United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 08-1500**
	)	**Issued: December 5, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 23, 2008 appellant filed a timely appeal from an April 25, 2007 merit decision of the Office of Workers' Compensation Programs granting a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUES

The issues are: (1) whether appellant has more than a two percent permanent impairment of each lower extremity; and (2) whether the Office properly denied her request for a subpoena.

FACTUAL HISTORY

This case is before the Board for the second time. On July 25, 2005 the Board affirmed December 31, 2003 and March 2, June 20, August 11, November 5 and December 7, 2004 Office decisions finding that appellant did not establish a recurrence of disability on April 1, 2003 causally related to her June 13, 2001 employment injury and denying her request for a hearing

under 5 U.S.C. § 8124.[1] The findings of fact and conclusions of law from the Board's decision are hereby incorporated by reference.

On July 14, 2004 appellant filed an occupational disease claim alleging that she sustained a back condition causally related to factors of her federal employment. The Office assigned the claim file number xxxxxx140. By decision dated September 15, 2004, it denied the claim after finding that appellant did not establish fact of injury. On September 21, 2005 an Office hearing representative set aside the September 15, 2004 decision and remanded the case for further medical development on the issue of whether appellant sustained a low back condition due to employment factors. The hearing representative instructed the Office to combine the case record with file number xxxxxx680. Following further development, the Office accepted that appellant sustained a lumbar intervertebral disc and bilateral thoracic and lumbar neuritis and radiculitis.

On May 11, 2006 appellant filed a claim for a schedule award. By letter dated June 5, 2006, the Office requested that she submit a medical report addressing the extent of any permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). Appellant submitted an impairment evaluation dated May 31, 2006 from Dr. Huntly G. Chapman, a Board-certified orthopedic surgeon, who found bilateral stocking numbness of the lower extremities to pinprick without atrophy. Dr. Chapman measured Grade 4 power of the ankle dorsiflexors and great toe extensors. He found that appellant had a 15 percent whole person impairment of the common peroneal nerve pursuant to Tables 17-37 on page 552 of the A.M.A., *Guides*. Dr. Chapman multiplied the 15 percent whole person impairment by a graded 25 percent motor deficit under Table 13-24 on page 348 to find a four percent whole person impairment. He then applied Table 13-23 and Table 17-37 to find one percent whole person impairment due to a sensory impairment.[2] Dr. Chapman combined the 4 percent and the 1 percent whole person impairment to find 5 percent whole person impairment on each side, or a 10 percent whole person impairment.

An Office medical adviser reviewed Dr. Chapman's report on August 8, 2006. He found that the physician did not properly apply the provisions of the A.M.A., *Guides* for an extremity impairment rating secondary to a lumbar disorder. The Office medical adviser opined that Tables 15-17 and 15-18 on page 424 of the A.M.A., *Guides* should be used to evaluate nerve root impairments originating in the back. He recommended that the Office refer appellant for a second opinion examination on the issue of the extent of any permanent impairment.

On August 21, 2006 the Office referred appellant to Dr. John A. Sklar, a Board-certified physiatrist, for a second opinion examination. In an impairment evaluation dated September 15, 2006, Dr. Sklar found intact sensation and good strength in the lower extremities with no

[1] Docket No. 05-477 (issued July 25, 2005). On June 13, 2001 appellant, then a 54-year-old licensed vocational nurse, sustained cervical, thoracic and lumbar strain when she caught a falling patient. The Office assigned the case, file number xxxxxx680. Appellant sustained intermittent periods of total disability from June 13 to October 17, 2001. She retired on disability effective April 19, 2005.

[2] A.M.A., *Guides* 348, 552

evidence of weakness. He diagnosed chronic upper and lower back pain without radiculopathy. Dr. Sklar stated:

> "In regard to an impairment rating for this claimant there is clearly no evidence of radiculopathy of peripheral neuropathy involving the lower or upper extremities. There is no evidence of radiculopathy on physical examination nor is there any evidence of lower extremity radiculopathy on EMG [electromyogram] testing. As such, then there is no basis to grant a neurological impairment involving the upper or lower extremities in this case. The claimant does have pain in her legs. The [A.M.A., *Guides*] do allow for rating pain and according to [Office] procedures an impairment up to three percent can be assigned for pain. In this case, I will assign a two percent lower extremity impairment for the right lower extremity secondary to complaints of pain. I will also assign a two percent lower extremity impairment for the left lower extremity due to complaints of pain. This is the only ratable impairment I find."

In an accompanying form report relevant to lower extremity impairments, Dr. Sklar indicated that appellant did not have neurological involvement but did have moderate pain without weakness. He indicated that she reached maximum medical improvement on May 31, 2005.

On October 5, 2006 an Office medical adviser reviewed Dr. Sklar's report. He noted that the physician utilized page 573 of the A.M.A., *Guides* in finding that appellant had a two percent impairment of the each lower extremity. The Office medical adviser concurred with Dr. Sklar's determination and found that appellant reached maximum medical improvement on May 31, 2006.

By decision dated October 13, 2006, the Office granted appellant a schedule award for a two percent permanent impairment to each lower extremity. The period of the award ran for 11.52 weeks from May 31 to August 19, 2006.

