

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

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**M.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Margate, NJ, Employer**

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**Docket No. 11-640  
Issued: December 15, 2011**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 6, 2011 appellant, through his attorney, filed a timely appeal from a July 13, 2010 schedule award decision of the Office of Workers' Compensation Programs (OWCP) and a September 13, 2010 decision in which OWCP's hearing representative denied his request for a hearing. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

**ISSUES**

The issues are: (1) whether appellant has more than a 25 percent impairment of the right lower extremity and whether he is entitled to a schedule award for the left lower extremity; and (2) whether OWCP properly denied his request for a hearing.

On appeal, counsel asserted that a conflict in medical evidence was created between the opinions of appellant's attending physician and OWCP's medical adviser regarding whether appellant had an increased impairment rating for his right lower extremity and whether he was

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

entitled to a schedule award for the left lower extremity. He further asserted that OWCP erred in denying appellant's hearing request because the July 13, 2010 decision was not certified until after review by OWCP's medical adviser on July 30, 2010.

### **FACTUAL HISTORY**

On May 11, 2005 appellant, then a 45-year-old letter carrier, filed an occupational disease claim, alleging that his job duties caused radiating pains around his lower back and legs with left foot numbness. He noted that he previously had surgery for a herniated disc. A May 23, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine, was compared with a previous examination done on January 22, 2004 and demonstrated a recurrent disc extrusion at L5-S1 on the right with multilevel spinal stenosis, unchanged at L3-4 and L4-5 and slightly worse at L2-3. In an October 5, 2005 report, Dr. Richard A. Balderston, a Board-certified orthopedic surgeon, advised that appellant had a laminectomy for a herniated disc at L5-S1 in March 2004 and returned in May 2005 with similar complaints. He reported the MRI scan findings.

On November 19, 2005 OWCP accepted that appellant sustained employment-related lumbar radiculopathy and aggravation of herniated lumbar disc. Appellant stopped work on March 22, 2006 and was placed on the periodic compensation rolls. On June 7, 2006 Dr. Balderston performed authorized right hemilaminotomies at L5 and S1. Appellant returned to modified duty on October 12, 2006.

Appellant filed a schedule award claim on November 17, 2008 and submitted an August 5, 2008 report from Dr. Steven M. Allon, an orthopedic surgeon, who advised that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>2</sup> (hereinafter A.M.A., *Guides*), appellant had a 25 percent impairment of the right lower extremity and a 12 percent impairment on the left.<sup>3</sup>

By letter dated September 25, 2009, OWCP asked Dr. Allon to provide an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*.<sup>4</sup> On December 23, 2009 Dr. Allon updated his August 5, 2008 report. He did not reexamine appellant. Dr. Allon advised that maximum medical improvement was reached on August 5, 2008 and that under the sixth edition of the A.M.A., *Guides*, appellant had a 32 percent impairment of the right lower extremity and a nine percent impairment on the left.

In a January 31, 2010 report, Dr. Andrew A. Merola, OWCP's medical adviser and Board-certified in orthopedic surgery, performed his review of the medical record including Dr. Allon's report. He advised that because appellant had a right-sided laminectomy at L5-S1, appellant had only right S1 radiculopathy. Therefore, appellant was entitled to a right-sided schedule loss secondary to a right sacral root problem and was not entitled to a schedule award for a left-sided sensory deficit. Dr. Merola further advised that appellant was not entitled to a

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> Dr. Allon also provided an impairment rating for appellant's left arm, not at issue in the current appeal.

<sup>4</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2008).

right femoral nerve deficit because the right femoral nerve was not involved in the right L5-S1 root problem. He concluded that under the sixth edition of the A.M.A., *Guides*, appellant had 25 percent right leg impairment and that August 25, 2008 was the correct date of maximum medical improvement. On June 26, 2010 Dr. Merola later corrected his date of maximum medical improvement to August 5, 2008 to agree with Dr. Allon.

On July 13, 2010 OWCP found that the weight of the medical opinion rested with Dr. Merola and granted appellant a schedule award for a 25 percent right lower extremity impairment, for a total of 72 weeks, to run from August 5, 2008 to December 21, 2009. It further found, based on his opinion, that appellant was not entitled to a schedule award for the left lower extremity. In a July 19, 2010 supported report, Dr. Merola confirmed that he had reviewed Dr. Allon's December 23, 2009 report and had utilized the sixth edition in preparing his report. He further explained that the femoral nerve exited the L3 and L4 nerve root and because appellant had sustained an injury at the L5-S1 level (resulting in right-sided S1 radiculopathy), the femoral nerve could not be included in calculating his impairment.<sup>5</sup>

On August 13, 2010 appellant, through counsel, requested a hearing. By decision dated September 13, 2010, OWCP's hearing representative denied his request as untimely.

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

The schedule award provision of FECA<sup>6</sup> and its implementing federal regulations<sup>7</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, FECA 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, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>8</sup> For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.<sup>9</sup> For decisions beginning May 1, 2009, the sixth edition is to be used.<sup>10</sup>

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.<sup>11</sup> In 1960, amendments to FECA modified the schedule award provisions to provide for an award for

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<sup>5</sup> The record indicates that payment of the schedule award by electronic transfer was deleted on July 23, 2010 because it was denied at certification. The schedule award was paid on August 6, 2010.

