United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 12-129**
	)	**Issued: May 22, 2012**
SOCIAL SECURITY ADMINISTRATION, SOUTHEASTERN REGION, Birmingham, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2011 appellant filed a timely appeal from the July 12, 2011 merit and September 28, 2011 nonmerit 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 these decisions.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a 17 percent permanent impairment of her left arm, for which she received a schedule award; and (2) whether OWCP properly denied her request for a hearing under section 8124 of FECA.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that prior to October 21, 2005 appellant, then a 51-year-old customer service representative, sustained a neck sprain, left shoulder rotator cuff tear, left shoulder impingement and aggravation of C5-6 radiculopathy due to the repetitive duties of her job. On January 23, 2006 she underwent arthroscopic surgery of her left shoulder, including debridement of a partial thickness rotator cuff tear, debridement of a labral tear and subacrimial decompression. The procedures were authorized by OWCP. Appellant filed a claim for a schedule award due to her accepted conditions.

On March 7, 2008 OWCP granted appellant a schedule award for a 16 percent permanent impairment of her left arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). On May 22, 2009 it granted her a schedule award for an additional one percent permanent impairment of her left arm under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009). Appellant now had been compensated for a total permanent impairment of her left arm of 17 percent.

In a December 28, 2009 decision, OWCP's hearing representative remanded the case for further development to consider whether appellant had impairment due to a C5-6 radiculopathy as indicated by Dr. Jairo Libreros, an attending Board-certified neurologist.

On January 6, 2010 OWCP's medical adviser cited a June 2007 magnetic resonance imaging (MRI) scan study of the cervical spine, showing no objective evidence of radiculopathy, and concluded that appellant had no greater impairment than had previously been awarded.

On February 1, 2010 Dr. Francisco Torres, an attending Board-certified physical medicine and rehabilitation physician, disputed OWCP's medical adviser's findings and cited a May 4, 2006 study showing a bulging disc and a May 7, 2008 electromyogram (EMG) study showing a left C5-6 radiculopathy. On April 8, 2010 the medical adviser reviewed additional reports to include the May 2008 EMG study and noted it was incomplete and insufficient to show objective evidence of greater impairment.

In an April 15, 2010 decision, OWCP denied appellant entitlement to a greater impairment rating for her left arm. On August 17, 2010 OWCP's hearing representative remanded the case for an impartial medical examination, finding a conflict in the medical opinion evidence between the attending physicians and the medical adviser regarding appellant's left arm impairment.

OWCP referred appellant to Dr. Vincent Kiesel, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In an October 26, 2010 report, Dr. Kiesel provided results of physical examination and a review of records to include the results of diagnostic studies. He noted that EMG testing on May 7, 2008 only included the raw data, but not the interpretation of the data. Dr. Kiesel stated that the raw data appeared to show normal nerve conduction studies of the left wrist and elbow. He noted that the cervical MRI scan on March 5, 2010 showed no evidence of foraminal encroachment at any level. Dr. Kiesel stated that there was mild disc bulging at C5-6 without

significant canal stenosis and concluded that there was no evidence of radiculopathy based on good motion of the neck, no complaints of a neurological nature such as arm numbness or tingling, ability to hyperextend the neck without discomfort and a normal neurological examination with sensory complaints not following normal cervical dermatomes. He noted that the slight disc bulge report on MRI scan was compatible with "anyone over the age of 50 who is even asymptomatic." Dr. Kiesel cited the sixth edition of the A.M.A., *Guides* and concluded that appellant had a 14 percent permanent impairment of her left arm based on loss of left shoulder motion. He stated, "[B]ased on the range of motion that I have examined and documented page 475, Table 15-34 of the [sixth edition of the A.M.A., *Guides*] forward flexion is 3 percent, her range of motion extension 1 percent, abduction 6 percent, adduction 2 percent, internal rotation 2 percent and external rotation 0 percent, the total being 14 percent."[2]

On November 9, 2010 OWCP's medical adviser utilized Dr. Kiesel's range of motion findings and calculated an eight percent impairment of the left arm. He stated that Dr. Kiesel erred in his calculation noting the following impairment ratings for left shoulder motion: three percent for 170 degrees of flexion, one percent for 30 degrees of extension, three percent for 160 degrees of abduction, one percent for 30 degrees of adduction, zero percent for 80 degrees of external rotation and zero percent for 80 degrees of internal rotation.

