

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

L.J., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Imperial, CA, Employer**

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**Docket No. 13-1246
Issued: December 20, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2013 appellant filed a timely appeal from a December 13, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim and an April 16, 2013 nonmerit decision denying his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 sustained permanent impairment of an extremity related to his accepted back injury; and (2) whether OWCP properly denied his request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, then a 33-year-old border patrol agent, sustained a closed fracture of thoracic vertebra at levels T4, T5, T6 and T8 without spinal cord injury. He was thrown from an all-terrain vehicle in the performance of duty on June 14, 2010.² Appellant returned to full-time, regular-duty work without restrictions on April 25, 2012 based on the April 25, 2012 report of Dr. Christopher C. Lai, an attending orthopedic surgeon.

On September 10, 2012 appellant filed a claim for a schedule award. He submitted an April 25, 2012 report from Dr. Lai, who diagnosed multiple thoracic spinous processes fractures, healed, low back pain and bilateral lower extremity radiculopathy. Appellant had persistent pain in his upper back which was worse with standing or sitting for long periods of time. He was not able to drive or walk for long periods of time and had occasional numbness and tingling in both lower extremities when standing. Upon examination, appellant was tender to palpation throughout the thoracic spinous process region and had slight limitation in range of motion. Sensation of light touch was intact and equal bilaterally, reflexes were normal and equal bilaterally and straight-leg raise was negative bilaterally. Dr. Lai stated that appellant had multiple spinous process fractures of the thoracic spine which placed him in a class 1 impairment rating under Table 17-3 (Thoracic Spine Regional Grid -- Spine Impairments)³ of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter, A.M.A., *Guides*). The functional history (GMFH) adjustment was grade 2 as appellant had pain and symptoms with normal activities. His Physical Examination (GMPE) adjustment was 0 as he had a negative straight-leg raise test, normal reflexes, normal sensation and normal strength. Appellant's clinical studies (GMCS) adjustment was grade 1 as he had findings in support of his symptoms and computerized tomography (CT) scans and x-rays which showed multiple spinous processes fractures. Dr. Lai concluded that appellant fell into grade modifier 1 and had a net adjustment of 0 which was a four percent permanent impairment of the whole person.⁴ He opined that appellant had reached a permanent and stationary status.

On November 20, 2012 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Lai's April 25, 2012 report. He determined that appellant had zero percent (no) impairment of the right or left lower extremity based on the sixth edition of the A.M.A., *Guides*. Dr. Harris noted that Dr. Lai rated impairment based on Table 17-3 on page 568 of the A.M.A., *Guides* for mechanical low back pain, radiculopathy and documented spinal pathology on diagnostic studies including magnetic resonance imaging (MRI) scan. He noted that OWCP and FECA provided schedule awards only for the loss of use or impairment to the lower extremities and not for the spine. Appellant had no objective evidence or documentation of neurologic deficit in either lower extremity. He noted a zero percent permanent impairment of

² On June 14, 2011 appellant filed a traumatic injury claim (Form CA-1) for a right eye injury allegedly sustained in the performance of duty that same day.

³ A.M.A., *Guides* (6th ed., 2009) 567-69.

⁴ *Id.* at 587.

the lower extremities and noted that the date of maximum medical improvement was April 25, 2012, the date of Dr. Lai's examination and report.

By decision dated December 13, 2012, OWCP denied appellant's schedule award claim. It found that the medical evidence did not establish a ratable impairment to a scheduled member.

In an appeal request form dated March 14, 2013, appellant requested an oral hearing before an OWCP hearing representative. The request for an oral hearing was scanned on March 19, 2013. The envelope in which the request was mailed is of record, but the date stamp is not legible.

