

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

Appellant, a 44-year-old nurse, injured her right knee on January 24, 2008 when she slipped and fell to the floor at work. She filed a claim for benefits, which OWCP accepted for sprain of the right lateral collateral ligament, derangement of anterior horn of right medial meniscus, and derangement of the posterior horn of the right medial meniscus.

On April 21, 2008 Dr. Richard H. Lehman, an osteopath, performed authorized arthroscopic surgery to repair appellant's torn right lateral meniscus.

In reports dated April 13 and 23, 2010, Dr. Lehman released appellant to return to work for eight hours per day as a clerk and letter carrier with the following restrictions: no lifting exceeding 10 pounds for approximately three hours a day; intermittent stairclimbing, walking, and standing with seated breaks daily; intermittent pushing/pulling/bending for one to two hours per day; driving a vehicle for five to six hours per day; reaching above the shoulder/climbing for two to four hours; intermittent climbing and twisting at the waist for four hours a day; and sitting not exceeding 30 minutes each hour, for six hours per day. He allowed her to case her route daily with modifications.

On June 9, 2010 appellant accepted a position as a modified city letter carrier, which met Dr. Lehman's restrictions.

In an August 11, 2010 decision, OWCP found that appellant's actual earnings as a modified letter carrier effective June 9, 2010 fairly and reasonably represented her wage-earning capacity. It noted that she had worked in the position for over 60 days. OWCP indicated that appellant's current, adjusted pay rate for her job on the date of injury was \$601.90, and that her actual wages in the modified letter carrier were \$1,014.10 per week. It reduced her compensation to zero as her actual earnings exceeded the current wages of her date-of-injury position.

On May 12, 2011 appellant requested a schedule award. By letter dated May 31, 2011, OWCP requested that Dr. Lehman provide an opinion regarding appellant's work-related condition and any resulting permanent impairment.

In a report dated June 15, 2011, Dr. Lehman related that, following appellant's work-related right knee injury, she had undergone right knee arthroscopy with extensive debridement of scar tissue, partial lateral meniscectomy, debridement of the patellofemoral joint and open medial collateral ligament reconstruction. He stated that, pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, he would assign a three percent impairment for right leg joint pain, three percent impairment for tear of the lateral meniscus of the right knee, two percent impairment for derangement of the lateral meniscus of the right knee, and six percent impairment for sprain of the right knee cruciate

ligament. Dr. Lehman concluded that appellant had a 14 percent permanent impairment of the right lower extremity.

On February 13, 2012 Dr. David H. Garelick, Board-certified in orthopedic surgery, acting as OWCP's district medical adviser, reviewed Dr. Lehman's report. He concluded that Dr. Lehman's rating of 14 percent permanent impairment should be disregarded. Dr. Garelick explained that, while Dr. Lehman awarded a six percent impairment for sprain of the acromioclavicular (ACL), in his numerous notes, he did not describe any ACL laxity, and in fact had described the ACL as "in tact," and normal at the time of the arthroscopy. Also while Dr. Lehman awarded separate impairment ratings for lateral meniscectomy as well as for derangement of the lateral meniscus, these were the same thing and should only be rated once. Dr. Garelick concluded that appellant had a three percent permanent impairment of the right knee due to her lateral meniscectomy.

By narrative report dated September 11, 2012, Dr. Lehman related that he had examined appellant on that day for left hip complaints. He related her examination findings and then noted that a magnetic resonance imaging (MRI) scan of her left hip showed a partial tear of her labrum. Dr. Lehman concluded that he believed this was directly related to appellant's right knee condition and her job duties which required substantial walking. He completed a form report on September 26, 2012 wherein he noted that she was restricted to sedentary work.

On October 30, 2012 appellant filed a Form CA-7 claim for compensation for leave without pay (LWOP) from October 6 to 20, 2012.

By letter dated November 29, 2012, OWCP asked appellant to submit additional medical evidence supporting that her alleged period of total disability from October 6 to 20, 2012 was causally related to her accepted right knee conditions. It requested that she submit this evidence within 30 days.

In an OWCP memorandum dated December 7, 2012, it was determined that appellant was off work from October 6 to 20, 2012 because there was no work available at the employing establishment within her physician's work restrictions.

OWCP referred the case record to the district medical adviser, Dr. Christopher Gross, an orthopedic surgeon, to determine whether appellant's left knee and left hip conditions were related to her accepted September 6, 2003 right knee injury. On December 16, 2012 Dr. Gross reported that an MRI scan of appellant's left knee was reported as normal. He disagreed with Dr. Lehman's assessment that walking at work caused degeneration of appellant's hip. Dr. Gross noted that scientific literature did not relate prolonged walking to hip joint deterioration, and altered gait mechanics was not a known cause for idiopathic knee pain. He concluded that OWCP should not accept any new work-related conditions and should not cover any surgical expense related to appellant's left hip.

By decision dated July 2, 2013, OWCP granted appellant a schedule award for a three percent permanent impairment of the right lower extremity for the period September 16 to November 15, 2009 for a total of 8.64 weeks of compensation.

In an undated letter received by OWCP on July 23, 2013, appellant related that, after her right knee injury in 2003, she underwent four surgeries, her right leg was now shorter than her left, and this caused stress to her left hip. She stated that Dr. Lehman had sent documentation of her condition to OWCP since September 2012, but her request for compensation benefits had been ignored.

By decision dated July 25, 2013, OWCP denied appellant's claim for compensation finding that she failed to establish disability for the period October 6 to 20, 2012.

By letter dated August 2, 2013, OWCP informed appellant that it had erred in determining her entitlement to wage-loss compensation from October 6 to 20, 2012. It advised her that, since a formal LWEC decision was in place on her claim, her claim for wage-loss compensation from October 6 to 20, 2012 was being treated as a request for modification of her formal LWEC decision. OWCP therefore rescinded the July 25, 2013 decision. It stated that there was currently insufficient evidence in the record for modifying a formal LWEC decision pursuant to 20 C.F.R. § 10.511 and advised appellant that she needed to submit evidence or argument to substantiate one of the three criteria required to meet the standards set forth in 20 C.F.R. § 10.511.

On August 29, 2013 appellant requested an oral hearing using a form from the August 10, 2010 wage-earning capacity decision but noting on the form that she was sure there was more than three percent permanent disability on her leg.

By decision dated October 30, 2013, OWCP denied appellant's request for an oral hearing.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary 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.³ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁴ The 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.⁵ 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. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁶ A request for either an oral hearing or a review of the written record must be submitted, in writing,

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *Id.* at § 10.615.

within 30 days of the date of the decision for which the hearing is sought.⁷ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of the decision.⁸ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁹ In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹⁰

While a claimant may not be entitled to a hearing as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.¹¹

ANALYSIS

On August 29, 2013 appellant requested an oral hearing. Although it is unclear for which decision she was requesting an oral hearing OWCP considered the request for oral hearing to relate to the August 11, 2010 wage-earning capacity decision and found it untimely. As appellant did not request a hearing within 30 days of August 11, 2010, she was not entitled to a hearing as a matter of right under section 8124(b)(1). Even if the decision for which the oral hearing was requested was the July 2, 2013 schedule award decision, it too was not filed within 30 days and was also not entitled to a hearing. OWCP exercised its discretion and determined that the issues in the case could be resolved equally well through a request for reconsideration and the submission of additional evidence. The Board finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing in its October 30, 2013 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

⁷ *Supra* note 5.

⁸ *James Smith*, 53 ECAB 188 (2001).

⁹ 20 C.F.R. § 10.616(b).

¹⁰ *Supra* note 8.

¹¹ *See id.*; *Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*, 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board