

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Petersburg, FL, Employer**

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**Docket No. 09-992
Issued: November 4, 2009**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 3, 2009 appellant timely appealed the March 5 and October 23, 2008 merit decisions of the Office of Workers' Compensation Programs. She also timely appealed the Branch of Hearings and Review's January 16, 2009 nonmerit decision denying her request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.¹

ISSUES

The issues are: (1) whether appellant has greater than seven percent impairment of the right foot; and (2) whether the Branch of Hearings and Review properly denied her December 23, 2008 request for review of the written record.

¹ The record on appeal includes evidence received after the Office issued its October 23, 2008 merit decision. The Board cannot consider evidence for the first time on appeal. 20 C.F.R. § 501.2 (c).

FACTUAL HISTORY

Appellant, a 53-year-old customer service supervisor, has an accepted claim for aggravation of bone spurs of the 4th and 5th toes of the right foot. Her condition arose on or about September 1, 1990. On October 3, 2007 the Office granted a schedule award for seven percent impairment of the right foot. The award represented 14.35 weeks compensation. The Office based the October 3, 2007 schedule award on the September 21, 2007 report of Dr. James W. Dyer, a Board-certified orthopedic surgeon and Office medical adviser.² The seven percent rating was for sensory deficit (pain) involving the lateral plantar nerve.³ By decision dated March 5, 2008, the Branch of Hearings and Review affirmed the October 3, 2007 schedule award.⁴

In July 2008, appellant filed a claim for an additional schedule award. In a report dated July 25, 2008, her treating physician, Dr. Pettina, indicated that her right foot condition caused her to have an altered gait, which affected her left foot and knee and caused constant pain in the lower lumbar region. He also reiterated his prior opinion that appellant had 20 percent impairment of her right foot. Dr. Pettina further indicated that he strongly disagreed with the Office's award of only seven percent impairment. He explained that appellant was unable to bend her 4th and 5th toes any further than approximately 10 percent without experiencing severe pain. Dr. Pettina indicated that his opinion was in accordance with the A.M.A., *Guides* (5th ed. 2001), but he did not otherwise identify the particular tables or figures he purportedly relied upon.

The Office advised appellant on September 8, 2008 that Dr. Pettina's latest report was insufficient to support her claim for an additional schedule award. Appellant was afforded 30 days to provide new evidence showing an increase in her impairment beyond the previously awarded seven percent impairment of the right foot.

In a September 17, 2008 report, Dr. Pettina explained that appellant's right foot condition had "progressed in severity." He once again reiterated that appellant's schedule award should be increased to 20 percent.

On October 16, 2008 the Office medical adviser, Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon, reviewed Dr. Pettina's latest reports and commented that appellant's attending physician did not explain his opinion that the impairment should be 20 percent.⁵ He also stated that the A.M.A., *Guides* were not used as a basis for the claim. Based

² Appellant's treating physician, Dr. Samuel A. Pettina, a Board-certified family practitioner, provided an August 10, 2007 right foot impairment estimate of 20 percent. However, his impairment rating was not based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) and, therefore, it was deemed insufficient to support a schedule award.

³ Dr. Dyer referenced Table 17-37, A.M.A., *Guides* (5th ed. 2001).

⁴ Appellant submitted an October 30, 2007 report from Dr. Pettina wherein he stated that the 20 percent impairment rating "accurately and fairly" represented his condition.

⁵ Dr. Hogshead is a Board-certified orthopedic surgeon.

on the information provided, Dr. Hogshead concluded that there was no new evidence to alter the prior schedule award for seven percent impairment of the right foot.

By decision dated October 23, 2008, the Office denied appellant's claim for an additional schedule award.

Appellant requested a review of the written record utilizing the appeal request form that accompanied the October 23, 2008 decision. She signed and dated the form on December 23, 2008. The Branch of Hearings and Review received appellant's request on December 29, 2008.

By decision dated January 16, 2009, the Branch of Hearings and Review denied appellant's request for a review of the written record. Appellant's request was untimely and, therefore, she was not entitled to a hearing as a matter of right. Furthermore, in denying a discretionary hearing the Branch of Hearings and Review advised her that she could pursue the issue by requesting reconsideration before the district Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act 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.⁶ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁸

ANALYSIS -- ISSUE 1

Between August 2007 and September 2008 appellant's treating physician, Dr. Pettina, stated on at least four occasions that appellant had 20 percent impairment. His reports, however, do not explain how he arrived at his 20 percent impairment rating. The evidence submitted prior to the issuance of the most recent merit decision does not comply with the A.M.A., *Guides* (5th ed. 2001). When a treating physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, Dr. Pettina's opinion is of diminished probative value in establishing the degree of permanent impairment.⁹ Under the circumstances, the Office properly relied on the Office medical adviser's September 21, 2007 impairment rating.¹⁰ Based on the evidence of

⁶ For a total loss of use of a foot, an employee shall receive 205 weeks' compensation. 5 U.S.C. § 8107(c)(4) (2006).

⁷ 20 C.F.R. § 10.404 (2008).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁹ *Linda Beale*, 57 ECAB 429, 434 (2006).

¹⁰ *Id.*

record, Dr. Dyer found seven percent impairment of the right foot due to sensory deficit involving the lateral plantar nerve.¹¹ The Board finds that the Office medical adviser's impairment rating conforms to the A.M.A., *Guides* and, thus, constitutes the weight of the medical evidence. Accordingly, appellant has not demonstrated that she has greater than seven percent impairment of the right foot.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.¹² A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.¹³ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Office regulations further provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."¹⁴ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹⁵

ANALYSIS -- ISSUE 2

Appellant's request for a review of the written record was dated December 23, 2008, which is more than 30 days after the Office issued its October 23, 2008 decision.¹⁶ The regulations clearly specify that "[t]he hearing request must be sent within 30 days ... of the date of the decision for which a hearing is sought."¹⁷ Appellant's request was, therefore, untimely. Because of the untimely nature of her request, she was not entitled to a review of the written record as a matter of right. In its January 16, 2009 decision, the Branch of Hearings and Review also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative's discretionary authority.¹⁸ Moreover, there is no evidence indicating that the Branch of Hearings and Review otherwise abused its discretion in denying appellant's request. Accordingly, the Board finds that the Branch of

¹¹ See Table 17-37, A.M.A., *Guides* 552.

¹² 20 C.F.R. § 10.615.

¹³ *Id.* at § 10.616(a).

¹⁴ *Id.*

¹⁵ See *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁶ Appellant acknowledged that her December 23, 2008 request for review of the written record was late. She attributed the delay to her doctor's office being behind on paperwork. Appellant also indicated that her doctor had been out sick.

¹⁷ 20 C.F.R. § 10.616(a).

¹⁸ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

Hearings and Review properly exercised its discretion in denying appellant's request for review of the written record.

CONCLUSION

Appellant is not entitled to a schedule award in excess of seven percent impairment of the right foot. The Board further finds that the Branch of Hearings and Review properly denied her untimely request for review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2009, October 23 and March 5, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 4, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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