

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

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**E.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Sayville, NY, Employer**

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**Docket No. 11-189  
Issued: August 3, 2011**

*Appearances:*  
*Jeffrey Amster*, for the appellant  
No appearance, for the Director

Oral Argument March 17, 2011

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 2, 2010 appellant, through her representative, filed a timely appeal from a July 8, 2010 merit decision of the Office of Workers' Compensation Programs granting her a schedule award and an October 20, 2010 nonmerit decision of the Office denying her request for a hearing. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 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 more than a one percent permanent impairment of the right upper extremity; and (2) whether the Office properly denied her request for an oral hearing as untimely under 5 U.S.C. § 8124.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated October 14, 2009, the Board affirmed a November 12, 2008 Office decision finding that appellant received an overpayment of \$10,954.64 for the period December 8, 2005 to April 14, 2006 because she received both compensation from the Office and leave from the employing establishment.<sup>2</sup> It further affirmed the Office's finding that she was at fault in creating the overpayment. The facts and circumstances from the prior decision are hereby incorporated by reference.

The relevant facts pertinent to this appeal will be set forth. The Office accepted that appellant sustained right calcific tendinitis, right shoulder capsulitis and right medial epicondylitis due to factors of her federal employment. On January 10, 2008 she filed a claim for a schedule award. In an impairment evaluation dated July 29, 2009, Dr. Paul Yerys, a Board-certified orthopedic surgeon, related that appellant had full range of motion of the right shoulder with no peripheral nerve impairment or complex regional pain syndrome. He noted that she experienced discomfort using her right arm for internal and external rotation. Dr. Yerys diagnosed right shoulder impingement syndrome with postoperative scarring of the subdeltoid bursa due to the work injury. He asserted that appellant had the minimal impairment under the state workers' compensation guidelines of 7.5 to 10 percent.

On May 24, 2010 an Office medical adviser reviewed the evidence and applied the sixth edition of the A.M.A., *Guides* to Dr. Yerys' findings. He utilized the diagnosis of impingement syndrome provided by Table 15-5 on page 402 of the A.M.A., *Guides* and noted that the default impairment value was one. The medical adviser applied a grade modifier of zero for physical examination based on appellant's full range of motion and function, a grade modifier of one for clinical studies based on prior diagnostic studies, and a grade modifier of one for functional history due to her shoulder surgery and previous symptoms. Applying the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), he calculated that she should receive a net adjustment down one from the default grade of one, which under Table 15-5 resulted in a one percent impairment of the right upper extremity. The medical adviser opined that appellant reached maximum medical improvement on July 29, 2009.

By decision dated July 8, 2010, the Office granted appellant a schedule award for a one percent permanent impairment of the right upper extremity. The period of the award ran for 3.12 weeks from July 29 to August 19, 2009. The Office deducted the amount payable to appellant for the schedule award from the amount that she owed due to the overpayment of compensation.

In an appeal request form dated and postmarked September 22, 2010, appellant requested an oral hearing before an Office hearing representative on the July 8, 2010 decision. In a decision dated October 20, 2010, the Office's Branch of Hearings and Review denied her request on the grounds that it was not untimely under section 8124.

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<sup>2</sup> Docket No. 09-722 (issued October 14, 2009). In a previous decision dated July 24, 2008, the Board issued an order remanding the case for the Office to provide appellant with a telephone conference. Docket No. 08-748 (issued July 24, 2008).

On appeal appellant argues that she is entitled to a greater schedule award than that awarded by the Office as her attending physician found that she had a greater impairment. She also notes that she subsequently submitted another impairment evaluation showing that she had a greater impairment. Appellant questions why the award ran from July to August 19, 2009, after her retirement.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Act,<sup>3</sup> and its implementing federal regulations,<sup>4</sup> 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>5</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>6</sup>

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>7</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained right calcific tendinitis, right shoulder capsulitis and right medial epicondylitis causally related to her work duties. Appellant submitted a July 29, 2009 impairment evaluation from Dr. Yerys in support of her schedule award claim. Dr. Yerys found normal range of motion and function of the right shoulder with no nerve involvement or impairment due to complex regional pain syndrome. He diagnosed employment-related impingement syndrome of the right shoulder with postoperative scarring of the subdeltoid bursa. Dr. Yerys opined that appellant had the minimum impairment provided under state workers' compensation guidelines of 7.5 to 10 percent. Under the Act, however, the extent of any impairment is determined using the sixth edition of the A.M.A., *Guides*. Dr. Yerys did not utilize the sixth edition of the A.M.A., *Guides*; consequently, his opinion is of diminished probative value.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *Id.* at § 10.404(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>7</sup> A.M.A., *Guides* 494-531.