In a December 3, 2010 decision, OWCP denied entitlement to an increased schedule award on the basis that the weight of medical evidence showed that appellant did not have a greater impairment than the prior award of 17 percent of the left arm.

Appellant disagreed with that decision and requested an oral hearing. During the hearing held on April 19, 2011, she argued that Dr. Kiesel failed to consider diagnostic testing performed after 2008. Appellant cited EMG testing on August 11, 2010, MRI scan testing on August 11 and 16, 2010 and January 26, 2011 reports of Dr. Luis Figueroa, an attending Board-certified neurologist.

In a May 19, 2011 decision, OWCP's hearing representative set aside OWCP's December 3, 2010 decision and remanded the case to OWCP for further development of the medical evidence. He found that, because Dr. Kiesel did not review all of the pertinent diagnostic findings, further development was required. On return of the case record to the district OWCP, OWCP was directed to submit the following reports to Dr. Kiesel for review: EMG testing on August 11, 2010; MRI scan testing on August 11 and 16, 2010; and January 26, 2011 reports of Dr. Figueroa. OWCP's hearing representative indicated that OWCP should direct Dr. Kiesel to review these reports and state whether they demonstrate a cervical radiculopathy. If such a radiculopathy was present, Dr. Kiesel was to identify the degree of permanent partial impairment inclusive of radiculopathy.

On remand, OWCP submitted the following reports to Dr. Kiesel for review EMG study of August 11, 2010 and Dr. Figueroa's reports dated August 11 and 16, 2010.

[2] For the left shoulder, Dr. Kiesel found 170 degrees of flexion, 30 degrees of extension, 160 degrees of abduction, 30 degrees of adduction, 80 degrees of external rotation and 80 degrees of internal rotation.

Dr. Kiesel was asked to review the aforementioned reports and state whether the medical evidence demonstrated a cervical radiculopathy and, if so, to identify the degree of permanent partial impairment inclusive of radiculopathy. His response, dated June 9, 2011, stated, "My original report explains at length why I do not feel she has any cervical radiculopathy despite the EMG testing which I reviewed. I have reviewed the new records that were not available to me at the time of my original assessment and I stand by my original diagnosis."

The MRI scan study of July 15, 2010 was faxed to Dr. Kiesel for his review on June 27, 2011. OWCP received Dr. Kiesel's reply which stated, "No significant pathology -- no change in my [independent medical examination] assessment."

In a July 12, 2011 decision, OWCP determined that appellant did not meet her burden of proof to establish that she has more than a 17 percent permanent impairment of her left arm, for which she received a schedule award.

In a document dated and signed August 18, 2011, appellant requested a hearing before an OWCP hearing representative.

In a September 28, 2011 decision, OWCP denied appellant's request for a hearing under section 8124 of FECA. It found that her request was untimely as OWCP issued its merit decision on July 12, 2011 and her hearing request was signed and dated August 18, 2011. Therefore, appellant was not entitled to a hearing as a matter of right. OWCP then exercised its discretion and denied her hearing request on the basis that the issue in the case could equally be resolved by submitting medical evidence to establish entitlement to additional schedule compensation.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[3] and its implementing regulations[4] 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.[5] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[6]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For OWCP decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

With respect to the shoulder, reference is first made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. A class of diagnosis may be determined from the Shoulder Regional Grid (including identification of a default grade value).[7] Table 15-5 also provides that, if motion loss is present for a claimant who has undergone certain shoulder surgeries, impairment may alternatively be assessed using section 15.7 (range of motion impairment). Such a range of motion impairment stands alone and is not combined with a diagnosis-based impairment.[8] Impairment ratings for limited shoulder motion are derived from Table 15-34 on page 475.[9]

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[11] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a neck sprain, left shoulder rotator cuff tear, left shoulder impingement and aggravation of C5-6 radiculopathy due to the repetitive duties of her job. On January 23, 2006 appellant underwent arthroscopic surgery of her left shoulder. OWCP granted her schedule awards for a total left arm impairment of 17 percent, but she claimed that she was entitled to additional schedule award impairment.

