

FACTUAL HISTORY

On February 22, 2007 appellant, then a 50-year-old mail processor, filed a traumatic injury claim alleging that he sustained a low back strain on February 21, 2007 when placing trays of mail in a cage in the performance of duty. The Office accepted the claim on March 16, 2007 for strain of lumbosacral joint and ligament. On March 3, 2007 appellant underwent a magnetic resonance imaging (MRI) scan which demonstrated mild L3-4 and L4-5 disc desiccation and bulge and mild L2-3 and L5-S1 disc desiccation. Appellant's attending physician, Dr. Edward J. Dohring, a Board-certified orthopedic surgeon, diagnosed L3-4 right disc herniation, right L4 radiculitis and radiculopathy, L3-4 disc protrusion causing spinal stenosis and L3-4 degenerative disc disease on November 7, 2007.

The Office referred appellant for a second opinion evaluation on March 27, 2008. In a report dated April 18, 2008, Dr. Jon T. Abbott, a Board-certified orthopedic surgeon and second opinion physician, reviewed appellant's history of injury and medical history. He found normal strength in all motor groups in both lower extremities and an intact sensory examination. Dr. Abbott reviewed the MRI scan and diagnosed lumbosacral strain and L3-4 herniated disc. He stated that the herniated disc was either related to the acute injury on February 21, 2007 or to the treatment for the injury. Dr. Abbott noted that appellant reported low back and right lower extremity pain with intermittent numbness of the right third through fifth toes.

The Office accepted appellant's claim for the additional condition of L3-4 herniated disc on April 29, 2008. Appellant underwent an MRI scan on June 20, 2008 which demonstrated a degenerative disc at L3-4 with a small disc extrusion and a left-sided synovial cyst. Dr. Dohring performed L3 and L4 left spinal stenosis decompression, partial laminectomies, partial foraminotomies and partial facetectomies with decompression of the cauda equine and nerve roots on September 9, 2008.

Dr. Dohring completed a report on April 24, 2009 and opined that appellant had reached maximum medical improvement. He noted that appellant continued to experience pain in both the back and right leg. Dr. Dohring reported normal muscle strength in the lower extremities, but found that sensation was decreased to light touch and pin prick in the right lower extremity. He stated that permanent impairment of 10 percent was appropriate.

Appellant filed a claim for compensation and requested a schedule award on November 17, 2009. In a letter dated November 20, 2009, the Office requested additional information from Dr. Dohring regarding any permanent impairment of the lower extremities as a result of appellant's accepted back injuries. Dr. Dohring did not respond.

The Office referred the medical evidence to the Office medical adviser on March 19, 2010. The medical adviser reviewed Dr. Dohring's reports and the diagnostic studies. Applying the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² (A.M.A., *Guides*) the Office medical adviser found documentation of

² For new decisions issued after May 1, 2009, the Office began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

right lower extremity symptoms only. He identified the right L4 nerve root as the most likely cause of the right lower extremity pain based on appellant's medical history and noted that moderate sensory deficit and pain involving L4 nerve root was three percent default rating. Applying the formula, the medical adviser found a functional history adjustment of one and that neither physical examination adjustment nor clinical studies adjustment was applicable for a default rating of three percent. The Office medical adviser concluded that the medical record did not indicate any lower extremity findings and hence no impairment.

By decision dated April 14, 2010, the Office granted appellant a schedule award for three percent impairment of the right lower extremity and zero percent impairment of the left lower extremity.

Appellant requested an oral hearing on April 29, 2010. In a letter dated July 1, 2010, the Branch of Hearings and Review informed him that his oral hearing would take place on August 4, 2010 at 4:00 p.m. eastern time and provided him with the telephone number and the pass code. By decision dated August 25, 2010, the Branch of Hearings and Review noted that he failed to appear for the oral hearing and that there was no indication that he contacted the Office to explain his failure to appear. The Branch of Hearings and Review found that appellant had abandoned his request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.⁶ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,⁷ no claimant is entitled to such an award.⁸ Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered

³ 5 U.S.C. §§ 8101-8193, 8107.

⁴ 20 C.F.R. § 10.404.

