United States Department of Labor
Employees' Compensation Appeals Board

I.P., Appellant	)	
	)	
and	)	**Docket No. 10-1847**
	)	**Issued: June 16, 2011**
DEPARTMENT OF THE NAVY,	)	
SAN FRANCISCO NAVAL SHIPYARD,	)	
San Francisco, CA, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2010 appellant filed a timely appeal of the Office of Workers' Compensation Programs' April 28, 2010 merit decision denying his schedule award claim and June 22, 2010 nonmerit decision denying his request for a review of the written record. Pursuant to the Federal Employees' Compensation Act,[1] 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 is entitled to a schedule award; and (2) whether the Office properly denied his request for a review of the written record.

On appeal, appellant contends that although he was recognized as injured, he never received compensation benefits.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a November 30, 2006 decision, the Board affirmed the Office's September 12, 2005 decision which found the medical evidence insufficient to establish that appellant's current back condition and resultant disability were causally related to his accepted September 15, 1959 employment-related injuries.[2] The Board also affirmed the Office's November 16, 2005 decision which denied his request for an oral hearing before an Office hearing representative on the grounds that his claim involved an injury sustained prior to the enactment of the 1966 amendments to the Act. The Board found that the Office properly denied appellant a discretionary hearing on the grounds that the issue could equally well be addressed on reconsideration. In an October 1, 2007 decision, the Board affirmed the Office's April 2, 2007 decision which again found that appellant failed to establish that his current back condition and resultant disability were causally related to his accepted employment-related injuries.[3] In a January 14, 2009 decision, the Board affirmed the Office's May 14, 2008 decision denying appellant's request to reopen his case for further merit review of its finding that his current back condition and resultant disability were due to his accepted employment injuries.[4] The Board found that the medical evidence submitted on reconsideration was previously of record and considered by the Office in its prior decision. The facts and history of the case as set forth in the prior decisions are hereby incorporated.[5]

On February 19, 2009 appellant filed a claim for a schedule award. In an undated medical report, Dr. Bernard R. Reinertsen, Board-certified in aerospace medicine and an employing establishment physician, provided a history of appellant's employment, medical treatment and family background. Medical records dated June 6 through September 15, 1959 from the employing establishment health unit advised that appellant had a superficial abrasion of the left hand, elbow and knee. He also had a contusion and an abrasion of the back. In reports dated November 1 and December 1, 1965, Dr. V.E. Kaufman, an employing establishment physician, reviewed appellant's medical record. He advised that there was a definite change in lumbar x-rays performed in 1959 and 1961, but there obviously was a disease process of some type already present before the 1959 employment-related injuries. Dr. Kaufman was unable to state whether the advance in the pathological process during the intervening two years was aggravated by the accepted injuries.

By letter dated August 14, 2009, the Office advised appellant that a schedule award was not payable for impairment to the back, but was payable for impairment to the lower extremities.

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[2] Docket No. 06-1652 (issued November 30, 2006).

[3] Docket No. 07-1304 (issued October 1, 2007).

[4] Docket No. 08-1800 (issued January 14, 2009).

[5] On June 13, 2005 appellant, then a 67-year-old boilermaker, filed an occupational disease claim alleging that on September 15, 1959 he sustained a back injury when a sailor dropped a valve from 10 feet above onto his back. The Office adjudicated his claim as a traumatic injury and accepted it for back contusion and abrasion for the closed period September 15 through 17, 1959. It denied his claim for treatment of a degenerative low back condition or lost compensation occurring after September 17, 1959 as the medical evidence did not establish that his current back condition was related to the accepted employment incident.

It advised him to submit medical evidence from an attending physician as to whether his lower extremities were impaired due to his accepted back condition. It asked that the physician address maximum medical improvement, provide a detailed description of the impairment and provide a schedule award rating according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

On August 17, 2009 appellant stated that he had received medical treatment since 1959. He had a sciatic nerve attack which caused pain to radiate down his right leg. Appellant noted his recent surgery which involved the removal of two-thirds of his left lung. He developed cancer as a result of his asbestos exposure at the employing establishment.

