United States Department of Labor
Employees' Compensation Appeals Board

F.C., Appellant	)	
and	)	**Docket No. 09-1456**
	)	**Issued: April 2, 2010**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Staten Island, NY, 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 May 26, 2009 appellant filed a timely appeal of a July 3, 2008 decision of the Office of Workers' Compensation Programs denying his schedule award claim, and a May 6, 2009 decision denying his oral hearing request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he is entitled to a schedule award due to his accepted employment injury; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely filed.

FACTUAL HISTORY

On May 7, 1992 appellant, then a 48-year-old automotive mechanic, filed a traumatic injury claim alleging that on that day he injured his lower back after hooking up a jeep to a tow truck. He stopped work on May 8, 1992 and returned to light duty on May 13, 1992. The Office

accepted appellant's claim for lumbosacral sprain. It accepted his claim for a recurrence of disability beginning May 13, 1992. Subsequently, the Office denied appellant's claim for a recurrence of disability beginning August 30, 1993.

A January 27, 2006 report from Dr. David Drucker, a Board-certified orthopedic surgeon, noted that appellant was placed in a modified mechanic position requiring prolonged driving which caused his low back pain. Dr. Drucker noted that appellant could not sit for any significant length of time without pain. He recommended a spinal magnetic resonance imaging (MRI) scan. In reports dated between March 10 and May 5, 2006, Dr. Drucker noted appellant's status and complaints of back and left lower extremity pain. In a September 28, 2006 lumbosacral spine MRI scan report, Dr. Richard Pinto, a Board-certified diagnostic radiologist, found herniated disc central and anterolateral to the left of midline at L5-S1. He also found small central subligamentous disc herniation at L4-5 and diffuse annular bulge at L3-4. On November 3, 2006 Dr. Drucker recommended pain management based on the MRI scan findings. In reports dated between December 14, 2006 and March 22, 2007, Dr. Christopher Perez, a Board-certified physiatrist, diagnosed acute left S1 radiculopathy with underlying L5-S1 herniated disc. He recommended lumbar epidural injection and physical therapy.

On March 13, 2007 appellant filed a schedule award claim. He submitted a March 13, 2007 attending physician's report from Dr. Perez who noted that appellant had been on light duty since the mid 1990s and that he had not been out of work since he began treating appellant on November 16, 2006. On May 10, 2007 Dr. Perez diagnosed acute left S1 radiculopathy with underlying L5-S1 herniated disc. He opined that appellant's low back was improving with discomfort in the right calf. Dr. Perez also opined that appellant was tolerating well working light duty for eight hours per day. He advised that appellant continue physical therapy. On July 24, 2007 Dr. Perez opined that appellant's work was getting more difficult and this exacerbated his condition. He noted no other interval change in appellant's condition and recommended continued physical therapy.

On October 12, 2007 the Office requested that appellant obtain a physician's opinion regarding his impairment and whether he had reached maximum medical improvement. In an October 25, 2007 report, Dr. Perez noted that appellant's back had been relatively stable. Upon examination, he found left sciatic notch tenderness. Appellant's range of motion consisted of 10 degrees extension and 60 degrees flexion. Dr. Perez diagnosed chronic left S1 radiculopathy with underlying L5-S1 herniated disc that was still symptomatic. He recommended continued physical therapy and listed work restrictions. Dr. Perez opined that appellant had permanent partial moderate disability in the lumbar spine given the nature and duration of his symptoms and functional limitations. He advised that appellant should follow up in four to six weeks. In reports dated between November 27, 2007 and May 1, 2008, Dr. Perez reiterated his diagnosis of chronic left S1 radiculopathy and L5-S1 herniated disc. He also recommended continued physical therapy.

On December 26, 2007 the Office referred appellant with a statement of accepted fact to Dr. Andrew Weiss, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 11, 2008 report, Dr. Weiss summarized the history of injury and reviewed the medical evidence. Upon examination, he found that appellant walked with normal gait. Dr. Weiss also found that appellant's spinal range of motion revealed 70 degrees forward flexion, 30 degrees

extension, right and left lateral flexions at 45 degrees each and right and left rotations at 45 degrees each. He also noted subjective complaints of tenderness at L1-5. Dr. Weiss noted normal neurovascular status with the exception of decreased sensation at the plantar aspect of the right toe, which was not related to appellant's back problem. He found normal sensation throughout the lower limbs except the plantar aspect of the great toe and normal strength of both hips, knees, feet and ankles. Dr. Weiss also found normal deep tendon reflexes about both knees and ankles. He diagnosed a lumbar sprain, causally related to the May 7, 1992 work injury, which was resolved. Dr. Weiss opined that appellant was no longer suffering from the accepted lumbar sprain as demonstrated by a normal evaluation of his lumbar spine by objective clinical criteria and the physician's examination findings. He noted that appellant had reached maximum medical improvement but that he was unable to specify a date as he had only examined appellant once. Dr. Weiss determined that appellant had no permanent impairment as he had no lower extremity impairment due to loss of function of sensory deficit, pain or discomfort and no lower extremity impairment due to loss of function of decreased strength.