On October 14, 2006 appellant requested an oral hearing. By letter dated November 12, 2006, she requested a subpoena of the report of the Office medical adviser who reviewed Dr. Chapman's evaluation and recommended a second opinion examination. Appellant also requested a copy of the statement of accepted facts and questions for the second opinion physician. She asserted that she had asked for the report three times without success.[3] On November 15, 2006 the Office sent appellant a copy of her medical records in file numbers xxxxxx680 and xxxxxx140. On December 29, 2006 an Office hearing representative denied her request for a subpoena of Dr. Mosely's report. The hearing representative noted that the Office sent appellant a copy of the medical evidence in both of her case files. Further, appellant did not explain why she wanted the information or how it would assist her in showing that she had a greater permanent impairment.

[3] Appellant requested a copy of her medical records on May 10 and 25, June 23 and September 16, 2006. On August 25 and September 13, 2006 she requested the report of the Office medical adviser.

A hearing was held on February 15, 2007. In a decision dated April 25, 2007, a hearing representative affirmed the October 13, 2006 decision. She noted that appellant could appeal the denial of her subpoena request.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act,[4] and its implementing federal regulation,[5] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained strains of the cervical, thoracic and lumbar spine due to a June 13, 2001 employment injury. It also accepted that she sustained a lumbar intervertebral disc and bilateral thoracic and lumbar neuritis and radiculitis casually related to factors of her federal employment. On May 11, 2006 appellant filed a claim for a schedule award. In a report dated May 31, 2006, Dr. Chapman found bilateral stocking numbness of the lower extremities to pinprick without atrophy and Grade 4 power of the ankle dorsiflexors and great toe extensors. He determined the extent of her permanent impairment by using Tables 13-23 and 13-24 on pages 346 and 347 of the A.M.A., *Guides*, which are relevant to determining peripheral nerve impairments for "sensory and motor impairments from individual nerve lesions or multiple nerve disorders, such as polyneuropathy or monomeuritis multiplex." Dr. Chapman concluded that appellant had a "10 percent whole person impairment."[8] An Office medical adviser reviewed his report and found that it was not in accordance with the A.M.A., *Guides*. There is no evidence that appellant has a nerve lesion or multiple nerve disorders. Additionally, the Act does not provide for impairment of the whole person.[9] As Dr. Chapman's report does not conform to the A.M.A., *Guides*, it is of diminished probative value.[10]

The Office referred appellant to Dr. Sklar for an impairment evaluation. On September 16, 2006 Dr. Sklar found good sensation and strength in the lower extremities. He

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] 20 C.F.R. § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] A.M.A., *Guides* 347.

[9] *Tania R. Keka*, 55 ECAB 354 (2004).

[10] *Mary L. Henninger*, 52 ECAB 408 (2001).

diagnosed chronic pain in both the upper and lower back with no radiculopathy. Dr. Sklar found that she had no evidence of radicuopathy or peripheral neuropathy on physical examination or diagnostic testing. He advised that appellant had a two percent impairment of the right and left lower extremities due to moderate pain. Dr. Sklar found that the impairment due to pain was the only ratable employment as that she had no neurological impairment. He opined that appellant reached maximum medical improvement on May 31, 2005. The Office medical adviser reviewed Dr. Sklar's report and found that he utilized page 573 in Chapter 18 of the A.M.A., *Guides* in determining that appellant had a two percent impairment of each lower extremity. He agreed that she had a two percent left lower extremity impairment. Chapter 18 provides that an impairment percentage determined according to the body or organ rating system in other chapters may be increased by up to three percent based on an informal pain assessment.[11] In order to provide an impairment due to pain not associated with a ratable impairment from other chapters, a formal assessment of the pain-related impairment must be performed under Chapter 18.[12] Dr. Sklar did not find that appellant had any impairment based on other chapters of the A.M.A., *Guides* and did not provide a formal assessment of appellant's pain; consequently, there is no basis for awarding appellant a schedule award for an impairment due to pain. The Board finds that there is no probative medical evidence in accordance with the A.M.A., *Guides* establishing greater than a two percent permanent impairment of each lower extremity.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[13] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[14]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[15] Section 10.619(a)(1) of the implementing regulation provides that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by

[11] A.M.A. *Guides* 573.

[12] *Id*.

[13] 5 U.S.C. § 8126(1).

[14] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[15] *Id*.

postmark, electronic marker or other objective date mark) after the date of the original hearing request.[16]

The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[17] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[18]

ANALYSIS -- ISSUE 2

On October 14, 2006 appellant requested an oral hearing. By letter dated November 12, 2006, she requested a subpoena for the report of the Office medical adviser who reviewed Dr. Chapman's evaluation and recommended a second opinion examination. Appellant also requested a copy of the statement of accepted facts and questions for the second opinion physician. On November 15, 2006 the Office sent her a copy of her medical records in file numbers xxxxxx680 and xxxxxx140. On December 29, 2006 an Office hearing representative denied appellant's request for a subpoena for Dr. Mosely's report. She noted that the Office had provided her with a copy of the medical evidence in both of her case files. Additionally, appellant did not explain why she wanted the information or how it would show that she was entitled to a greater impairment rating.

The Board finds that the hearing representative properly denied appellant's request because she did not provide any explanation of why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could have been obtained. 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 deduction from established facts.[19] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion. The Board finds that the hearing representative did not abuse her discretion in denying appellant's request for a subpoena.

CONCLUSION

The Board finds that appellant has no more than a two percent permanent impairment of each lower extremity. The Board further finds that the Office properly denied her request for a subpoena.

[16] 20 C.F.R. § 10.619(a)(1).

[17] *See Gregorio E. Conde*, *supra* note 14.

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

[19] *V.T.*, 58 ECAB ___ (Docket No. 06-1347, issued October 19, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2007 is affirmed.

Issued: December 5, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board