By letter dated October 1, 2009, the Office advised appellant that a decision was forthcoming. It requested that he file an occupational disease claim if he believed his lung cancer to be work related and submit supportive medical evidence.

On October 31, 2009 appellant requested a review of the written record by an Office hearing representative regarding the Office's October 1, 2009 letter. In a January 20, 2010 letter, the Office advised him that his case was not in posture for decision as no adverse decision had been issued on his schedule award claim.

By letter dated March 12, 2010, the Office again advised appellant that he was not entitled to a schedule award for impairment to the back. It requested that he claim a schedule award for impairment to an arm or leg and submit all the necessary supportive medical evidence.

In a March 16, 2010 letter, appellant reiterated that the pain in his back radiated down his right leg and knee. The pain was so bad that he had to use crutches.

In an April 13, 1983 treatment note, Dr. Paul A. Feigenbaum, a Board-certified internist and rheumatologist, reviewed a history that appellant sustained a back injury in 1961. He experienced pain in his knee and hip during the past 10 years. Dr. Feigenbaum diagnosed chronic pain.

In an April 28, 2010 decision, the Office denied appellant's claim for a schedule award. It found that he failed to submit sufficient medical evidence to support that he sustained permanent impairment of a lower extremity due to his accepted back condition.

On May 1 and 11, 2010 appellant requested a review of the written record by an Office hearing representative.

In a June 22, 2010 decision, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. It found that he was not entitled to a hearing or review of the written record as a matter of right because his injury occurred on September 15, 1959.[6] The Branch of Hearings and Review considered the request and denied a discretionary hearing on the grounds that appellant could equally well address the issue in the

[6] The Office inadvertently stated that appellant's accepted employment injury occurred on September 15, 2009 rather than referring to September 15, 1959 as the date of injury.

case by requesting reconsideration and submitting additional evidence not previously considered to establish that he was entitled to a schedule award.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act,[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, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[9] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10] Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides*[11] as the appropriate edition for all awards issued after that date.[12]

A schedule award is not payable for loss, or loss of use, of a part of the body that is not specifically enumerated in the schedule.[13] Section 8107 and its implementing regulations do not provide for schedule awards for impairment to the back, spine or the body as a whole. The back is specifically excluded from the definition of organ.[14] To the extent that the schedule award provisions include the extremities, an employee may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine.[15]

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[16] A claimant seeking a schedule award therefore has the burden of establishing that his accepted

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Ausbon N. Johnson*, 50 ECAB 304 (1999).

[10] *Supra* note 7.

[11] A.M.A., *Guides* (6th ed. 2009).

[12] Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

[13] *See Anna V. Burke*, 57 ECAB 521 (2006); *Patricia J. Horney*, 56 ECAB 256 (2005).

[14] *See Jesse Mendoza*, 54 ECAB 802 (2003); *Tomas Martinez*, 54 ECAB 623 (2003).

[15] *George E. Williams*, 44 ECAB 530 (1993).

[16] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

employment injury caused permanent impairment of a scheduled member, organ or function of the body.[17]

ANALYSIS -- ISSUE 1

The Office accepted that on September 15, 1959 appellant sustained a back contusion and abrasion while in the performance of duty. On February 19, 2009 appellant filed a claim for a schedule award. In an undated report, Dr. Reinertsen reviewed a history of appellant's employment but did not address any employment-related impairment. The employing establishment health unit records dated June 6 through September 19, 1959 merely confirmed the accepted conditions. In November 1 and December 1, 1965 reports, Dr. Kaufman noted that he was unable to conclude from lumbar x-rays whether the preexisting disease was aggravated by the accepted back conditions. He did not address the issue of employment-related impairment. Dr. Feigenbaum's April 13, 1983 treatment note advised that appellant hurt his back in 1961 and experienced pain in his knee and hip for the past 10 years. The Board finds that appellant is not entitled to a schedule award for impairment to his back.[18] Appellant may be entitled to a schedule award for permanent impairment to a lower extremity, even though the cause of the impairment originated in the spine.[19] But none of the medical reports of record provide an impairment rating or an opinion as to whether he had reached maximum medical improvement with regard to his accepted lumbar conditions or whether he sustained any lower extremity impairment causally related to the accepted lumbar conditions. The Board finds, therefore, that the reports of Dr. Reinertsen, Dr. Kaufman and Dr. Feigenbaum and the employing establishment health unit are of diminished probative value and insufficient to establish appellant's entitlement to a schedule award.

