United States Department of Labor
Employees' Compensation Appeals Board

H.D., Appellant	)	
and	)	**Docket No. 08-2465**
	)	**Issued: July 15, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Omaha, NE, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' schedule award decision dated June 24, 2008 and an August 26, 2008 decision which denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

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

FACTUAL HISTORY

On November 15, 2001 appellant, then a 47-year-old city carrier filed an occupational disease claim alleging that he developed heel spurs and numbness in the right foot as a result of

walking and climbing steps in the performance of duty.[1] He first became aware of his condition on April 19, 2001. Appellant stopped work on November 15, 2001 and returned to fully duty on November 29, 2001.[2] The Office accepted the claim for aggravation of right heel spur and bilateral plantar fasciitis. It authorized surgery on June 18, 2003 for an excision of the left heel spur, resection of the plantar fascia and decompression of the heel on the left. Appellant received appropriate compensation benefits.

On October 23, 2007 appellant filed a claim for a schedule award.

In a November 8, 2007 report, Dr. David E. Cornell, a podiatrist, determined that appellant had a severe case of plantar fasciitis and large heel spurs which required surgery. The relief that appellant was able to receive was compromised due to the delay in treatment. After several surgeries and considerable time, appellant's condition reached a point where he was now unable to stand for longer than half an hour or take an evening stroll without his wheelchair. Dr. Cornell advised that the pain in appellant's feet, while improved, was constant whenever he was ambulatory. He opined that appellant's quality of life was not likely to improve in the foreseeable future. Dr. Cornell provided work restrictions and indicated that appellant's "lower extremity, however, is at least 80 percent impaired permanently."

In a report dated May 11, 2008, the Office medical adviser noted that Dr. Cornell's report did not provide sufficient findings from examination to rate impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (5th ed. 2001) (A.M.A., *Guides*). He recommended that appellant be seen by a physician who could provide an impairment rating under the A.M.A., *Guides*.

On May 21, 2008 the Office referred appellant for a second opinion examination with Dr. Anil Agarwal, a Board-certified orthopedic surgeon. In a June 6, 2008 report, Dr. Agarwal noted appellant's history of injury and treatment and utilized the A.M.A., *Guides*. He advised that appellant reached maximum medical improvement on December 31, 2006. Dr. Agarwal referred to Chapter 18 of the A.M.A., *Guides* and advised that for the right foot appellant sustained an impairment of three percent to the body as a whole. He indicated that appellant did not have any disability to the left foot with regard to the spurs. Dr. Agarwal indicated that appellant had chronic pain from prolonged and repetitive work involving the right foot. He noted that the left foot did not have much of a problem. Dr. Agarwal provided range of motion findings for the right ankle of 15 degrees of dorsiflexion and 45 degrees of plantar flexion with 5 degrees of inversion and eversion. For the left ankle, he noted 20 degrees of dorsiflexion and 45 degrees of plantar flexion with 10 degrees of inversion and eversion. Dr. Agarwal noted that appellant had loss of sensation of 50 percent to light touch in the right lower extremity in the distribution of the superficial peroneal nerve and a decrease in strength of the right big toe and weakness of the extensor hallucis longus.

[1] The record reflects that appellant has preexisting conditions including obesity, diabetes and hypertension. Appellant has a separate claim number xxxxxx816, which was accepted for right carpal tunnel syndrome, with surgical release.

[2] Appellant subsequently returned to light duty on February 3, 2002. On September 8, 2004 the Office found that the position as a modified city letter carrier and general clerk with wages of $870.81 per week, effective June 17, 2004, fairly and reasonably represented his wage-earning capacity.

In a June 14, 2008 report, the Office medical adviser reviewed Dr. Agarwal's report, noting that a rating for pain utilizing Chapter 18 of the A.M.A., *Guides* was not permitted as the Office did not use whole person ratings. He reviewed the range of motion findings for both ankles and referred to Table 17-11 and 17-12.[3] For the right lower extremity, appellant had seven percent impairment and, for the left lower extremity, he had four percent impairment. The Office medical adviser also noted that appellant had a loss of sensation of 50 percent to light touch in the right lower extremity in the distribution of the superficial peroneal nerve. He referred to Table 16-10 and section 17.21 pertaining to peripheral nerve injuries to find that appellant had a sensory deficit of 20 percent or Grade 4.[4] The Office medical adviser referred to Table 17-37 to note that the maximum percentage of impairment allowed for a superficial peroneal nerve was five percent for sensory change.[5] He multiplied these values (20 percent times 5 percent) to total 1 percent impairment. The Office medical adviser referred to the Combined Values Chart[6] and determined that for the right lower extremity the seven percent for range of motion combined with the one percent for sensory deficit totaled eight percent impairment. He also referred to Table 17-2[7] and noted that range of motion findings were allowed to be combined with peripheral nerve conditions. The Office medical adviser noted that appellant had four percent impairment of the left lower extremity.

On June 24, 2008 the Office granted appellant schedule awards for eight percent permanent impairment of the right leg and four percent permanent impairment of the left leg. The awards covered a period of 34.56 weeks from January 29 to September 27, 2007.

On July 25, 2008 appellant requested a hearing.

By decision dated August 26, 2008, the Office found that appellant was not entitled to a hearing for the reason that his request was not made within 30 days of the issuance of its June 24, 2008 decision. It exercised its discretion and determined that it would not grant a hearing for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered pertaining to his claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[8] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[9] The Act, however, does not specify the manner by which the

[3] A.M.A., *Guides* 537.

[4] *Id*. at 483, 550.

[5] *Id*. at 552.

[6] *Id*. at 604.

