

FACTUAL HISTORY

On January 17, 2002 appellant, then a 56-year-old mail handler, filed a claim for compensation for a traumatic injury to his right shoulder sustained on April 20, 2000 by throwing magazines from a pallet. The Office accepted that he sustained right shoulder pain and a right rotator cuff tear and on April 22, 2002 appellant underwent surgery on his right shoulder, consisting of debridement of the rotator cuff, anterior acromioplasty, and distal clavicle resection. The Office paid compensation for temporary total disability until appellant returned to limited duty on June 12, 2002.

On September 27, 2002 appellant filed a claim for a schedule award. He submitted a November 21, 2002 report from Dr. W. Scott Bowen, the Board-certified orthopedic surgeon who performed the April 22, 2002 surgery, stating that appellant had a five percent permanent impairment of the right upper extremity. By letter dated July 25, 2003, the Office advised Dr. Bowen that it needed a description of any restriction of movement and of all other pertinent findings, a description of subjective complaints and a statement as to whether maximum medical improvement had occurred. In an August 8, 2003 report, received by the Office on August 14, 2003, Dr. Bowen stated that maximum medical improvement was reached on September 13, 2002, that appellant had full range of motion but some pain and weakness of the right upper extremity, and that his permanent impairment of the right arm was five percent.

By decision dated August 21, 2003, the Office found that the evidence was not sufficient to establish that he sustained a permanent impairment, as Dr. Bowen had not replied to its July 25, 2003 letter.

On September 14, 2004 appellant requested a hearing.²

By decision dated November 12, 2004, the Office found that appellant was not entitled to a hearing as a matter of right for the reason that his request was not made within 30 days. The Office determined that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered that establishes a permanent impairment due to his accepted work injury.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act,³ concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "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." The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a

² Between the Office's August 21, 2003 decision and his September 14, 2004 request for a hearing, appellant submitted additional reports from Dr. Bowen.

³ 5 U.S.C. § 8124(b)(1).

matter of right only if the request is filed within the requisite 30 days.⁴ The Office's regulations provide that a request received more than 30 days after the Office's decision is subject to the Office's discretion,⁵ and the Board has held that the Office must exercise this discretion when a hearing request is untimely filed.⁶

ANALYSIS

On August 21, 2003 the Office issued a decision denying appellant's claim for a schedule award. On September 14, 2004 appellant requested a hearing. As this request was made more than 30 days after the Office's decision, appellant is not entitled to a hearing as a matter of right.

The Office also properly exercised its discretion in denying a hearing at its discretion. The issue in this case is medical in nature, namely whether appellant has a permanent impairment of the arm. As found by the Office, this issue can equally well be addressed through a request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing.

⁴ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

⁵ 20 C.F.R. § 10.616(b).

⁶ *Supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member