United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 09-1736**
	)	**Issued: June 1, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 12, 2008 denying her request for an additional schedule award and an April 8, 2009 nonmerit decision denying her request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more than a 30 percent impairment to her left lower extremity; and (2) whether the Office properly denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 27, 2006 appellant, then a 55-year-old nursing assistant, injured her left leg, left hand, left hip and lumbar spine when she stepped into a hole filled with grass and fell. The

Office accepted the claim for left hip, back and left leg contusions, which was expanded to include the conditions of left acetabulum fracture and cervical strain.[1] On June 18, 2003 appellant filed a request for a schedule award.

In a February 13, 2003 report, Dr. B.T. Wright, Jr., an attending Board-certified orthopedic surgeon, concluded that appellant had a two percent whole person impairment. On physical examination range of motion revealed 30 degrees extended left hip internal rotation, 45 degrees extended left hip external rotation, 25 degrees flexed left hip internal rotation, 45 degrees flexed left hip external rotation, 40 degrees left hip abduction and 15 degrees left hip adduction. Dr Wright noted that the measured hip flexion of the left side was 105 degrees with appellant supine.

In a December 20, 2005 decision, the Office granted appellant a schedule award for a 30 percent impairment of the left leg. The period of the award was from October 25, 2005 to June 21, 2007, or 86.40 weeks of compensation.

On February 13, 2007 Dr. Jerry D. Lloyd, a chiropractor, diagnosed cervical spondylosis. He concluded that appellant had 15 percent whole person impairment as a result of her cervical condition.

Appellant filed a claim for an additional schedule award on May 31, 2007.

By decision dated July 25, 2007, the Office denied a schedule award for appellant's cervical condition.

On August 16, 2007 appellant requested an oral hearing before an Office hearing representative.

By decision dated December 20, 2007, the Office hearing representative set aside the July 25, 2007 decision finding that further medical development was warranted on whether appellant sustained a lumbar and cervical condition as a result of the February 26, 2002 employment injury.

On February 28, 2008 the Office referred appellant to Dr. James F. Hood, a Board-certified orthopedic surgeon, for a second opinion evaluation on the extent of permanent impairment. In an April 2, 2008 report, Dr. Hood noted his review of appellant's medical and employment injury history and her complaint of back pain and problems with her left leg. On physical examination, the lumbar spine demonstrated limitation of motion secondary to her discomfort complaints and no palpable spasm. Sitting straight leg raise was normal to 90 degrees bilaterally, bilateral normal hip flexor muscle strength and appellant was neurologically normal. Dr. Hood also reported no measurable atrophy involving the left and right legs. He provided hip range of motion measurements of 95 degrees flexion, 20 degrees internal and external rotation and 20 degrees abduction. Dr. Hood advised that appellant had impairment based on her acetabulum fracture which he noted would be rated by hip range of motion. Using

[1] Appellant retired from the employing establishment in March 2005.

Table 17-9, page 537, he found appellant had a slight decrease left hip range of motion resulting in five percent whole person impairment.

In a May 6, 2008 report, Dr. H. Mobley, an Office medical adviser, reviewed Dr. Hood's February 27, 2008 report. He found a total 13 percent left lower extremity impairment based on Dr. Hood's 5 percent whole person impairment or a 20 percent left lower extremity impairment when adding all the hip motion impairment. Dr. Mobley reported that, under Table 17-9, page 537, appellant had a mild impairment due to 95 degrees flexion, 20 degrees internal rotation, 30 degrees external rotation and 20 degrees abduction. He noted that Dr. Hood provided a whole person impairment rating instead of a lower extremity impairment rating. As appellant had previously received a schedule award for a 30 percent left lower extremity impairment, Dr. Mobley concluded that the medical evidence did not establish greater impairment.

By decision dated August 12, 2008, the Office denied an additional schedule award for her left lower extremity.[2]

In a request dated February 10, 2009 and mailed on February 11, 2009, appellant requested an oral hearing before an Office hearing representative.

By decision dated April 8, 2009, the Office denied appellant's request as untimely and determined that her claim could be addressed through the reconsideration process.[3]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] Effective

[2] The Board notes that the Office has not issued a final decision on whether appellant is entitled to a schedule award for any impairment to her upper extremities resulting from her accepted cervical condition. On July 22, 2008 the Office referred appellant to Dr. Zvi Kalisky, a Board-certified orthopedic surgeon, for a second opinion or this issue. As no final decision has been issued the Board has no jurisdiction to consider this matter; 20 C.F.R. § 501.2(c).

