United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 09-1778**
	)	**Issued: April 5, 2010**
U.S. POSTAL SERVICE, BULK MAIL 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2009 appellant timely appealed the January 13, 2009 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the schedule award claim. The Board also has jurisdiction over the Office's April 8, 2009 nonmerit decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether appellant has greater than three percent impairment of the right lower extremity; and (2) whether the Branch of Hearings and Review properly denied appellant's March 16, 2009 request for an oral hearing.

FACTUAL HISTORY

This case was previously before the Board.[1] Appellant, a 45-year-old mail handler, sustained injuries to her back and right upper extremity in the performance of duty on February 4, 1999.[2] Her traumatic injury claim was initially accepted for cervical, thoracic, lumbar and right shoulder strains. The Office later expanded appellant's claim to include lumbar intervertebral disc displacement and lumbosacral radiculitis. Appellant subsequently filed a claim for a schedule award, which the Office denied by decision dated September 13, 2007. The Office based its decision on the May 1, 2007 report of its district medical adviser (DMA), Dr. H. Mobley. While the DMA found two percent impairment of the left upper extremity and one percent impairment of the right upper extremity, the pain-related impairments were attributed to fibromyalgia, which according to the DMA was not a result of appellant's "accepted condition of a fall in 1999." The DMA, therefore, recommended "no schedule award for the upper extremities."[3]

Appellant requested reconsideration and submitted, *inter alia*, a June 28, 2007 impairment rating from Dr. Louis D. Zegarelli, who found six percent impairment of the right lower extremity due to sensory abnormality at the L4 level involving the common peroneal and superficial peroneal nerves.[4] In a decision dated January 18, 2008, the Office denied modification. When the case was previously on appeal, the Board set aside the January 18, 2008 decision because the Office neglected to consider Dr. Zegarelli's June 28, 2007 impairment rating. Neither the September 13, 2007 decision nor the January 18, 2008 decision referenced Dr. Zegarelli's six percent right lower extremity impairment rating. The case was, therefore, remanded to the Office for a proper review of the evidence and issuance of an appropriate final decision regarding whether appellant was entitled to a schedule award.[5]

On remand, the Office referred the case record, including Dr. Zegarelli's June 28, 2007 impairment rating, to its DMA, Dr. Mobley. In a January 2, 2009 report, the DMA concurred with Dr. Zegarelli's six percent right lower extremity impairment rating. However, he noted that he had previously determined on May 1, 2007 that appellant had a two percent "LLE" (left lower extremity) impairment and one percent "RLE" (right lower extremity) impairment. Under the

[1] Docket No. 08-1331 (issued November 24, 2008).

[2] Appellant indicated that she was placing a mail sack in an over-the-road container when her foot slipped on a piece of mail lying on the floor. She reportedly regained her balance, but injured her back and right upper extremity in the process.

[3] Dr. Mobley reviewed the March 5, 2007 impairment rating of Dr. John A. Sklar, a Board-certified physiatrist and Office referral physician. Dr. Sklar examined appellant on March 1, 2007 and provided impairment ratings for both the upper and lower extremities. While Dr. Mobley concurred with Dr. Sklar's bilateral upper extremity impairment ratings, the DMA did not specifically review or otherwise comment on Dr. Sklar's bilateral lower extremity impairment ratings.

[4] The Office initially received Dr. Zegarelli's report on June 28, 2007, which was after the DMA had reviewed the case file, but prior to the issuance of the September 13, 2007 decision denying appellant's claim for a schedule award.

[5] The Board's November 24, 2008 decision under Docket No. 08-1331 is incorporated herein by reference.

assumption that appellant had already received a schedule award for two percent "LLE" and one percent "RLE," the DMA recommended that the Office reduce the current recommended six percent "RLE" impairment by what he presumed to have been a prior combined three percent award for both lower extremities.

By decision dated January 13, 2009, the Office granted a schedule award for three percent impairment of the right lower extremity. The award covered a period of 8.64 weeks from January 24 through August 23, 2007.

On March 16, 2009 appellant requested an oral hearing. The Branch of Hearings and Review denied the request by decision dated April 8, 2009. Appellant's hearing request was untimely as it was dated more than 30 days after the Office's January 13, 2009 schedule award. Because of the untimely nature of her request, appellant was not entitled to a hearing as a matter of right. The Branch of Hearings and Review also denied a discretionary hearing, noting that appellant could instead file a request for reconsideration with the Office.

LEGAL PRECEDENT

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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* 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] While the fifth edition of the A.M.A., *Guides* was in effect when the Office issued the January 13, 2009 schedule award, the Office has since adopted the sixth edition of the A.M.A., *Guides* (6th ed. 2008) for all schedule award determinations issued on or after May 1, 2009.[9]

The Act and its implementing regulations provide for the reduction of compensation for subsequent injury to the same schedule member.[10] Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different

[6] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

[7] 20 C.F.R. § 10.404 (2009).

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

[9] Federal (FECA) Procedure Manual, *id.* at Chapter 3.700, Example 1 (January 2010).

[10] 5 U.S.C. § 8108; *see* 20 C.F.R. § 10.404(c).

parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.[11]

ANALYSIS

The Board finds that the case is not in posture for decision. The Office erroneously based its January 13, 2009 schedule award on the DMA's January 2, 2009 report. Although the DMA found six percent impairment of the right lower extremity, he recommended that the current schedule award be reduced by three percent to offset a presumed earlier award. The DMA's January 2, 2009 report is faulty because he assumed incorrectly that appellant had previously received a schedule award. Upon close examination of the record, there is no evidence of a prior schedule award having been granted. In fact, the DMA had advised against such an award in his May 1, 2007 report, upon which the Office previously relied. Moreover, he misinterpreted his own May 1, 2007 report. This prior report dealt with appellant's upper extremities, not her lower extremities. In his January 2, 2009 report, the DMA mischaracterized his May 1, 2007 report as a lower extremity rating rather than an upper extremity impairment rating. The May 1, 2007 report made no reference to appellant's lower extremities. Thus, there was no prior schedule award to offset, let alone a prior lower extremity award. Hypothetically, an offset might have been appropriate if there was a prior award involving the "same member or function."[12] The Office compounded the DMA's above-noted mistakes by failing to independently verify whether a schedule award had previously been granted. It appears that the Office simply accepted the DMA's January 2, 2009 report at face value without testing his assumptions or purported factual underpinnings. The result was the offset of a right lower extremity schedule award by a nonexistent prior award. Accordingly, the January 13, 2009 schedule award will be set aside, and the case shall be remanded to the Office for a proper evaluation of appellant's claimed entitlement to a schedule award. The Board further notes that the current standard for determining entitlement to a schedule award is the A.M.A., *Guides* (6th ed. 2008).

CONCLUSION

The case is not in posture for decision regarding appellant's entitlement to a schedule award.[13]

[11] 20 C.F.R. § 10.404(c)(1), (2).

[12] 5 U.S.C. § 8108(1).

[13] Given the Board's disposition of the merits of appellant's claim for a schedule award, the April 8, 2009 decision of the Branch of Hearings and Review is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2009 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further consideration consistent with this decision.

Issued: April 5, 2010
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