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> *Id.* at § 10.404(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

<sup>10</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>11</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>12</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. The A.M.A., *Guides* has for decades offered an alternative approach to rating spinal nerve impairments.<sup>13</sup> OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.<sup>14</sup> Specifically, it will address lower extremity impairments originating in the spine through Table 16-11<sup>15</sup> and upper extremity impairments originating in the spine through Table 15-14.<sup>16</sup>

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, 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) and if electrodiagnostic testing were done, Clinical Studies (GMCS).<sup>17</sup> The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).<sup>18</sup>

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

The Board finds that appellant has a 27 percent impairment of the right leg. The accepted conditions in this case are lumbar radiculopathy and aggravation of herniated lumbar disc with authorized surgery at the L5-S1 level. The Board finds that the weight of the medical evidence rests with the opinion of OWCP's medical adviser, Dr. Merola, who provided medical rationale for his conclusion that, as the disc herniation at L5-S1 was right sided and affected the sciatic nerve only, appellant would not be entitled to an impairment rating based on findings related to the femoral nerve or to a schedule award for a left leg impairment.

Dr. Allon, the attending physician, stated in his August 5, 2008 report and December 23, 2009 update that, using Table 16-12 of the sixth edition of the A.M.A., *Guides*,<sup>19</sup> he found appellant had a class 1 severe sensory deficit of the sciatic nerve which created a 12 percent impairment, the default value. He advised that appellant had grade modifiers of two for GMFH

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<sup>12</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>13</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

<sup>14</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 9.

<sup>15</sup> A.M.A., *Guides*, *supra* note 4 at 533.

<sup>16</sup> *Id.* at 425.

<sup>17</sup> *Id.* at 533.

<sup>18</sup> *Id.* at 521.

<sup>19</sup> *Id.* at 535.

and GMCS and applied the net adjustment formula, finding a net adjustment of two. Dr. Allon concluded that, with the net adjustment, appellant had a grade E impairment of 14 percent, based on a class 1 sensory deficit of the sciatic nerve. He found a class 1 mild motor deficit of the sciatic nerve which yielded 9 percent impairment under Table 16-12, the default value. Dr. Allon found grade modifiers of two for GMFH and GMCS and applied the net adjustment formula, for a net adjustment of two and concluded that, with the net adjustment, appellant had a grade E impairment of 13 percent due to a mild motor deficit.<sup>20</sup>

Section 16.4(c) of the sixth edition of the A.M.A., *Guides* provides that motor and sensory impairment are to be combined to calculate the lower extremity value.<sup>21</sup> A 14 percent sensory impairment plus a 13 percent motor impairment yields a total 27 percent impairment of the right lower extremity due to a sciatic nerve injury.

Dr. Merola agreed with Dr. Allon's findings that appellant had a 13 percent motor impairment and a 14 percent sensory impairment. He incorrectly combined the sensory impairment of 14 percent with the motor impairment of 13 percent, rather than adding the two impairments as indicated in the A.M.A., *Guides*.<sup>22</sup> Dr. Merola provided a rationalized explanation regarding why appellant was not entitled to an impairment rating for the left lower extremity or for femoral nerve findings on the right side. The medical evidence does not create a conflict between Dr. Merola and Dr. Allon because the reports are not of equal weight. Appellant is entitled to a schedule award for a 27 percent right lower extremity impairment. The Board will affirm the July 13, 2010 decision as modified to show that appellant is entitled to a schedule award for a 27 percent impairment of the right lower extremity.

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

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

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. 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. If the 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.<sup>23</sup> The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this

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<sup>20</sup> The net adjustment values determine how many places up or down from the default value of C a rating should move and the corresponding numerical value for impairment. *Id.* at 521.

<sup>21</sup> *Id.* at 553.

<sup>22</sup> *Id.*

<sup>23</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

discretionary authority in deciding whether to grant a hearing.<sup>24</sup> OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.<sup>25</sup>

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

In its September 13, 2010 decision, OWCP denied appellant's request for a hearing on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a hearing as his request, dated and postmarked August 13, 2010, had not been made within 30 days of its July 13, 2010 decision. As appellant's request was dated and postmarked August 13, 2010, more than 30 days after the date of the July 13, 2010 decision, the Board finds that OWCP properly determined that he was not entitled to a hearing as a matter of right as his request was untimely filed.<sup>26</sup>

OWCP also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the September 13, 2010 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, 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>27</sup> In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion.

As to appellant's arguments on appeal, in the absence of evidence to the contrary, correspondence properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.<sup>28</sup> There is nothing in this record to support that the schedule award was not mailed on that date or that the schedule award was rescinded. The fact that payment of the schedule award was not certified until a later date or that additional medical evidence was provided after OWCP's decision is not sufficient grounds to toll the time limitations for filing a request for a hearing. As appellant did not timely file a request for a hearing, OWCP therefore properly denied his request.

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<sup>24</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>25</sup> *Claudio Vazquez*, *supra* note 23.

<sup>26</sup> *Id.* The hearing request was both faxed and mailed to OWCP.

<sup>27</sup> *See Mary Poller*, 55 ECAB 483 (2004).

<sup>28</sup> *C.T.*, Docket No. 08-2160 (issued May 7, 2009).

**CONCLUSION**

The Board finds that appellant has a 27 percent impairment of the right leg and is not entitled to a schedule award for the left leg. The Board further finds that OWCP properly denied his request for a hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The July 13, 2010 decision is affirmed, as modified.

Issued: December 15, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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