

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**BARBARA A. ENGLAND, Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 05-49**

**Issued: April 21, 2005**

*Appearances:*

*Barbara A. England, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On September 29, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 26, 2004, finding that appellant was not entitled to a schedule award. The record also contains an August 2, 2004 decision of the Office, denying her request for an oral hearing as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit and merit decisions.

**ISSUES**

The issues are: (1) whether appellant is entitled to a schedule award for her back, neck or upper extremities; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

**FACTUAL HISTORY**

On March 3, 1997 appellant, then a 57-year-old rigger, filed a traumatic injury claim on February 24, 1997 when a beam fell on her head. Appellant stopped work on the date of injury

and returned to light-duty work on April 3, 1997.<sup>1</sup> The Office accepted her claim for a laceration to the forehead with surgical scar revision, cervical strain, sprain/strain of the left shoulder and neck and an open wound to the scalp without complications.

By letter dated September 30, 2003, the Office requested that Dr. Lawrence R. Morales, an attending Board-certified orthopedic surgeon, address whether appellant's employment-related back and neck conditions caused any permanent impairment to one or both of her upper extremities utilizing the applicable tables and figures in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*). The Office advised that a schedule award was not payable for any impairment of the back. The Office also requested that Dr. Morales include an impairment rating for appellant's left shoulder in his examination and state the date she reached maximum medical improvement. Dr. Morales did not respond.

On October 19, 2003 appellant filed a claim (Form CA-7) for a schedule award. She submitted Dr. Morales's October 15, 2003 attending physician's report in which he noted that she sustained a neck and shoulder injury on February 24, 1997. Dr. Morales diagnosed disc protrusion at C6 and indicated with an affirmative mark that this condition was caused by an employment activity.

By letter dated March 1, 2004, the Office advised appellant that since Dr. Morales had not responded to its September 30, 2003 letter, a second opinion medical examination would be scheduled. By letter dated March 8, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edward W. Gold, a Board-certified orthopedic surgeon.

On March 15, 2004 Dr. Morales submitted a February 12, 2004 medical report who provided findings based on physical examination. He opined that appellant had a five percent permanent impairment of the cervical spine. The Office received an August 21, 2001 report from Andrea Powell, a physical therapist, who reported findings on physical examination.<sup>2</sup> She diagnosed category III cervicothoracic radiculopathy which she determined resulted in a 10 percent impairment of the whole person. Ms. Powell determined that impairment for abnormal motion of the shoulder was six percent of the upper extremity which correlated to a four percent impairment of the whole person. She concluded that the combined values for the cervical and shoulder impairments constituted a 14 percent impairment of the whole person.

Dr. Gold submitted a March 30, 2004 report. He reviewed a history of appellant's February 24, 1997 employment injuries and medical treatment. On physical examination of appellant's neck, Dr. Gold found limited rotation to the left and forward flexion. He also found tenderness to palpation of the neck at the left posterior scalenus muscles and discomfort and tenderness at the left upper trapezius and levator scapula muscle area of the shoulder. Dr. Gold

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<sup>1</sup> Appellant was removed from the employing establishment effective August 9, 2002 because she was physically unable to perform her work duties.

<sup>2</sup> It appears from the record that Dr. Morales requested that Ms. Powell perform an impairment rating evaluation of appellant.

stated that sensation in the upper extremities was intact and there were no motor deficits. Circulation and pulses were normal, deep tendon reflexes were symmetrical bilaterally and there were no upper extremity deformities or atrophy. The left shoulder examination revealed full painless range of motion and no tenderness at the shoulder but, there was tenderness at the left lateral mid-scapula. The elbows, wrists and hands had normal motion and the shoulder impingement test was mildly positive. Dr. Gold diagnosed chronic left shoulder and cervical strains and myofascial pain syndrome. He noted that appellant did not have any resolution of her complaints and that surgery had not been performed. Dr. Gold stated that there were no objective findings on examination and that radiographic studies showed degenerative changes since the date of the injury. He stated that there were no indications for surgical intervention or specific treatment.

In response to the Office's questions, Dr. Gold opined that appellant had a five percent permanent impairment of the cervical spine based on Tables 15-12 and 15-14, pages 418 and 421 of the A.M.A., *Guides*. He further opined that there was no impairment for the left upper extremity based on the A.M.A., *Guides*. Dr. Gold stated that appellant reached maximum medical improvement on August 30, 2001, the date she was assigned a permanent impairment rating by Dr. Morales.

On April 12, 2004 the Office received a March 25, 2004 medical report from Dr. Steven L. Gershon, a Board-certified physiatrist, who described appellant's February 24, 1997 employment injuries and medical treatment. He provided findings on physical and objective examination regarding appellant's neck and shoulder. Dr. Gershon stated that it appeared appellant experienced chronic myofascial pain. In a March 25, 2004 report, Dr. Morales noted appellant's complaints of problems with her neck and left shoulder and provided his findings on physical examination.

