United States Department of Labor
Employees' Compensation Appeals Board

B.A., Appellant	)	
and	)	**Docket No. 12-1135**
	)	**Issued: November 20, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Yonkers, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2012 appellant filed a timely appeal from March 26 and January 4, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[2]

ISSUE

The issue is whether appellant has established entitlement to a schedule award due to her work-related injuries.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received; thus the Board has decided the appeal on the record.

FACTUAL HISTORY

On May 29, 2008 appellant, then a 34-year-old mail carrier, filed a traumatic injury claim alleging that, on April 23, 2008, while in the performance of her duties, she felt a sharp pain in her right buttocks which radiated to her back and right leg and neck. She stopped work on the date of injury and sought treatment in a local emergency room. OWCP accepted the conditions of lumbar sprain and neck sprain. On June 30, 2008 appellant returned to work in a limited-duty part-time position. She stopped working on July 18, 2008 and filed a recurrence of disability, which OWCP accepted. Appellant returned to work part-time limited duty on September 21, 2010.

To determine if appellant had any injury-related residuals that prevented her from working, OWCP referred appellant to Dr. Lawrence Schulman, a Board-certified orthopedic surgeon, for a second opinion. In an April 13, 2010 report, Dr. Schulman noted the history of injury, and his review of the medical records, set forth examination findings and diagnosed traumatic lumbosacral musculoskeletal disorder and traumatic cervical musculoskeletal disorder with accompanying mechanical pain and strain. He opined that the work-related incident was a causative factor in developing neck and low back symptoms. Dr. Schulman opined that appellant had a partial mild disability referable to her injuries and that she was capable of returning to lighter or sedentary work with restrictions. He recommended that she be hired as a mail carrier with a pull cart for four hours per day. Dr. Schulman opined that maximum medical improvement was reached and no further treatment was indicated other than a home exercise program.

On August 2, 2010 appellant requested a schedule award.

In letters dated August 11 and September 14, 2010, OWCP advised appellant's physician, Dr. Eugene J. Liu, a physiatrist, of the evidence necessary to establish permanent impairment under FECA as a result of the accepted conditions. It noted that awards for permanent impairment may not be paid for the spine, but awards can be paid for impairment of the upper or lower extremities caused by injury to a spinal nerve. OWCP also stated that impairment determinations were calculated under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and requested supportive medical evidence.[3] No response was received from Dr. Liu.

By decision dated October 20, 2010, OWCP denied the schedule award claim on the basis that the evidence of file was insufficient to establish that appellant had sustained permanent impairment to a scheduled member under FECA due to the accepted conditions.

On October 25, 2010 appellant, through her attorney, requested a telephonic hearing, which was held on February 10, 2011. Appellant's physicians, including Dr. Liu, submitted status reports and return to work certificates. However, no opinion was provided regarding permanent impairment.

[3] As previously noted, appellant returned to part-time limited-duty work on September 21, 2010.

On March 24, 2011 appellant stated that the oral hearing was requested in error and that she did not want her attorney to represent her. She indicated that she wished to proceed with reconsideration after she obtained an impairment examination. On May 2, 2011 OWCP's Branch of Hearings and Review granted appellant's request to withdraw her hearing request and noted that appellant's claim would proceed with reconsideration.

By decision dated July 7, 2011, OWCP denied appellant's reconsideration request without a merit review of the claim. It noted that Dr. Schulman, the second opinion examiner, did not indicate that appellant had a permanent impairment and other evidence was irrelevant to the issue of whether she sustained a permanent impairment as a result of her injury.

On December 28, 2011 appellant again requested a schedule award.

In a December 28, 2011 letter, appellant requested reconsideration as OWCP erred in interpreting the law as Dr. Schulman, the second opinion specialist, had already determined the loss of use and it was OWCP's responsibility to determine the extent of loss of use. She also advised OWCP of her change of address. Appellant noted a new schedule award claim was filed. In a February 9, 2012 letter, she requested "an appeal of the decision regarding the schedule award. I feel I am entitled and OWCP already has documentation from second opinion doctor, Dr. Schulman, to support my entitlement."

