

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

C.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
JAMES A. HALEY MEDICAL CENTER,)
Tampa, FL, Employer)

Docket No. 15-1729
Issued: October 3, 2016

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 17, 2015 appellant filed a timely appeal from a May 15, 2015 merit decision and a July 14, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated February 19, 2016, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 15-1729 (issued February 19, 2016). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

ISSUES

The issues are: (1) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely; (2) whether appellant has met his burden of proof to establish permanent impairment of a scheduled member.

FACTUAL HISTORY

On June 30, 2006 appellant, then a 48-year-old medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that he developed pain in his lower back when opening an autoclave door in the performance of duty. OWCP accepted his claim for lumbosacral joint sprain on September 18, 2006.

Appellant underwent a lumbar magnetic resonance imaging (MRI) scan on December 22, 2006 which demonstrated moderate stenosis at L5-S1, with moderate disc bulge, and mild disc bulge at L3-4 and L4-5. The scan exhibited lumbar spinal stenosis, lumbar disc degeneration, and lumbosacral spondylosis without myelopathy.

On May 1, 2008 OWCP accepted appellant's claim for the additional conditions of herniated disc at L4-5 with left nerve root impingement. Appellant underwent authorized anterior lumbar discectomy at L3-4 and L4-5 with multilevel L3 to S1 spinal fusion on June 23, 2008.

On April 16, 2008 appellant underwent a second lumbar MRI scan which demonstrated congenital canal stenosis exacerbated by disc bulges from L2-3 to L4-5, and left disc protrusion at L4-5 with impingement on the left L5 nerve root. He resigned from the employing establishment on January 26, 2009 and was placed on wage-loss compensation.

By decision dated January 11, 2010, OWCP terminated appellant's wage-loss compensation for wage loss effective January 11, 2010. Appellant requested reconsideration on February 9, 2010. By decision dated February 17, 2010, OWCP declined to reopen his claim for consideration of the merits. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on March 29, 2010.

On April 14, 2010 appellant underwent a computerized tomography (CT) scan of the lumbar spine. This scan demonstrated mild loss of disc space and height at L2-3, disc bulge, and mild stenosis at that level. At L3-4 appellant's CT indicated disc bulge, mild stenosis, and thickening of the ligamentum flavum. Appellant also demonstrated disc bulge at L4-5 with thickening of the ligamentum flavum and mild stenosis. At L5-S1 he had disc bulge with no canal or foraminal stenosis.

By decision dated May 11, 2010, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as he had previously requested reconsideration on the same issue and as the issue could equally well be addressed through the reconsideration process.

Appellant underwent a lumbar MRI scan on May 13, 2010 which demonstrated a broad disc bulge at L3-4 with facet and ligamentum flavum hypertrophy resulting in mild canal and

bilateral foraminal stenosis. He underwent an additional MRI scan on June 23, 2011 which showed straightening of the normal lumbar lordosis, and broad-based disc bulge at L2-3.

On November 29, 2011 appellant underwent a nerve conduction velocity (NCV) study of the lower extremities. This testing revealed radiculopathy in the L5 distribution.

Appellant underwent additional NCV study testing on April 3, 2013 which demonstrated a mild-to-moderate degree of motor demyelination neuropathy of the left deep peroneal motor nerve, left posttibial nerve, right deep peroneal nerve, and right posttibial nerve. His NCV study dated January 7, 2014 was suggestive of L5 radiculopathy on the right as well as possible posterior tarsal tunnel syndrome. Appellant underwent a lumbar MRI scan on June 5, 2014 which demonstrated a broad-based central disc herniation at L2-3.

On March 21, 2015 appellant filed a claim for schedule award compensation (Form CA-7). In support of this request, he submitted a report dated January 6, 2015 from Dr. Richard M. Blecha, an orthopedic surgeon, addressing appellant's permanent impairment. Dr. Blecha described appellant's history of injury in 2006 as well as his back surgery in 2008. He noted appellant's symptoms of constant low back pain radiating to the posterolateral aspect of both legs down to the feet.