On April 23, 2004 the Office requested that an Office medical adviser review the medical record to determine permanent impairment based on the A.M.A., *Guides* and the date appellant reached maximum medical improvement. On April 29, 2004 the Office medical adviser found that Ms. Powell's rating of 14 percent of the whole person had no medical basis as ratings provided by a physical therapist were not acceptable under the A.M.A. *Guides*. He found that Dr. Morales's five percent impairment rating had no basis as he did not indicate which volume, page, chapter, table or figure he used in the A.M.A., *Guides* to support his rating. Regarding Dr. Gold's rating of a five percent impairment of the whole person, the Office medical adviser stated that the doctor's references to the tables in the A.M.A., *Guides* "related to impairment due to motion at the cervical spine resulting in whole person impairment." He pointed out that such an impairment rating was not accepted by the Office and the tables relied upon by Dr. Gold did not relate to any impairment of a member under the schedule. The Office medical adviser concluded that there was no basis for an impairment relating to appellant's cervical spine. He stated that there was no evidence of any disc herniation, spinal stenosis, neurological impairment, structural abnormalities such as a fracture and no diminished muscle function. He concluded that appellant had a zero percent impairment based on the A.M.A., *Guides*.

The Office received an April 22, 2004 report from Dr. Morales, who noted appellant's complaint of neck pain going into her shoulders and into the interscapular area and intermittent weakness in her upper arm. He provided his findings on physical examination and indicated that

appellant received an injection in two painful trigger point areas. Dr. Morales stated that x-rays revealed no instability but there was degenerative arthritis at the mid-cervical level.

By decision dated May 26, 2004, the Office denied appellant's claim for a schedule award finding that the medical evidence did not support an award.

The Office received a duplicate copy of Dr. Morales's March 25, 2004 report. The Office also received his April 15 and 22 and May 27, 2004 reports addressing treatment of appellant's neck, shoulder and ankle pain. On June 3, 2004 Dr. Morales prescribed physical therapy for appellant's neck and shoulder and requested an impairment rating for these members of the body based on the A.M.A., *Guides*. The June 21, 2004 treatment notes of Robert F. Collins, a physical therapist, indicated that appellant had a five percent impairment of the whole person. A June 9, 2004 magnetic resonance imaging (MRI) scan report from Dr. Daryl R. Fanney, a Board-certified radiologist, of appellant's left shoulder, diagnosed a focal low grade articular surface tear in the anterior fibers of the supraspinatus tendon, supraspinatus, infraspinatus and subscapularis tendinopathy and mild osteoarthritis of the left acromioclavicular joint with trace amount of subacromial-subdeltoid bursal fluid. A June 9, 2004 MRI scan report regarding her cervical spine found left uncovertebral joint and facet joint hypertrophy contributing to neural foraminal narrowing at C3-4 that was not significantly changed compared to May 26, 2001. Dr. Fanney also reported degenerative disc disease at C5-6 and moderate diffuse disc protrusion with discovertebral spurring and bilateral uncovertebral joint hypertrophy that was not significantly changed. He found no large central disc herniation, cord compression or cord signal abnormality.

On July 16, 2004 appellant requested an oral hearing before an Office hearing representative. By decision dated August 2, 2004, the Office denied appellant's request, finding that her request was untimely. The request was postmarked July 8, 2004 and was received more than 30 days after the issuance of the May 26, 2004 decision. Therefore, she was not entitled to a hearing as a matter of right. The Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in the case of whether she sustained permanent impairment causally related to her February 24, 1997 employment injuries could be addressed through the reconsideration process.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the

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<sup>3</sup> Following the Office's August 2, 2004 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

<sup>4</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>5</sup> 20 C.F.R. § 10.404.

percentage of loss of use.<sup>6</sup> However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.<sup>7</sup>

A schedule award is not payable for the loss or loss of use of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulation provide for a schedule award for any impairment to the back or cervical spine or to the body as a whole.<sup>8</sup> The back is specifically excluded from the definition of organ under the Act.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant's claim was accepted for laceration to the forehead, cervical strain and sprain/strain of the left shoulder and neck and an open wound to the scalp. However, she has not submitted sufficient medical evidence to establish that she sustained any impairment to a scheduled member. Dr. Morales's October 15, 2003 report found that appellant sustained a disc protrusion at C6 and indicated with an affirmative mark that this condition was caused by the February 24, 1997 employment injury. On a February 12, 2004 he indicated that appellant had a five percent impairment of the cervical spine. The Board notes, however, that the Act and its implementing regulation specifically excludes the back from the definition of an organ. Appellant is not entitled to a schedule award for permanent impairment to her cervical spine.<sup>10</sup>

