United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 07-494**
	)	**Issued: August 7, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINSTRATION MEDICAL CENTER, Jackson, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 13, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 17, 2006 finding that she was entitled to a schedule award. She also filed a timely appeal of an October 17, 2006 nonmerit decision from the Branch of Hearings and Review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has more than a 10 percent permanent impairment of her right lower extremity for which she received a schedule award; and (2) whether the Branch of Hearings and Review properly denied her request for an oral hearing as untimely.

FACTUAL HISTORY

On April 11, 2002 appellant, then a 46-year-old nurse, filed a traumatic injury claim alleging that she twisted her right ankle walking to a conference while in authorized travel status

on October 25, 2001. She stated that she had sustained a contusion to her right ankle. Appellant filed a notice of recurrence of disability on July 20, 2004 alleging that her right ankle condition worsened due to walking in the performance of duty.

On November 15, 2004 the Office informed appellant that her claim was not a recurrence of disability but a new occupational disease claim. The Office requested additional factual and medical evidence.

By decision dated April 1, 2005, the Office accepted that appellant sustained a contusion of the ankle and foot on October 25, 2001. Appellant's attending physician, Dr. Robert Woodruff, a podiatrist, completed a form report on April 22, 2005 and indicated that appellant had 10 percent impairment of her right foot and ankle. In a letter dated October 19, 2005, the Office requested additional medical evidence regarding the nature and extent of appellant's right ankle impairment. Dr. Woodruff responded on November 17, 2005 and indicated that she reached maximum medical improvement on June 3, 2002. He found that appellant demonstrated 5 degrees of dorsiflexion and 40 degrees of plantar flexion. Dr. Woodruff stated that she had inversion of 20 degrees and eversion of 15 degrees. He noted no ankylosis and additional impairment of 10 percent due to weakness, atrophy and pain for an impairment rating of 10 percent of the right foot and leg.

The Office medical adviser reviewed appellant's claim on July 25, 2006 and found that she had right ankle and foot strain with residual loss of range of motion in the right ankle. He found that based on appellant's loss of range of motion she had nine percent impairment citing to the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* The Office medical adviser concluded that appellant's schedule award could be "rounded up" to 10 percent in keeping with Dr. Woodruff's assessment.

By decision dated August 17, 2006, the Office granted appellant a schedule award for 10 percent impairment of her right lower extremity. Appellant requested a review of the written record on September 19, 2006. In a decision dated October 17, 2006, the Branch of Hearings and Review denied appellant's request for a review of the written record as untimely. The hearing representative exercised his discretion and noted that the issue in the case could be addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] 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

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

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.

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[3]

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Woodruff, a podiatrist, completed a form report and listed appellant's permanent impairments due to right ankle contusion. He found that she had 5 degrees of dorsiflexion or extension and found 40 degrees of plantar flexion. Appellant demonstrated 15 degrees of eversion and 20 degrees of inversion. Dr. Woodruff indicated that she had a total impairment rating of 10 percent of the right lower extremity which he based solely on pain and weakness. However, he did not offer any description of appellant's pain or weakness in support of his conclusion. It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment and the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.[4]

In reviewing appellant's claim, the Office medical adviser properly concluded that she had seven percent impairment of the lower extremity due to five degrees of dorsiflexion.[5] He noted that 40 degrees of plantar flexion was not a ratable impairment.[6] The Office medical adviser also properly concluded that appellant had two percent impairment due to inversion of only 20 degrees.[7] He properly found that 15 degrees of eversion was not a ratable impairment.[8] The Office medical adviser concluded that appellant had a nine percent impairment of the right lower extremity due to loss of range of motion. However, he also found that her impairment rating could be increased by 1 percent to a total of 10 percent in agreement with Dr. Woodruff's final impairment rating. The Office medical adviser did not provide any medical reasoning for the additional one percent impairment rating. The Board thus finds that the evidence supports that

[3] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[4] *Linda Beale*, 57 ECAB ___ (Docket No. 05-1536, issued February 15, 2006).

[5] A.M.A., *Guides*, 537, Table 17-11.

[6] *Id.*

[7] *Id*. at Table 17-12.

[8] *Id.*

appellant only has a nine percent impairment of the right lower extremity. Consequently, she has not established entitlement to a schedule award greater than the 10 percent awarded by the Office.[9]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the 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 … 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."[10]

The claimant can choose between two formats: an oral hearing or a review of the written record.[11] The requirements are the same for either choice.[12] The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking[13] and before the claimant has requested reconsideration.[14] However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.[15]

ANALYSIS -- ISSUE 2

Appellant's request for review of the written record was dated September 19, 2006 more than 30 days after the Office issued its August 17, 2006 schedule award decision. She was not entitled to a review of the written record as a matter of right. The Office properly exercised its discretion in denying a review of the written record upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration.

---

[9] *P.C.*, 58 ECAB ___ (Docket No. 07-410, issued May 31, 2007).

[10] 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

[11] 20 C.F.R. § 10.615.

[12] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

[13] 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

[14] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

[15] *Id.*

CONCLUSION

The Board finds that appellant has no more than a 10 percent impairment of her right lower extremity for which she received a schedule award. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the October 17 and August 17, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 7, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board