After extensive development of the medical evidence, OWCP properly determined that there was a conflict in the medical evidence regarding the extent of appellant's left arm impairment, including the question of whether she had a left-sided cervical radiculopathy which should be included in the impairment calculation. It referred appellant to Dr. Kiesel, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

[7] *See* A.M.A., *Guides* 401-11 (6th ed. 2009).

[8] *Id.* at 405, 475-78.

[9] *Id.* at 475, Table 15-34.

[10] 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[12] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board finds that OWCP properly determined that the weight of the medical opinion evidence regarding the question of whether appellant had a left-sided cervical radiculopathy which should be included in the impairment calculation rested with the well-rationalized opinion of Dr. Kiesel.

In an October 26, 2010 report, Dr. Kiesel noted that EMG testing on May 7, 2008 only included the raw data, but not the interpretation of the data. He stated that the raw data appeared to show normal nerve conduction studies of the left wrist and elbow. Dr. Kiesel noted that the cervical MRI scan on March 5, 2010 showed no evidence of foraminal encroachment at any level. He stated that there was mild disc bulging at C5-6 without significant canal stenosis and concluded that there was no evidence of radiculopathy based on good motion of the neck, no complaints of a neurological nature such as arm numbness or tingling, ability to hyperextend the neck without discomfort and a normal neurological examination with sensory complaints not following normal cervical dermatomes. After viewing relevant additional evidence from 2010, Dr. Kiesel determined on June 9, 2011 that this evidence did not change his opinion that appellant did not have a left-sided cervical radiculopathy which should be included in the impairment calculation.

Dr. Kiesel had provided an opinion that, under Table 15-34 on page 475 of the sixth edition of the A.M.A., *Guides,* appellant had a 14 percent permanent impairment of her left arm based on limited shoulder motion. OWCP sent this assessment to OWCP's medical adviser for review and, on November 9, 2010, the medical adviser utilized Dr. Kiesel's range of motion findings and properly calculated an eight percent impairment of the left arm. He stated that Dr. Kiesel erred in his calculation noting the following impairment ratings: three percent for 170 degrees of flexion, one percent for 30 degrees of extension, three percent for 160 degrees of abduction, one percent for 30 degrees of adduction, zero percent for 80 degrees of external rotation and zero percent for 80 degrees of internal rotation.[13]

OWCP properly found that the opinion of Dr. Kiesel regarding the lack of the cervical radiculopathy and OWCP's medical adviser's proper evaluation of the range of left shoulder motion (obtained by Dr. Kiesel) showed that appellant did not have more than a 17 percent permanent impairment of her left arm, for which she received a schedule award.

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, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, 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 her claim before a representative of the Secretary."[14] As section 8124(b)(1) is unequivocal in setting

[13] A.M.A., *Guides* 475, Table 15-34.

[14] 5 U.S.C. § 8124(b)(1).

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.[15] The date of filing is fixed by postmark or other carrier's date marking.[16]

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.[17] 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,[18] when the request is made after the 30-day period for requesting a hearing,[19] and when the request is for a second hearing on the same issue.[20]

ANALYSIS -- ISSUE 2

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of OWCP's prior decision dated July 12, 2011 and, thus, she was not entitled to a hearing as a matter of right. She requested a hearing before an OWCP representative in a document signed and dated August 18, 2011. Hence, OWCP was correct in stating in its September 28, 2011 decision that she was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of OWCP's July 12, 2011 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 September 28, 2011 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could equally be resolved by submitting medical evidence to establish entitlement to additional schedule compensation. 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.[21] 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.

[15] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[16] *See* 20 C.F.R. § 10.616(a).

[17] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[18] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[19] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[20] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[21] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 17 percent permanent impairment of her left arm, for which she received 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 September 28 and July 12, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 22, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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