Appellant may, however, be entitled to a schedule award for permanent impairment to her left upper extremity. Amendments to the Act modified the schedule award provisions to provide for 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.<sup>11</sup> Ms. Powell, appellant's physical therapist, found that appellant had a 10 percent impairment of the whole person based on the diagnosis of category III cervicothoracic radiculopathy. She found that appellant had a six percent impairment of the upper extremity due to abnormal motion of her shoulder which constituted a four percent impairment of the whole person. Ms. Powell concluded that the combined values for appellant's cervical and shoulder impairments constituted a 14 percent impairment of the whole person. The Board notes, however, that Ms. Powell's impairment rating does not constitute competent medical evidence as a physical therapist is not defined as a "physician" under the Act.<sup>12</sup>

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<sup>6</sup> 5 U.S.C. § 8107(c)(19).

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Francesco C. Venezian*, 48 ECAB 572 (1997); *Gary L. Loser*, 38 EAB 673 (1987).

<sup>9</sup> *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

<sup>10</sup> See the cases cited in *supra* note 8.

<sup>11</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>12</sup> 5 U.S.C. §§ 8101-8193, 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act); see also *Jerre R. Rinehart*, 45 ECAB 518 (1994).

Dr. Gershon reported findings on physical and objective examination regarding appellant's neck and shoulder. He diagnosed chronic myofascial pain. Dr. Gershon, however, failed to provide any impairment rating based on the A.M.A., *Guides*. Dr. Morales failed to provide any impairment rating in his March 25 and April 22, 2004 reports. These reports are insufficient to establish appellant's entitlement to a schedule award.

The March 30, 2004 report of Dr. Gold, an Office referral physician, indicated normal findings on physical examination of appellant's upper extremities. Dr. Gold reported no loss of range of motion. However, he opined that appellant had a five percent impairment of the cervical spine based on Tables 15-12 and 15-14, pages 418 and 421 of the A.M.A., *Guides*. As noted above, appellant is not entitled to a schedule award for any impairment to her cervical spine.<sup>13</sup> Dr. Gold's report does not establish impairment to the left upper extremity, which is a scheduled member.

The Office medical adviser reviewed appellant's medical records, including the reports of Ms. Powell, Dr. Morales and Dr. Gold. He noted that Ms. Powell's opinion was not probative medical evidence. He also explained that Dr. Morales's finding of five percent impairment of the cervical spine and Dr. Gold's opinion of a five percent impairment of the whole person were not probative under the Office's procedures. He noted that the tables cited by Dr. Gold did not relate to any impairment to a scheduled member. The Office medical adviser found no evidence of disc herniation, spinal stenosis, neurological impairment, structural abnormalities such as fracture and no diminished muscle function. He found that appellant had no impairment due to the accepted injury. The Board finds that the Office medical adviser's opinion is well rationalized and based on an accurate factual and medical background. Therefore, his report constitutes the weight of the medical evidence in this claim and establishes that appellant is not entitled to a schedule award.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the 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."<sup>14</sup> 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.<sup>15</sup> The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.<sup>16</sup>

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<sup>13</sup> See the cases cited in *supra* note 8.

<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> 20 C.F.R. § 10.615.

<sup>16</sup> *Id.*

Section 10.616(a) of the Office's regulations<sup>17</sup> 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.<sup>18</sup> 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 to a hearing,<sup>19</sup> when the request is made after the 30-day period for requesting a hearing<sup>20</sup> and when the request is for a second hearing on the same issue.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The 30-day period for determining the timeliness of appellant's hearing request would commence on May 27, 2004, the date following the issuance of the Office's May 26, 2004 decision. Thirty days from May 27, 2004 is June 26, 2004. Appellant requested an oral hearing on July 16, 2004. The envelope which contained her request contains a postmark of July 8, 2004. As appellant's request for a hearing was dated more than 30 days after the Office issued the May 26, 2004 decision, the Board finds that it was not timely filed and she is not entitled to a hearing as a matter of right. Further, the Office considered appellant's request and correctly advised her that she could equally well address the issue in her case through the reconsideration process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.<sup>22</sup>

### **CONCLUSION**

The Board finds that appellant has failed to establish that she is entitled to a schedule award for her back, neck and upper extremities. The Board further finds that the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

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<sup>17</sup> 20 C.F.R. § 10.616(a).

<sup>18</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>19</sup> *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

<sup>20</sup> *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

<sup>21</sup> *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>22</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. E.g., *Jeff Micono*, 39 ECAB 617 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 2 and May 26, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 21, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member