[3] The Board notes that, following the April 8, 2009 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003)

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[7]

ANALYSIS -- ISSUE 1

The Office accepted the claim for left hip, back and left leg contusions, left acetabulum fracture and a cervical strain. On December 20, 2005 it granted appellant a schedule award for a 30 percent impairment of the left lower extremity. Appellant filed a claim for an additional schedule award on May 31, 2007. The Office referred her to Dr. Hood to determine the extent and degree of her left leg impairment.

On February 13, 2007 Dr. Lloyd, a treating chiropractor, concluded that appellant had a 15 percent whole person impairment as a result of her cervical condition. However, his impairment rating is not probative. Dr. Lloyd did not diagnose a spinal subluxation based on x-ray. As a chiropractor, he is not considered a physician as defined under the Act and his report is of no medical value. A chiropractor is considered to be a physician under the Act only to the extent that he treats a spinal subluxation as demonstrated by x-ray.[8] Moreover, this report did not address appellant's lower extremity impairment.

In a July 29, 2008 report, Dr. Hood advised that there was no neurological involvement, weakness or atrophy of the lower extremities. Although appellant had complaint of moderate pain, this did not interfere with daily activity. Dr. Hood determined that she had no impairment due to lower extremity sensory loss, weakness, atrophy or pain. He provided range of motion findings for appellant's hips. Dr. Hood's findings for flexion, extension, abduction, adduction, internal and external rotation were within the mild range as noted in Table 17-9 of the A.M.A., *Guides*. He concluded that appellant had a five percent whole person impairment due to her loss of hip range of motion. The Office medical adviser reviewed the report and noted that schedule awards are not authorized for permanent impairment of the whole person under the Act.[9] The Board notes that, under Office procedures, referral to an Office medical adviser is appropriate when a detailed description of the impairment from a physician is obtained.[10]

Dr. Mobley stated that appellant had 20 percent impairment of the left leg for loss of range of motion based on Dr. Hood's report and Table 17-9 at page 537 of the A.M.A., *Guides*. This included five percent for 20 degrees of internal rotation, five percent for 20 degrees of external rotation, five percent for 95 degrees of flexion and five percent for 20 degrees of abduction. Dr. Mobley properly noted that Dr. Hood rated a whole person impairment rating

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[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[8] *See* 20 C.F.R. § 8101(2); *Mary A. Ceglia*, 55 ECAB 626 (2004) (in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under 5 U.S.C. § 8101(2); a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist).

[9] *D.J.*, 59 ECAB ____ (Docket No. 08-725, issued July 9, 2008); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

[10] *See Thomas J. Fragale*, 55 ECAB 619 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

instead of a lower extremity impairment. The Office medical adviser found a total 20 percent left lower extremity impairment when adding these values.[11]

The Board finds that the medical adviser properly applied the A.M.A., *Guides* to the findings of Dr. Hood. The medical evidence does not establish greater impairment than that previously noted in this case. Appellant previously received a schedule award for a 30 percent left leg which is more than the 20 percent impairment rating found by Dr. Hood. There is no other evidence of record, conforming with the A.M.A., *Guides* to establish greater impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of the Office's final decision.[12] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[13] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

ANALYSIS -- ISSUE 2

Appellant's request for a hearing before an Office hearing representative was dated February 10, 2009 and sent in an envelope postmarked February 11, 2009. The date of filing for appellant's hearing request was fixed by the date of the postmark, *i.e.*, February 11, 2009.[16] Appellant's February 11, 2009 hearing request was made more than 30 days after the date of issuance of the Office's August 12, 2008 decision and, thus, she was not entitled to a hearing as a matter of right.

The Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. The Board finds that the Office, in its April 8, 2009 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that her claim could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest

[11] *See* A.M.A., *Guides* 538.

[12] 5 U.S.C. § 812(b)(2). *See A.B.*, 58 ECAB 546 (2007).

[13] 20 C.F.R. § 10.616(b).

[14] *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

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

[16] *See N.M.*, 59 ECAB ___ (Docket No. 07-1432, issued May 5, 2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking.

error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[17] In the present case, the evidence of record does not indicate that the Office committed any abuse of discretion in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant has not established that she had more than 30 percent left lower extremity impairment. The Board further finds that the Office did not abuse its discretion when it denied her request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 8, 2009 and August 12, 2008 are affirmed.

Issued: June 1, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[17] *Teresa M. Valle*, *supra* note 15; *Daniel J. Perea*, 42 ECAB 214 (1990).