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ *William Edwin Muir*, 27 ECAB 579 (1976).

⁷ The Act itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁸ *Timothy J. McGuire*, 34 ECAB 189 (1982).

by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.⁹

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹⁰ The Office 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.¹¹ Specifically, it will address lower extremity impairments originating in the spine through Table 16-11¹² and upper extremity impairment originating in the spine through Table 15-14.¹³

In addressing lower extremity impairments, due to peripheral or spinal nerve root involvement, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH) and if electrodiagnostic testing were done, clinical studies (GMCS).¹⁴ The net adjustment formula is (GMFH - CDX) + (GMCS - CDX).¹⁵

ANALYSIS -- ISSUE 1

Appellant's attending physician, Dr. Dohring, opined that appellant had reached maximum medical improvement on April 24, 2009 and found that appellant had 10 percent impairment. He based this rating on findings of continued pain in the back and right leg. Dr. Dohring reported that appellant had normal muscle strength in the lower extremities. He found that sensation was decreased to light touch and pin prick in the right lower extremity. The Board finds that this report is not sufficient to constitute the weight of the medical opinion evidence for schedule award purposes as Dr. Dohring did not identify the scheduled member for which he was providing an impairment rating. Dr. Dohring also failed mention the A.M.A., *Guides* or correlate his findings in anyway with the applicable provisions of the A.M.A., *Guides*. Due to these deficiencies, this report is not sufficient to establish an impairment rating of 10 percent of any scheduled member.

⁹ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹⁰ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, *supra* note 2, Chapter 3.700, Exhibit 4 (January 2010).

¹¹ Federal (FECA) Procedure Manual, *supra* note 2, Chapter 3.700 Exhibits 1 (January 2010).

¹² A.M.A., *Guides* 533, Table 16-11.

¹³ *Id.* at 425, Table 15-14.

¹⁴ *Id.* at 533.

¹⁵ *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and the Office may rely on the opinion of its Office medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.¹⁶ The medical adviser reviewed the medical records and found evidence of symptoms in the right lower extremity. He identified the right L4 nerve root as the most likely cause of the right lower extremity pain based on appellant's medical history and noted that appellant had moderate sensory deficit or impaired light touch but retained sharp and dull recognition¹⁷ and pain involving L4 nerve root which was three percent default rating.¹⁸ Applying the above-described formula, the medical adviser found that the adjustment of zero for functional history only, as clinic studies adjustment was not appropriate and that appellant has a default rating of three percent. He concluded that the medical record did not indicate any lower extremity findings and hence no impairment.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* and reached an impairment rating of three percent for the right lower extremity and no impairment rating for the left lower extremity as there were no physical findings reported.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides:

“Before review under section 8128(a) of this title, 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 his claim before a representative of the Secretary.”¹⁹

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.²⁰

OWCP's procedures state:

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

¹⁶ *Linda Beale*, 57 ECAB 429 (2006).

¹⁷ A.M.A., *Guides* 533, Table 16-11.

¹⁸ Federal (FECA) Procedure Manual, *supra* note 2, Chapter 3.700 (Exhibits 4, Proposed Table 2) (January 2010).

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. § 10.616(a).

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return to case to the DO [district Office].”²¹

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing and on July 1, 2010, the Branch of Hearings and Review informed him that his oral hearing would take place on August 4, 2010 at 4:00 p.m. eastern time and provided him with the telephone number and the pass code. The record does not reflect that appellant requested postponement of the hearing prior to the scheduled date of the hearing. Appellant did not appear for the oral hearing. Neither did he provide any notification for the failure to appear within 10 days after the scheduled date of the hearing. Appellant’s failure to provide any notification, together with his failure to appear at the scheduled hearing, constituted abandonment of his request for a hearing and the Board finds that the Office properly so determined.

CONCLUSION

The Board finds that appellant has no more than three percent impairment of his right lower extremity, for which he received a schedule award and no impairment of his left lower extremity entitling him to a schedule award. The Board further finds that the Office properly determined that he abandoned his request for an oral hearing.

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 1.1601.6(e) (January 1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 25 and April 14, 2010 are affirmed.

Issued: June 14, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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