidence.

In a letter dated July 23, 2003, appellant requested reconsideration of his claim. He resubmitted the June 17, 2003 report from Dr. Kam. In a report dated August 8, 2003, Dr. Kam provided results on examination and indicated that appellant's condition was stable. Appellant also submitted an October 3, 2003 magnetic resonance imaging (MRI) scan of the head and neck.

By decision dated February 11, 2004, the Office determined that appellant's request for reconsideration was not sufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act 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.¹ Neither the Act nor the regulation specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.²

ANALYSIS -- ISSUE 1

Here the reports of the attending physician, Dr. Kam, noted that appellant had numbness in two toes of the left foot. An Office referral physician, Dr. Jou, also found that appellant had sensory deficit and pain along the L5 nerve distribution in the first and second toes of the left foot. To determine the impairment to the leg from a nerve root impairment, the A.M.A., *Guides* requires that the nerve involved is identified, the extent of the sensory or motor impairment is graded according to severity and the severity of the deficit is multiplied by the maximum value of the relevant nerve.³ The Office medical adviser identified the nerve root as L5 and graded the severity of the sensory deficit/pain impairment at Grade 3 or 60 percent of the maximum.⁴ Under Table 15-18, the maximum impairment for L5 nerve root sensory deficit or pain is 5 percent. Accordingly, the medical adviser multiplied 60 percent of 5 percent for a 3 percent left leg impairment in this case.

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

² A. *George Lampo*, 45 ECAB 441 (1994).

³ A.M.A., *Guides* 423.

⁴ The medical adviser identified Table 16-10, which is the table for upper extremity sensory deficits. The relevant table in this case is Table 15-15, which provides an identical grading scheme. A.M.A., *Guides* 424, Table 15-15, 482, Table 16-10. A Grade 3 impairment is for distorted superficial tactile sensibility with some abnormal sensations or slight pain, that interferes with activity. The range for Grade 3 is 26 to 60 percent of the maximum.

There is no probative evidence of record establishing a greater impairment than the three percent awarded. For example, Dr. Kam consistently reported no lower extremity weakness or motor impairment in his reports. The Office medical adviser properly applied the A.M.A., *Guides* to the physical findings of sensory deficit and pain in toes of the left foot. The Board finds that the Office properly found that the medical evidence of record established a three percent leg impairment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that “a claimant for compensation not satisfied with a decision of the Secretary ... 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.”⁵ Section 10.615 of the federal regulation implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁶ The regulation provide that a request for a hearing or review of the written record must be made within 30 days, as determined by the postmark or other carrier’s date marking, of the date of the decision.⁷

ANALYSIS -- ISSUE 2

In the present case, appellant’s request for a review of the written record was postmarked June 20, 2003. Since this is more than 30 days after the May 16, 2003 Office decision, appellant is not entitled to a review of the written record as a matter of right.

Although appellant’s request for a review of the written record was untimely, the Office has discretionary authority with respect to granting the request and the Office must exercise such discretion.⁸ In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office’s discretionary authority.⁹ There is no evidence of an abuse of discretion in this case.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁰ the Office’s regulation provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law;

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ 20 C.F.R. § 10.616(a).

⁸ See *Cora L. Falcon*, 43 ECAB 915 (1992).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”)

(2) advancing a relevant legal argument not previously considered by the Office, or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹¹ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹²

ANALYSIS -- ISSUE 3

With his request for reconsideration appellant submitted a June 17, 2003 report from Dr. Kam, who stated that the three percent impairment rating did not properly consider appellant's lumbar impairment. Dr. Kam referred to the A.M.A., *Guides* and the impairments described in Table 15-3, which provides diagnosis-related estimates for spinal impairments.¹³ According to Dr. Kam, appellant would be considered a Category 3 under Table 15-3, resulting in a 10 to 13 percent whole person impairment.

The June 17, 2003 report is not sufficient to warrant reopening the claim because it is not new and relevant evidence with respect to a schedule award under the Act. Neither the Act nor its regulation provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.¹⁴ The diagnosis-related estimates discussed by Dr. Kam are not applicable to schedule awards under the Act. The criteria discussed in the lumbar categories, such as radiculopathy, may be relevant to a lower extremity impairment that is properly evaluated under the appropriate tables. Dr. Kam did not provide any new and relevant evidence with respect to a leg impairment that had not previously been considered in the schedule award issued in this case. In his August 8, 2003 report, Dr. Kam provided results on examination and indicated that appellant remained stable, without providing new evidence with respect to an additional leg impairment.

The record does not contain evidence submitted after the May 16, 2003 decision that is new and relevant to the leg impairment issue presented. Accordingly, the Board finds that the Office properly determined that the evidence was insufficient to warrant reopening the claim for merit review.¹⁵

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

¹³ A.M.A., *Guides* 384, Table 15-3.

¹⁴ *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

The regulation provides that the Board's review of a case is limited to evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The record contains evidence submitted after February 11, 2004, but there is no final decision with respect to this evidence and it will not be reviewed by the Board on this appeal.

CONCLUSION

The Board finds that the medical evidence of record establishes a three percent permanent impairment to the left leg. The Office properly denied appellant's request for a review of the written record and properly denied the February 11, 2004 request for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 11, 2004 and July 17 and May 16, 2003 are affirmed.

Issued: October 5, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member