By decision dated April 16, 2013, OWCP denied appellant's request for an oral hearing finding that it was untimely filed because it was not made within 30 days of the December 13, 2012 decision. It exercised its discretion and further denied the request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.⁵

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 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.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent

⁵ See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

impairment, preexisting impairments of the body are to be included.¹⁰ A schedule award is not payable under section 8107 of FECA for an impairment of the whole person.¹¹

A schedule award is not payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.¹² Neither FECA nor the complementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine, a claimant is not entitled to such an award.¹³ However, as FECA makes provision for the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.¹⁴

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that the medical evidence fails to establish that appellant sustained any permanent impairment to a scheduled member of the body. OWCP accepted his claim for closed fractures of thoracic vertebra at levels T4, T5, T6 and T8 without spinal cord injury. Under FECA, appellant may not receive a schedule award for permanent impairment to his back or spine.¹⁶ He may receive a schedule award, however, for any permanent impairment to his lower extremities, provided the medical evidence establishes such impairment.¹⁷ The Board finds that the medical evidence of record does not establish that appellant sustained permanent impairment to either lower extremity due to the accepted back condition.

¹⁰ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (September 1995). This portion of OWCP procedure provides that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

¹¹ See *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

¹² See *Tania R. Keka*, 55 ECAB 354 (2004).

¹³ See *id.* FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

¹⁴ See *George E. Williams*, 44 ECAB 530 (1993). In 1966, amendments to FECA modified the schedule award provision to provide for an award for 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.

¹⁵ See *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹⁶ 5 U.S.C. *supra* note 13; *Patricia J. Horney*, 56 ECAB 256 (2005).

¹⁷ See *George E. Williams*, *supra* note 14.

On April 25, 2012 Dr. Lai, an attending orthopedic surgeon, rated a four percent whole person impairment under Table 17-3 of the A.M.A., *Guides*. The Board notes that FECA does not authorize schedule awards for impairment of the whole person, back or spine.¹⁸ OWCP's medical adviser reviewed Dr. Lai's report on November 20, 2012 and found no evidence or documentation of any neurologic deficit in either lower extremity. Dr. Harris properly concluded that there was no medical evidence of impairment to the lower extremities resulting from the accepted condition. Therefore, there was no ratable impairment of a scheduled member under the sixth edition of the A.M.A., *Guides*.

Appellant has not established that he sustained any permanent impairment of his lower extremities. The Board finds that he is not entitled to a schedule award as a result of his accepted back injury. OWCP's December 13, 2012 decision was proper under the facts of this case.¹⁹

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

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."²⁰

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."²¹ 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.²² OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.²³ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.²⁴

¹⁸ See *D.H.*, 58 ECAB 358 (2007). See also *Thomas Martinez*, 54 ECAB 623 (2003).

¹⁹ See *J.D.*, Docket No. 13-627 (issued July 17, 2013).

²⁰ 5 U.S.C. § 8124(b)(1).

²¹ 20 C.F.R. § 10.615.

²² *Id.* at § 10.616.

²³ See *G.W.*, Docket No. 10-782 (issued April 23, 2010). See also *Herbert C. Holley*, 33 ECAB 140 (1981).

²⁴ *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

ANALYSIS -- ISSUE 2

Appellant had 30-calendar days from OWCP's December 13, 2012 decision or until January 14, 2013, to request an oral hearing. He filed a request for an oral hearing on March 14, 2013, which was more than 30 days after OWCP issued its December 13, 2012 decision.²⁵ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.²⁶ The Board notes that the envelope in which the request was mailed is of record, but the date stamp is not legible.²⁷ For this reason, the Board finds that the request was untimely. Because the application was not timely filed, appellant was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of FECA.

Exercising its discretion to grant an oral hearing, OWCP denied appellant's request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's December 13, 2012 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.²⁸

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for bilateral lower extremity impairment related to his accepted back injury. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely.

²⁵ Under OWCP regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. *See* 20 C.F.R. § 10.616(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

²⁶ *See William F. Osborne*, 46 ECAB 198 (1994).

²⁷ *See T.B.*, Docket No. 12-244 (issued June 8, 2012) (where the Board found that OWCP properly denied the claimant's request for an oral hearing as he mailed an untimely request for a telephonic hearing and the envelope containing the request, which was part of the case record, displayed an illegible postmark).

²⁸ *See Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2013 and December 13, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 20, 2013
Washington, DC

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

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

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