

**United States Department of Labor  
Employees' Compensation Appeals Board**

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T.T., Appellant	)	
	)	
and	)	<b>Docket No. 15-1397</b>
	)	<b>Issued: December 3, 2015</b>
DEPARTMENT OF VETERANS AFFAIRS,	)	
VETERANS ADMINISTRATION MEDICAL	)	
CENTER, Hines, IL, Employer	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 10, 2015 appellant filed a timely appeal from a May 19, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from January 29, 2014, the date of the most recent OWCP merit decision, to the filing of this appeal on June 10, 2015, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

**ISSUE**

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

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<sup>1</sup> Appellant timely requested oral argument before the Board. By order dated October 6, 2015, the Board denied the request as the issue on appeal could be adequately addressed based on a review of the case record. Thus, the Board concluded that an oral argument would serve no useful purpose. *See Order Denying Request for Oral Argument*, Docket No. 15-1397 (issued October 6, 2015).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 3, 2009 appellant, then a 53-year-old housekeeping aid, slipped and fell injuring his right arm. OWCP accepted the claim for right sprained shoulder and upper arm.

In an initial July 4, 2009 report, Dr. Zaid Jabbar, Board-certified in internal medicine, advised that appellant complained of right shoulder, neck, and hip pain. On examination of the right shoulder, he noted normal shoulder range of motion and mild tenderness of the right cervical paraspinal muscles. Dr. Jabbar assessed rotator cuff sprain and advised that appellant was able to return to work on July 11, 2009. In a July 13, 2009 diagnostic report, Dr. Hariprasad Kurella, a Board-certified radiologist, advised that a right shoulder x-ray revealed moderate degenerative joint disease of the acromioclavicular joint, mild-to-moderate degenerative joint disease of the glenohumeral joint, no evidence of fracture or subluxation, and no evidence of bone destruction or metastasis.

On December 10, 2012 appellant requested a schedule award (Form CA-7).

By letter dated January 2, 2013, OWCP advised appellant of the type of evidence needed to establish his claim. Although it allotted appellant 30 days to submit the requested evidence, he did not respond within the time allotted.

By decision dated June 5, 2013, OWCP denied appellant's request for a schedule award, as he did not submit additional evidence.

In a statement received on June 11, 2013, appellant requested that OWCP provide him with an impairment evaluation.

Appellant subsequently provided a July 22, 2013 report from Dr. Neil Allen, a Board-certified internist and neurologist. Dr. Allen found that appellant had 11 percent permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup> Using Table 15-34, page 475, Shoulder Range of Motion, he assessed 9 percent impairment for flexion, 3 percent impairment for abduction, and 2 percent impairment for internal rotation, totaling 14 percent upper extremity impairment based on range of motion. Using Table 15-35, page 477, Dr. Allen assessed a range of motion grade modifier of 2. Using Table 15-7, page 406 is assessed and a grade modifier 2 for functional history. Dr. Allen explained that he used the range of motion method to determine appellant's impairment rating because it reflected a more accurate impairment than the diagnosis-based impairment method.

On November 25, 2013 an OWCP medical adviser evaluated Dr. Allen's report and disagreed with his 11 percent permanent impairment rating. He determined that appellant had one percent upper extremity impairment rating in accordance with the A.M.A., *Guides*. The medical adviser selected shoulder pain as the impairment class for a one percent default rating. He noted that appellant had a grade modifier of 2 for functional history as he had pain with regular activity and grade modifier 2 for physical examination because he had moderate loss of

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

range of motion. The medical adviser noted that this moved the rating two places to grade E, which resulted in a total one percent impairment.

By decision dated January 29, 2014, OWCP granted appellant a schedule award for one percent permanent impairment of his right upper extremity. The award ran for 3.12 weeks from January 3 to 24, 2010.

On September 12, 2014 appellant requested an oral hearing. The request was postmarked on September 18, 2014.

By decision dated December 17, 2014, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as untimely, as his request was not made within 30 days of the January 29, 2014 decision. The Branch of Hearings and Review further denied the request, finding that the issue could be resolved with the submission of medical evidence showing a greater impairment.

By decision dated May 19, 2015, OWCP again denied appellant's request for an oral hearing as untimely, providing the same findings as in its December 17, 2014 decision.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], 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 or her claim before a representative of the Secretary."<sup>4</sup>

Section 10.615 of Title 20 of the Code of Federal Regulations provides that a hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.<sup>5</sup> 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.<sup>6</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>7</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>8</sup>

### **ANALYSIS**

The Board finds that OWCP properly determined that appellant's September 12, 2014 request for a hearing, postmarked September 18, 2014, was untimely filed. Appellant's request was made more than 30 days after the issuance of the January 29, 2014 decision. Section

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> *Id.* at § 10.616.

<sup>7</sup> *See G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>8</sup> *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>9</sup> For this reason, OWCP properly denied his hearing as a matter of right.

OWCP proceeded to exercise its discretion in accordance with Board precedent to determine whether to grant a hearing in this case. It denied appellant's request as he could equally well address any issues in his case by submitting evidence not previously considered by OWCP and requesting reconsideration. This is a proper exercise of OWCP's discretionary authority.<sup>10</sup> The Board finds that OWCP did not abuse its discretion in denying appellant's hearing request.

On appeal appellant argues the merits of his case, asserting that he was entitled to a greater award. The Board only has jurisdiction over the May 19, 2015 nonmerit decision which denied his request for an oral hearing. As explained, the Board does not have jurisdiction over the merits of the claim.

### **CONCLUSION**

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

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<sup>9</sup> See *William F. Osborne*, 46 ECAB 198 (1994).

<sup>10</sup> See *Lawrence C. Parr*, 48 ECAB 445 (1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board