By decision dated January 4, 2012, OWCP denied appellant's claim for a schedule award on the basis there was no medical evidence to support a permanent impairment to a member or function of the body.

OWCP further developed the issue of whether appellant had any permanent impairment due to her employment injury of April 23, 2008 by scheduling her for a second opinion examination with Dr. Marvin Gilbert, a Board-certified orthopedic surgeon. In a March 1, 2012 letter, appellant was notified of the second opinion examination with Dr. Gilbert on March 22, 2012. She did not appear for the scheduled examination.

By decision dated March 26, 2012, OWCP denied modification of the January 4, 2012 decision.[4]

LEGAL PRECEDENT

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[5] Neither FECA nor the regulations specify the

[4] Also on March 26, 2012, OWCP proposed to suspend appellant's compensation for not appearing for her scheduled appointment with Dr. Gilbert. As it did not issue a final decision on this matter prior to the filing of the instant appeal, the issue of suspension of benefits under 5 U.S.C. § 8123(d) is not presently before the Board. *See* 20 C.F.R. § 501.2(c).

[5] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.[7]

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[8] OWCP 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 so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[9]

OWCP's regulations also provide that a copy of the decision shall be mailed to the employee's last known address.[10] The Board has found that, in the absence of evidence to the contrary, a letter 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.[11] This is known as the "mailbox rule."

ANALYSIS

OWCP accepted the conditions of lumbar sprain and neck sprain. Appellant claimed a schedule award, which OWCP denied in January 4 and March 26, 2012 decisions.[12]

The evidence of record contains no medical opinion regarding any possible permanent impairment due to the April 23, 2008 employment injury. Appellant's treating physician did not provide an opinion regarding permanent impairment due to the April 23, 2008 employment injury, despite OWCP's request to do so. While Dr. Schulman, a second opinion specialist, indicated in his April 13, 2008 report that appellant had reached maximum medical improvement

[6] *A. George Lampo*, 45 ECAB 441 (1994).

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

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

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

[10] *Kenneth E. Harris*, 54 ECAB 502 (2003).

[11] *See Shakeer Davis*, 52 ECAB 448 (2001). In this case, OWCP mailed a copy of the preliminary decision to both appellant and her attorney at their address of record. No evidence had been presented to rebut the presumption of receipt. Thus, it is presumed that the preliminary decision reached both appellant and her attorney.

[12] On appeal, appellant contends that she never received the January 4, 2012 decision. The record reflects, however, that this decision was sent to the address she provided on December 28, 2011. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt. *Joseph R. Giallanza*, 55 ECAB 186 (2003).

and was partially disabled as a result of the employment injury, he did not offer an opinion as to whether appellant had any permanent impairment due to the April 23, 2008 employment injury.[13] Appellant did not otherwise submit a medical report which addressed whether appellant had permanent impairment of a scheduled body member causally related to her work injury along with an explanation of how any such impairment is determined pursuant to the A.M.A., *Guides*. Thus, there is no medical evidence which demonstrates the April 23, 2008 employment injury caused a permanent impairment.

On appeal, appellant contends that in her February 9, 2012 letter she had requested an appeal and not reconsideration. The Board notes that while appellant had requested an appeal of the schedule award decision she sent her request to OWCP and requested further development of her schedule award claim. In these circumstances, it was not unreasonable to treat this as a request for reconsideration.[14]

The medical evidence does not establish that appellant has permanent impairment to a scheduled member of the body causally related to her accepted injury. Consequently, appellant has not established entitlement to a schedule award.

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to a schedule award for permanent impairment.

[13] OWCP did not ask Dr. Schulman to render an opinion on permanent impairment due to the April 23, 2008 employment injury. It sought to develop the matter by referring appellant to Dr. Gilbert for a second opinion on any permanent impairment attributable to the April 23, 2008 employment injury. As noted, appellant did not appear for the scheduled examination with Dr. Gilbert.

[14] *Cf. Jack D. Johnson*, 57 ECAB 593 (2006) (the Board has held that there may be a request for reconsideration in situations where a letter does not contain the word "reconsideration").

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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