

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

E.P., Appellant)	
)	
and)	Docket No. 13-1442
)	Issued: December 9, 2013
)	
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer)	
)	

Appearances:
Lonnie Boylan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2013 appellant, through his attorney, filed a timely appeal from a March 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a May 10, 2013 nonmerit decision of OWCP. 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 OWCP properly denied appellant's request for a schedule award; and (2) whether OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

FACTUAL HISTORY

On April 16, 2007 appellant, then a 30-year-old mail processing clerk, filed an occupational disease claim alleging cervical spondylosis due to repetitive bending, reaching

¹ 5 U.S.C. §§ 8101-8193.

above his shoulders, twisting, lifting and pulling trays out of mail machines. OWCP accepted his claim for an aggravation of cervical and lumbar disc degeneration. Appellant worked in modified-duty positions at the employing establishment with intermittent periods of disability. On March 11, 2008 OWCP accepted that he sustained a cervical strain due to continuously moving his arms and neck to sort mail, reaching above his shoulders and reaching down into a cart to get bundles of magazines. After his March 11, 2008 injury, appellant returned to work with restrictions.

The findings of a March 11, 2011 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed minimal multilevel spondylosis at C3 through C7 which caused a very mild flattening of the thecal sac and neural foramen throughout. MRI scan testing of his lumbar spine on the same date showed mild multilevel spondylosis at L2 through S1 which represented minimal multilevel flattening of the lateral recesses.

On September 13, 2012 appellant filed a claim for a schedule award due to his accepted injuries. He did not submit any medical evidence providing an evaluation of permanent impairment of his arms or legs.

In December 2012, OWCP referred appellant to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon, for a second opinion regarding whether he sustained any permanent impairment of his arms or legs under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). OWCP sent Dr. Mindrebo the case record and provided him with a statement of accepted facts.

In a January 10, 2013 report, Dr. Mindrebo reviewed the medical record describing appellant's condition, including the findings of diagnostic testing. He also reviewed the statement of accepted facts and discussed appellant's medical history. Appellant stated that he had a functional capacity evaluation about a year prior, but the results of which did not appear in the record.² Upon physical examination, he complained of intermittent pain down his arms and down his legs but with no specific radicular pattern. When sitting and standing, appellant tilted his head to the right with his left shoulder slightly drooping. Dr. Mindrebo stated that appellant had no motor deficits to strength testing of the shoulders, elbows, wrists and digits. Light touch sensation was intact in all the major cervical dermatomes and there was no major palpable trapezius or paravertebral muscle spasm in the neck or in the low back. Dr. Mindrebo found that straight leg testing was negative, deep tendon reflexes of the upper and lower extremities were intact and there were no major motor deficits to strength testing in the lower extremities. He noted that appellant had a foot-dragging gait, but he could not explain it given appellant's normal deep tendon reflexes and the normal motor examination of his legs, feet and ankles while sitting. Dr. Mindrebo stated that because appellant's cervical and lumbar strains were still active and had not significantly improved, appellant was basically at maximal medical improvement with regard to these conditions. He noted:

“In my opinion, the spondylotic changes to his cervical and lumbar strains are not directly work related, but were exacerbated by the cervical and lumbar strains and are now quiescent, since he has no evidence of radicular signs on today's

² Dr. Mindrebo noted that, if an opinion were requested on appellant's work restrictions, he would like to see a copy of the functional capacity examination.

exam[ination]. Therefore, maximal medical improvement with regard to the cervical and lumbar strains has occurred, and the approximate date would be today's date, January 10, 2012. This is supported by objective findings of normal deep tendon reflexes, full range of motion of the shoulders, elbows, wrists, digits, hips, knees, and ankles, and no paravertebral spasm or atrophy noted upon inspection of the patient's cervical, thoracic or lumbar spinal musculature. He does have the bizarre postural position of head tilt to the right and left shoulder down and that is difficult to explain. Therefore, using the [sixth edition of the A.M.A., *Guides*], Cervical Spine Table 17-2 addresses soft tissue and nonspecific conditions as a class 1 injury that is [g]rade C or two percent whole person impairment. Likewise, Table 17-4 addresses soft tissue and nonspecific injuries to the lumbar spine, again, as a two percent whole person impairment for a combined four percent whole person impairment, secondary to his work-related cervical and lumbar strains."

In a supplemental report dated January 17, 2013, Dr. Mindrebo reiterated that appellant had no radicular pattern to the pain in his neck and back that would involve sensory deficit or motor deficit to the upper or lower extremities. He stated, "Therefore, based on the sixth edition [of the A.M.A., *Guides*], there is no permanent partial impairment secondary to his cervical and lumbar strains."

On February 7, 2013 an OWCP medical adviser agreed with Dr. Mindrebo's opinion. Based on the A.M.A., *Guides*, appellant had no permanent partial impairment in his extremities secondary to his accepted work injuries.

In a March 11, 2013 decision, OWCP denied appellant's claim for a schedule award finding that the weight of the medical evidence regarding the matter rested with the January 10 and 17, 2013 reports of Dr. Mindrebo.

In a letter dated and postmarked April 11, 2013, appellant requested reconsideration of his claim before an OWCP hearing representative and provided additional argument.

