



## ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing.

On appeal, appellant asserts that OWCP should have relied on the impairment rating provided by his attending physician and not on the percentage of impairment determined by an OWCP medical adviser.

## FACTUAL HISTORY

OWCP accepted that on September 11, 2007 appellant, then a 48-year-old housekeeping aid, sustained a left shoulder sprain and left supraspinatus tear.<sup>4</sup> On April 17, 2009 he underwent arthroscopic subacromial decompression, biceps tenodesis, rotator cuff repair and distal clavicle resection. OWCP approved the procedure. Appellant returned to light duty in May 2009.

Dr. Yechiel Kleen, an attending Board-certified physiatrist, submitted reports from June 11, 2009 to March 19, 2010 noting appellant's continued left shoulder pain and restricted motion. He found that appellant attained maximum medical improvement on April 23, 2010 and would require permanent work restrictions.

On May 27, 2010 appellant claimed a schedule award. In an April 23, 2010 report, Dr. Kleen utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*"). He found an 18 percent impairment of the left upper extremity due to restricted shoulder motion according to Table 15-34, page 475.<sup>5</sup> In a June 13, 2010 report, OWCP's medical adviser opined that the findings by Dr. Kleen warranted a 10 percent impairment rating of the left upper extremity using the shoulder regional grid at Table 15-5, page 401-05 of the A.M.A., *Guides*. The medical adviser commented that Dr. Kleen did not utilize the three trial measurement methods in assessing range of motion.

By decision dated September 3, 2010, OWCP granted appellant a schedule award for a 10 percent impairment of the left upper extremity. The period of the award ran from April 23 to November 27, 2010.

In a letter dated November 1, 2010 and received by OWCP on November 5, 2010, appellant requested an oral hearing. The employing establishment submitted a position description for his job as of July 18, 2010. Appellant provided an October 18, 2010 report from Dr. Kleen addressing range of motion of the left shoulder.

By decision dated December 16, 2010, OWCP denied appellant's request for an oral hearing on the grounds that it was not timely filed. It found that his hearing request was dated

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<sup>4</sup> OWCP initially denied the claim by September 23, 2008 decision. Following additional development, it accepted the claim on January 26, 2009.

<sup>5</sup> Table 15-34, page 475 of the sixth edition of the A.M.A., *Guides* is entitled "Shoulder Range of Motion."

November 1, 2010,<sup>6</sup> more than 30 days after issuance of the September 3, 2010 decision. OWCP exercised its discretion by considering appellant's hearing request and further denied it as the issues involved could be addressed equally well pursuant to a valid request for reconsideration.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA states that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before an OWCP representative.<sup>7</sup> Section 10.615 of Title 20 of the Code of Federal Regulations provide that a hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.<sup>8</sup>

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking of the request.<sup>9</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>10</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>11</sup>

### **ANALYSIS**

On September 3, 2010 OWCP issued a schedule award. Appellant had 30 days from the date of that decision or until October 4, 2010, to make a timely request for a hearing.<sup>12</sup> His letter requesting a review of the written record was dated November 1, 2010. Although the postmark and envelope are not of record, the letter was dated after October 4, 2010. The Board finds that the letter requesting a review of the written record was not timely.<sup>13</sup>

The Board finds that OWCP properly found that appellant was not entitled to a hearing as a matter of statutory right under section 8124(b)(1) of FECA. Exercising its discretion to grant an oral hearing, OWCP denied appellant's request on the grounds that he could equally well

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<sup>6</sup> In its December 16, 2010 decision, OWCP found that appellant's November 1, 2010 request for appeal was postmarked on November 1, 2010. However, the postmark is not in the record as presented to the Board.

<sup>7</sup> 5 U.S.C. § 8124 (b)(1). *See A.B.*, 58 ECAB 546 (2007); *Joe Brewer*, 48 ECAB 411 (1997).

<sup>8</sup> 20 C.F.R. § 10.615.

<sup>9</sup> *Id.* at § 10.616(a).

<sup>10</sup> *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>11</sup> *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>12</sup> The thirtieth day from September 3, 2010 was Sunday October 3, 2010. The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. *John B. Montoya*, 43 ECAB 1148 (1992). The next business day after October 3, 2010 was Monday, October 4, 2010.

<sup>13</sup> *See Glenda G. Muri*, Docket No. 05-437 (issued July 1, 2005).

address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's September 3, 2010 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.<sup>14</sup> On appeal, appellant asserts that OWCP should have relied on the impairment rating provided by his attending physician and not on the percentage of impairment offered by an OWCP medical adviser. As stated, the Board does not have jurisdiction over the schedule award issue on the present appeal.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 16, 2010 is affirmed.

Issued: February 23, 2012  
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

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<sup>14</sup> See *Gerard F. Workinger*, 56 ECAB 259 (2005).