On physical examination Dr. Blecha found that appellant exhibited difficulty sitting, rising, and moving on and off the examination table. He reported that appellant had tenderness in the midline and paraspinal areas as well as the sciatic notch. Dr. Blecha found loss of range of motion in the lumbar spine. He indicated that appellant's deep tendon reflexes were moderate and symmetrical with slight loss of muscle strength in the quadriceps on the left. Appellant had positive straight leg raising at 50 degrees bilaterally as well as slight hypoesthesia in the L3 nerve root distribution on the left. Dr. Blecha examined appellant's diagnostic studies and found herniated disc at L2-3 as well as L5 radiculopathy on the right based on NCV study. He diagnosed herniated disc at L2-3, lumbar degenerative disc disease, and lumbar radiculitis.

Dr. Blecha determined that appellant reached maximum medical improvement and applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ and the appropriate newsletter. He found a mild sensory deficit with a default grade of 1 and mild motor deficit with a default value of 3. Dr. Blecha reported a functional history grade modifier of 1, clinical studies grade modifier of 2 based on appellant's MRI scan findings of moderate pathology, and found that physical examination grade modifier was excluded as this defined the impairment values. He determined that appellant had sensory impairment of one percent and motor grade impairment of four percent for a total impairment rating of five percent for the left lower extremity.

OWCP provided this report to a medical adviser and on March 16, 2015 the medical adviser requested additional electrodiagnostic studies and a second opinion examination to determine appellant's permanent impairment for schedule award purposes.

³ A.M.A., *Guides*, 6th ed. (2009).

On March 19, 2015 OWCP referred appellant for a second opinion evaluation with Dr. William Dinenberg, a Board-certified orthopedic surgeon. It also referred appellant for updated diagnostic studies.

In a report dated April 8, 2015, Dr. Dinenberg described appellant's history of injury and medical treatment. On examination he found that appellant had a slow antalgic gait on the left with loss of lumbar flexion and extension. Dr. Dinenberg found positive straight leg raising on the left with normal muscle strength in the lower extremities. He noted that appellant reported decreased sensation circumferentially involving the entirety of the left calf and left foot as compared to the right stocking distribution. Dr. Dinenberg reported that appellant's right lower extremity exhibited normal sensation to light touch. He diagnosed herniated nucleus pulposus at L4-5 and postlaminectomy or failed back syndrome of the lumbar spine.

Dr. Dinenburg determined that appellant had reached maximum medical improvement by January 6, 2015, but requested additional electromyogram (EMG) and NCV studies of the bilateral lower extremities.

On May 11, 2015 OWCP's medical adviser reviewed Dr. Dinenberg's April 8, 2015 report and found that he had provided an excellent objective review of appellant's case. He agreed with Dr. Dinenberg's impairment rating but noted that the new diagnostic studies were not in the record. The medical adviser asked that they be referred to him for further review once they were completed.

The new EMG/NCV studies were forwarded to Dr. Dinenberg on April 9, 2015. In his supplemental report dated May 4, 2015, Dr. Dinenburg reviewed April 9, 2015 test results and found no evidence of electrical instability in appellant's lower extremities. He stated that appellant's NCV study was normal with no evidence of nerve entrapment or peripheral neuropathy. Dr. Dinenberg further found that appellant's EMG study of the lower extremities was normal with no electrodiagnostic evidence of lumbar radiculopathy.

Applying the A.M.A., *Guides* to appellant's physical findings and test results Dr. Dinenberg determined that appellant had no ratable impairment. He noted that appellant had normal EMG/NCV studies and normal motor strength. Dr. Dinenberg reported that appellant's decreased sensation was in a nonphysiologic pattern involving the entirety of the left calf and left foot. He concluded that there was no specific spinal nerve impairment and no ratable impairment for the spinal nerve on appellant.

In a supplemental report dated May 11, 2015 and received by OWCP on May 15, 2015, the medical adviser reviewed the new diagnostic studies and agreed that appellant had no permanent impairment due to the accepted conditions. He noted that appellant's electrodiagnostic studies were normal and found appellant had no ratable impairment under the A.M.A., *Guides*.

By decision dated May 15, 2015, OWCP denied appellant's claim for a schedule award. It found that the weight of the medical evidence rested with Dr. Dinenberg and OWCP's medical

adviser who agreed that there was no evidence of impairment of appellant's left lower extremity due to his accepted lumbar injury.⁴

Appellant requested an oral hearing from OWCP's Branch of Hearing and Review on June 17, 2015. The envelope in the record establishes that appellant's request was postmarked on this date.