Appellant has not submitted sufficient medical evidence to establish that, as a result of his employment injury, he sustained any permanent impairment to a scheduled member or function such that he would be entitled to a schedule award. Office procedures and the Board precedent require that the record contain a medical report with a detailed description of the impairment.[20] This description must be in sufficient detail, so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[21] Appellant has the burden of proof to submit medical evidence supporting that he has a permanent impairment of a scheduled member or function of the body.[22]

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[17] *E.g., Russell E. Grove*, 14 ECAB 288 (1963) (where medical reports from the attending physicians showed that the only leg impairment was due to arthritis of the knees, which was not injury related, the claimant failed to meet his burden of proof to establish entitlement to a schedule award).

[18] *See* cases cited *supra* note 13.

[19] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[20] *See Peter C. Belkind*, 56 ECAB 580 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c)(1) (August 2002).

[21] *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[22] *See Annette M. Dent*, 44 ECAB 403 (1993).

As such evidence has not been submitted the Office properly denied his request for a schedule award.[23]

Contrary to appellant's contention on appeal that he never received compensation benefits for his accepted employment injuries, the Office's September 12, 2009 letter indicates that his traumatic injury claim was accepted for the closed period September 15 through 17, 1959 and it paid benefits. The Office denied medical benefits and wage-loss compensation for a degenerative low back condition for the period after September 17, 1959 as the medical evidence did not establish that appellant's current back condition was causally related to the September 15, 1959 employment incident. The Board affirmed the Office's denial of medical benefits and wage-loss compensation in its prior decisions. Presently, the medical evidence of record does not establish that appellant sustained permanent impairment to a scheduled member or function due to his accepted injuries. Thus, he was not entitled to any schedule award compensation.

LEGAL PRECEDENT -- ISSUE 2

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings or review the written record in certain circumstances where no legal provision was made for such hearings or review and that the Office must exercise this discretionary authority in deciding whether to grant a hearing or review.[24] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request or review of the written record on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing or review.[25]

ANALYSIS -- ISSUE 2

The Board finds that appellant is not entitled to a review of the written record as a matter of right under the Act. Appellant's claim involves an injury sustained prior to the enactment of the 1966 amendments to the Act that provided the right to a hearing and a review of the written record.[26] The Office, however, has discretionary authority to grant a hearing or a review of the written record. In its June 22, 2010 decision, the Office's Branch of Hearings and Review exercised its discretionary authority and found that the issue of whether appellant was entitled to a schedule award could be addressed by requesting reconsideration before the Office and submitting additional relevant evidence. This basis for denying his request is a proper exercise

[23] The Board notes that the Office did not forward the case to the district medical adviser for review. The Office procedure manual provides that the claims examiner will ask the district medical adviser to evaluate cases when the case appears to be in posture for a schedule award determination. As the matter was deemed not to be in posture for a schedule award determination, the Office was not required to seek review by the district medical adviser. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (June 2003).

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

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

[26] *See* Act of July 4, 1966, 80 Stat. 252 (conferring the right to an Office hearing to claimants who sustained their employment injuries on or after the date of enactment, July 4, 1966).

of the Office's discretionary authority.[27] There is no evidence of record to establish that the Office abused its discretion. Accordingly, the Board finds that the denial of appellant's request for a review of the written record was proper.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award. The Board further finds that the Office properly denied appellant's request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the June 22 and April 28, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 16, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[27] The Board has held that a denial of a claimant's request for hearing on the grounds that the claim could be considered further upon the submission of evidence with a request for reconsideration is a proper exercise of the Office's discretionary authority. *Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).