In a May 10, 2013 decision, OWCP denied appellant's request for a hearing under section 8124 of FECA. It found that his request was untimely as it was not filed within 30 days of the issuance of OWCP's March 11, 2013 merit decision.³ OWCP considered appellant's request and determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional medical evidence to establish his schedule award claim.

LEGAL PRECEDENT -- ISSUE 1

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

³ Appellant's hearing request was filed on April 11, 2013 which was 31 days after the issuance of OWCP's March 11, 2013 decision.

schedule award compensation is alleged.⁴ 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.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 scheduled losses.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹

A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provide for a schedule award for impairment to the body as a whole.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a cervical strain and aggravation of cervical disc degeneration and lumbar disc degeneration. Appellant requested a schedule award due to these accepted injuries. On March 11, 2013 OWCP denied his schedule award finding that the weight of the medical evidence regarding the matter rested with the opinion of Dr. Mindrebo, a Board-certified orthopedic surgeon.

The Board finds that OWCP properly denied appellant's claim for a schedule award.

⁴ 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 had not established 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.

⁵ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

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

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

In a January 10, 2013 report, Dr. Mindrebo provided a review of the medical records describing appellant's condition, including the findings of diagnostic testing. He noted that, upon examination, appellant complained of intermittent pain down his arms and legs, but with no specific radicular pattern. Dr. Mindrebo stated that appellant had no motor deficits to strength testing of the shoulders, elbows, wrists and digits. Light touch sensation was intact in all the major cervical dermatomes and there was no major palpable trapezius or paravertebral muscle spasm in the neck or in the low back. Straight leg testing was negative, deep tendon reflexes of the upper and lower extremities were intact and there were no major motor deficits to strength testing in the lower extremities. In a supplemental report dated January 17, 2013, Dr. Mindrebo stated that, as noted in his January 10, 2013 report, appellant had no radicular pattern to his pain in his neck and his back that would involve sensory deficits or motor deficits to the upper or lower extremities. He stated, "Therefore, based on the sixth edition [of the A.M.A., *Guides*], there is no permanent partial impairment secondary to his cervical and lumbar strains."¹¹

The Board finds that OWCP properly relied on Dr. Mindrebo's well-rationalized opinion. Appellant noted that the medical evidence of record and the physical examination did not support that he sustained permanent impairment of his arms or legs. On February 7, 2013 an OWCP medical adviser discussed Dr. Mindrebo's opinion and stated his agreement that, based on the A.M.A., *Guides*, appellant had no permanent partial impairment in his extremities secondary to his accepted work injuries. Appellant did not submit any medical evidence containing an evaluation of permanent impairment of his arms or legs.

On appeal, counsel argued that Dr. Mindrebo's opinion was invalid because he did not have a copy of a functional capacity evaluation that appellant mentioned had occurred about one year prior. In his January 10, 2013 report, Mr. Mindrebo provided a review of appellant's medical history, including the findings on examination and diagnostic. The Board finds that he had a sufficient understanding of appellant's medical condition. Moreover, it should be noted that Dr. Mindrebo was asked to indicate whether appellant had any current arm impairment rather than comment on his medical condition in the past.¹² Counsel also argued that appellant did not have a clear picture of the accepted work injuries. Dr. Mindrebo was provided with a current and accurate statement of accepted facts and he discussed all the accepted work conditions.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title,

¹¹ In his January 10, 2013 report, Dr. Mindrebo provided an impairment rating based on the whole body. However, impairment ratings of the whole body are not accepted under FECA. *See supra* note 10.

¹² Dr. Mindrebo noted that, if an opinion were requested on appellant's work restrictions, he would like to see a copy of the functional capacity examination. However, he did not provide any indication that he needed the report to conduct an impairment evaluation.

a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”¹³ 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.¹⁴ The date of filing is fixed by postmark or other carrier’s date marking.¹⁵

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 discretionary authority in deciding whether to grant a hearing.¹⁶ Specifically, the Board has held that OWCP 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 FECA which provided the right to a hearing,¹⁷ when the request is made after the 30-day period for requesting a hearing,¹⁸ and when the request is for a second hearing on the same issue.¹⁹

ANALYSIS -- ISSUE 2

In the present case, appellant’s April 11, 2013 hearing request was made more than 30 days after the date of issuance of OWCP’s prior decision dated March 11, 2013 and, thus, he was not entitled to a hearing as a matter of right. He requested a hearing before an OWCP hearing representative in a letter dated and postmarked April 11, 2013, *i.e.*, 31 days after the issuance of OWCP’s March 11, 2013 decision. Hence, OWCP was correct in stating in its May 1, 2013 decision that appellant was not entitled to a hearing as a matter of right because his April 11, 2013 hearing request was not made within 30 days of OWCP’s March 11, 2013 decision.

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its May 10, 2013 decision, properly exercised its discretion by indicating it had carefully considered appellant’s request and had determined that the issue of the case could equally well be addressed by requesting reconsideration and submitting additional medical evidence to establish his schedule award claim. 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.²⁰ In

¹³ 5 U.S.C. § 8124(b)(1).

¹⁴ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

¹⁵ *See* 20 C.F.R. § 10.616(a).

¹⁶ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁷ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁸ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁹ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

²⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a schedule award. The Board further finds that OWCP properly denied appellant's request for a hearing under section 8124 of FECA.

ORDER

IT IS HEREBY ORDERED THAT the May 10 and March 11, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 9, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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