In an April 25, 2008 report, an Office medical adviser reviewed the medical record and Dr. Weiss' report. The medical adviser noted that Dr. Weiss' examination was normal with regard to the accepted condition and did not establish any permanent impairment. The medical adviser also noted reviewing record and determining that there was no correlation between appellant's examination and his herniated disc as a detailed review of the medical record indicated that appellant had advanced degenerative changes in the lumbar spine that were not of traumatic origin. The medical adviser opined that appellant had zero percent impairment to either lower extremity according to American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) as there was no nerve root encroachment.

In a July 3, 2008 decision, the Office denied appellant's schedule award claim finding the evidence insufficient to establish that appellant sustained permanent impairment to a scheduled member due to the accepted work injury. Appellant continued submitting medical reports to the record.

On August 18, 2008 appellant requested an oral hearing. He continued submitting medical reports from Dr. Perez.

In a May 6, 2009 decision, the Office denied appellant's oral hearing request finding that it was not filed within 30 days from the July 3, 2008 Office decision. It further found that appellant's claim could be equally well addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which

[1] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[2]

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member.[3] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[4] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail to include, 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 description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained employment-related lumbosacral sprain. Appellant subsequently claimed a schedule award due to this accepted injury. However, the back is not listed as a scheduled member under the Act.[6] While an injury to the spine or back may cause impairment in an extremity, the Board finds that the medical evidence is insufficient to establish that appellant's accepted back condition caused any permanent impairment to a scheduled member of the body.[7]

In support of his schedule award claim, appellant submitted Dr. Perez's October 25, 2007 report. However, this report does not support appellant's claim as it generally noted that appellant had "permanent partial moderate disability" of the lumbar spine, but Dr. Perez did not address the extent of permanent impairment or calculate an impairment percentage for a scheduled member of the body. Dr. Perez also did not consider appellant to be at maximum medical improvement as he recommended a follow-up visit in four to six weeks as well as

[2] *See* 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007).

[3] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[4] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[5] *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

[6] *See* 5 U.S.C. § 8101(19); *see also George E. Williams*, 44 ECAB 530 (1993) (finding that as neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award).

[7] *See J.Q.*, 59 ECAB ___ (Docket No. 06-2152, issued March 5, 2008) (the schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of such impairment originates in the spine).

continued physical therapy.[8] None of his other reports address the issue of permanent impairment due to the May 7, 1992 work injury.

The Office subsequently referred appellant to Dr. Weiss for a second opinion regarding permanent impairment due to the accepted work injury. In a January 11, 2008 report, Dr. Weiss opined that the May 7, 1992 lumbar injury had resolved based on objective clinical criteria as well as his own findings upon examination. In particular, his examination revealed that appellant walked with normal gait. Dr. Weiss also found normal neurovascular status, except for the plantar aspect of appellant's right toe which was not related to his back condition. Regarding appellant's lower extremities, he found normal sensation throughout the lower limbs and normal strength of the hips, knees, feet and ankles of both sides as well as normal deep tendon reflexes of both knees and ankles. Dr. Weiss also noted that appellant had reached maximum medical improvement. He opined that appellant had no permanent impairment of the legs causally related to his accepted lumbosacral sprain, noting that the work injury did not affect any particular nerve branches.

In an April 25, 2008 report, an Office medical adviser concurred with Dr. Weiss and also opined that appellant had no permanent impairment of a scheduled body member causally related to the accepted lumbosacral sprain. He indicated that, while appellant also had degenerative problems in his lumbar spine, these were not related to the accepted condition. The medical adviser found no basis on which to attribute permanent impairment of the legs to the accepted lumbosacral sprain.

None of the other medical reports submitted by appellant address permanent impairment of a scheduled body member, attributable to his low back injury, pursuant to the A.M.A., *Guides*. Consequently, the medical evidence does not establish that appellant's accepted lower back condition caused any permanent impairment entitling him to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.[9] Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision 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.[10] If the

[8] *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008) (under Office procedures, a schedule award may be made when it can be medically determined that the claimant has reached maximum medical improvement); *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (October 1990).

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[11]

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. 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 Board precedent.[12]

ANALYSIS -- ISSUE 2

The Office issued its decision denying appellant's claim on July 3, 2008. Appellant's request for an oral hearing was dated August 18, 2008. Because the hearing request was made more than 30 days after the July 3, 2008 decision, the Board finds that the Office properly denied appellant's request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for a hearing.[13]

The Office exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.[14] The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

On appeal, appellant asserts the additional medical report he submitted with his appeal confirms that he has limited movement and sensation to his left leg and foot as well as nerve damage in his lower back, which entitles him to a schedule award. However, the Board may only review evidence that was in the record at the time the Office issued its final merit decision.[15] Therefore, the Board may not consider any new evidence or any other evidence submitted to the record following the Office's July 3, 2008 decision.

[11] *Teresa Valle*, 57 ECAB 542 (2006).

[12] *D.E.*, 59 ECAB ___ (Docket No. 07-2334, issued April 11, 2008).

[13] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[14] *See André Thyratron*, 54 ECAB 257 (2002).

[15] *See* 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that appellant has not established that he is entitled to a schedule award due to his accepted employment injury. The Board also finds that the Office properly denied appellant's request for an oral hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated May 6, 2009 and July 3, 2008 are affirmed.

Issued: April 2, 2010
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