By decision dated July 14, 2015, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the basis that his request was not made within 30 days of the May 15, 2015 decision. The Branch of Hearings and Review further found that the issue in the case could equally well be addressed through the reconsideration process and by submitting evidence of permanent impairment resulting from his accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP, may obtain a hearing by writing to the address specified in the decision.⁵ 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. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.⁶

ANALYSIS -- ISSUE 1

In the instant case, OWCP properly determined that appellant's June 17, 2015 request for an oral hearing was untimely filed, as it was made more than 30 days after the issuance of the OWCP's May 15, 2015 decision. It, therefore, properly denied appellant's hearing as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. It determined that a hearing was unnecessary as the issue could be resolved through the submission of evidence in the reconsideration process. Therefore, OWCP properly denied appellant's request for a hearing as untimely and properly exercised its discretion to deny appellant's request for a hearing.

⁴ Following OWCP's May 15, 2015 decision, appellant submitted additional evidence to OWCP. As OWCP did not review this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 10.501.2(c).

⁵ *Id.* at § 10.616(a).

⁶ 5 U.S.C. §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ 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.⁹ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.¹⁰

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, under FECA a schedule award is not payable for injury to the spine.¹¹ In 1960, amendments to FECA modified the schedule award provisions 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. 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.¹²

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 offered an alternative approach to rating spinal nerve impairments.¹³ 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, which memorializes proposed tables outlined in July/August 2009 *The Guides Newsletter*.¹⁴

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.803.5a (February 2013) and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *Id.*

¹¹ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹² *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹³ FECA Transmittal No. 10-04 (issued January 9, 2010); *supra* note 9 at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁴ *See supra* note 9 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.¹⁵

ANALYSIS -- ISSUE 2

The Board finds the case not in posture for a decision on the issue of whether appellant met his burden of proof to establish permanent impairment to a scheduled member due to his accepted lumbar conditions. OWCP accepted appellant's claim for lumbar sprain, L4-5 disc herniation with impingement, and lumbar surgery.

In support of his claim for a schedule award, appellant submitted a report from Dr. Blecha addressing his permanent impairment. Dr. Blecha examined appellant's 2014 diagnostic studies and found herniated disc at L2-3 as well as L5 radiculopathy on the right based on NCV study. He diagnosed herniated disc at L2-3, lumbar degenerative disc disease, and lumbar radiculitis. Dr. Blecha determined that appellant had both motor and sensory impairments of the left lower extremity due to his accepted employment injuries through application of the A.M.A. *Guides*.

OWCP referred appellant for additional diagnostic testing and a second opinion evaluation with Dr. Dinenberg. Dr. Dinenberg reviewed appellant's 2015 electrodiagnostic tests which were read as normal and found that his decreased sensation was in a nonphysiologic pattern involving the entirety of the left calf and left foot. He concluded that there was no specific spinal nerve impairment and no ratable impairment for the spinal nerve in appellant's left lower extremity.

OWCP's medical adviser was provided a copy of Dr. Dinenberg's supplemental report and the new EMG/NCV studies and in his May 11, 2015 report he agreed with no permanent impairment. OWCP issued the schedule award decision denying any permanent impairment the next day. OWCP's procedures require that if an OWCP medical adviser provides a detailed and rationalized opinion but does not concur with the claimant's physician or second opinion rating, and the claimant has had an opportunity to submit the necessary evidence, the evidence should be weighed to determine whether a conflict exists.¹⁶ The Board finds that, contrary to this procedure, appellant had no opportunity to respond to the new diagnostic studies or to allow his treating physician an opportunity to review the studies and provide an updated impairment rating. OWCP has an obligation to see that justice is done.¹⁷ As OWCP began the development of the medical evidence by referral to Dr. Dinenberg and further electrodiagnostic studies, it should complete the process in keeping with its procedures and its obligation to ensure that justice is done.

¹⁵ *Supra* note 11.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability*, Chapter 2.808.6(f)(2)(e) (June 2013).

¹⁷ *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a hearing. The Board further finds the case not in posture for a decision with regard to appellant's schedule award claim, as it requires additional development of the medical opinion evidence regarding appellant's permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the May 15, 2015 decision is set aside and remanded for further development consistent with this decision of the Board.

Issued: October 3, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board