<sup>8</sup> *Fritz A. Klein*, 53 ECAB 642 (2002).

On May 24, 2010 the Office medical adviser applied the sixth edition of the A.M.A., *Guides* to Dr. Yerys' findings. He identified the diagnosis as impingement syndrome using the diagnosis-based regional grid for the shoulder set forth in Table 15-5. The Office medical adviser used the default percentage for a class 1 impairment due to impingement syndrome of one percent. He adjusted the default impairment percentage by a grade modifier of zero for physical examination based on appellant's full range of motion and function. The Office medical adviser found a grade modifier of one for clinical studies due to prior results of diagnostic testing and a grade modifier of one for functional history due to appellant's history of shoulder symptoms and surgery. He applied the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), which yielded  $(1-1) + (0-1) + (1-1) = -1$ . The Office medical adviser found that appellant should receive an adjustment down one from the default grade, which yielded a one percent impairment of the right upper extremity according to Table 15-5. The Board finds that the report of the Office medical adviser rationalized Dr. Yerys' findings conforms to the A.M.A., *Guides* (6<sup>th</sup> ed.) and represents the weight of the medical evidence regarding the extent of permanent impairment to appellant's right upper extremity. There is no medical evidence conforming to the A.M.A., *Guides* establishing greater percentage impairment.

On appeal appellant asserts that she is entitled to a greater schedule award based on the findings of her attending physician. As discussed, however, her attending physician did not utilize the A.M.A., *Guides* and thus his opinion is of diminished probative value.

Appellant further questions the date of the schedule award. It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.<sup>9</sup> The Office properly began the schedule award on July 29, 2009, the date of Dr. Yerys examination.

Appellant also maintains that, subsequent to the Office's schedule award decision, she submitted an impairment evaluation consistent with the A.M.A., *Guides* showing that she had a greater impairment. The Board has no jurisdiction to review evidence on appeal that was not before the Office at the time it issued the decision.<sup>10</sup>

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progressing of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of

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<sup>9</sup> *D.R.*, 57 ECAB 720 (2006); *Mark A. Holloway*, 55 ECAB 321 (2004).

<sup>10</sup> See 20 C.F.R. § 501.2(c)(1).

issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>11</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>12</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”<sup>13</sup>

Section 10.616(a) further provides, “A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent 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.”<sup>14</sup>

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.<sup>15</sup> The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

The Office issued a decision on July 8, 2010 granting appellant a schedule award. Appellant requested an oral hearing by letter dated and postmarked September 22, 2010. It denied her hearing request as untimely by decision dated October 20, 2010. As appellant request for a hearing was postmarked September 22, 2010, more than 30 days after the Office issued its July 8, 2010 decision, she was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.<sup>17</sup> It properly exercised

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<sup>11</sup> 5 U.S.C. § 8124(b)(1).

<sup>12</sup> *N.M.*, 59 ECAB 511 (2008); *Leona B. Jacobs*, 55 ECAB 753 (2004).

<sup>13</sup> 20 C.F.R. § 10.615.

<sup>14</sup> *Id.* at § 10.616(a).

<sup>15</sup> *See André Thyratron*, 54 ECAB 257 (2002).

<sup>16</sup> *J.C.*, 59 ECAB 206 (2007); *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>17</sup> *Afegalai L. Boone*, 53 ECAB 533 (2002).

its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An 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 deduction from established facts.<sup>18</sup> The evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. Accordingly, the Board finds that the Office properly denied her request for an oral hearing as untimely under section 8124 of the Act.

### **CONCLUSION**

The Board finds that appellant has no more than a one percent permanent impairment of the right upper extremity and that the Office properly denied her request for an oral hearing as untimely under section 8124.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 20 and July 8, 2010 are affirmed.

Issued: August 3, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> See *Andre Thyratron*, *supra* note 15.