[7] *Id*. at 526.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id*. at § 8107.

percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[10] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11]

ANALYSIS -- ISSUE 1

In support of his claim for a schedule award, appellant submitted a November 8, 2007 report, from his treating physician, Dr. Cornell. Although Dr. Cornell advised that appellant had 80 percent lower extremity impairment, he did not provide an impairment rating that complies with the A.M.A., *Guides*. Board precedent is well settled that, when an attending physician's report gives an estimate of impairment but does not address how the estimate is based upon the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly applied the A.M.A., *Guides*.[12]

The Office referred appellant for a second opinion examination with Dr. Agarwal. In a June 6, 2008 report, Dr. Agarwal provided findings on examination and advised that appellant sustained an impairment of three percent to the body as a whole under Chapter 18. The Board notes that the Act, however, does not provide a schedule award based on whole person impairments.[13] Dr. Agarwal noted that appellant did not have any disability to the left foot with regard to the spurs. He referred to Chapter 18 of the A.M.A., *Guides* and noted that appellant had chronic pain from prolonged and repetitive use of the right foot but that the left foot did not have much of a problem. The Board notes that Chapter 18 of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain and provides a qualitative method for evaluating impairment due to chronic pain. However, Chapter 18 should not be used to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. Office procedures state that a separate pain calculation under Chapter 18 is not to be used in combination with other methods to measure impairment due to sensory pain as outlined in Chapter 13, 16 and 17 of the fifth edition of the A.M.A., *Guides*.[14] Dr. Agarwal did not explain how the three percent impairment awarded appellant due to pain conformed to the above-noted protocols.

The Office medical adviser was able to utilize the findings of Dr. Agarwal to the A.M.A., *Guides*. In a June 14, 2008 report, he explained why a rating for pain utilizing Chapter 18 of the

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[10] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[11] 20 C.F.R. § 10.404.

[12] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[13] *See Tania R. Keka*, 55 ECAB 354 (2004); *James E. Mills*, 43 ECAB 215 (1991) (neither the Act, nor its implementing regulations provide for a schedule award for impairment to the body as a whole).

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* at section 18.3(b); *T.H.*, 58 ECAB ____ (Docket No. 06-1500, issued January 31, 2007).

A.M.A., *Guides* was not permitted. The Office medical adviser also noted that whole person ratings were not permitted.[15] He utilized the range of motion findings for the ankles and referred to Tables 17-11 and 17-12.[16] For the right ankle, he noted 15 degrees of dorsiflexion and 45 degrees of plantar flexion with 5 degrees of inversion and eversion. These findings correlate to zero percent impairment for 15 degrees of dorsiflexion and 45 degrees of plantar flexion. The Board also notes that five degrees of inversion represents five percent impairment and five degrees of inversion is two percent impairment. The Office medical adviser added the values for range of motion to total seven percent impairment for the right leg. Regarding the left ankle, the findings included 20 degrees of dorsiflexion and 45 degrees of plantar flexion with 10 degrees of inversion and eversion. These findings correlate to zero percent impairment for 20 degrees of dorsiflexion and 45 degrees of plantar flexion. Ten degrees of inversion represents two percent impairment and 10 degrees of inversion is two percent impairment. When added, these values total four percent impairment to the left leg. Additionally, the Office medical adviser rated impairment for pain or sensory loss based on loss of sensation of 50 percent to light touch in the distribution of the superficial peroneal nerve. He referred to Table 16-10 and section 17.21 pertaining to peripheral nerve injuries and selected a sensory deficit of 20 percent or Grade 4 under Table 16-10 based on his medical judgment.[17] The Office medical adviser explained that according to Table 17-37[18] the maximum percentage of impairment for sensory loss of the superficial peroneal nerve is five percent. He multiplied the value for the sensory deficit by the value for the superficial peroneal nerve and arrived at an additional impairment of one percent for the right leg. The Office medical adviser properly combined the seven percent impairment for lost range of motion in the right leg with the one percent for sensory loss to equal eight percent impairment. The Board finds that the Office medical adviser properly utilized the A.M.A., *Guides* and his opinion establishes that appellant has eight percent impairment of the right leg and four percent impairment of the left leg.

Appellant has not submitted any other medical evidence conforming with the A.M.A., *Guides*, supporting any greater impairment to either leg.

The Board finds that appellant has eight percent permanent impairment of the right leg and four percent permanent impairment of his left leg, for which he received schedule awards.

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 her claim before a representative of the Secretary.[19] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act

[15] *See supra* note 13.

[16] A.M.A., *Guides* 537.

[17] *Id*. at 483, 550.

[18] *Id*. at 552.

[19] 5 U.S.C. § 8124(b)(1).

provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[20] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[21]

ANALYSIS -- ISSUE 2

On June 24, 2008 the Office granted appellant a schedule award for eight percent permanent impairment of the right lower extremity and four percent permanent impairment of the left lower extremity. Appellant's letter requesting a hearing was dated and postmarked July 25, 2009, more than 30 days after the June 24, 2008 decision. Thus, the Office properly found that her request for a hearing was not timely filed under section 8124(b)(1) of the Act and that appellant was not entitled to an oral hearing as a matter of right.

The Office then exercised its discretion and determined that the issue in the case could equally well be addressed in a request for reconsideration. As the only limitation on its authority is reasonableness, 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 deductions from known facts.[22] The Board finds that there is no evidence that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for a hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he has more than eight percent permanent impairment of the right lower extremity and more than four percent permanent impairment of his left lower extremity, for which he received a schedule award. The Board also finds that the Office properly denied appellant's request for a hearing.

[20] 20 C.F.R. §§ 10.616, 10.617.

[21] *Claudio Vasquez*, 52 ECAB 496 (2002).

[22] *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 26 and June 24, 2008 are affirmed.

Issued: July 15, 2009
Washington, DC

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

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

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