

FACTUAL HISTORY

On May 1, 2002 appellant, then a 48-year-old animal health specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury in the performance of duty on April 19, 2002 when he tripped and fell. OWCP accepted the claim for a left ankle fracture. On December 18, 2009 appellant filed a claim for a recurrence of disability commencing November 2, 2009. By decision dated March 10, 2010, OWCP denied the claim for a recurrence of disability.

On March 2, 2011 appellant submitted a claim for compensation (Form CA-7) for a schedule award. By letter dated March 9, 2012, OWCP requested that he submit medical evidence regarding a permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition). No response was received.

By decision dated May 9, 2012, OWCP denied his claim for a schedule award as he had not submitted medical evidence regarding a permanent impairment. A copy of the decision was mailed to his address of record.

In a report dated April 5, 2013, Dr. Richard Langerman, Jr., an osteopath, indicated that appellant's retained hardware in the left ankle was removed surgically. By letter dated March 3, 2014, appellant inquired as to the status of his schedule award claim. On March 28, 2014 OWCP mailed him a copy of the May 9, 2012 decision.

On June 9, 2014 appellant submitted a May 30, 2014 report from Dr. Langerman, who noted that he had examined appellant on February 20, 2014 and opined that he had an eight percent impairment under the A.M.A., *Guides* due to intermittent discomfort in the left ankle.

On June 10, 2014 appellant submitted a request for an oral hearing. The letter was postmarked June 5, 2014.

By decision dated June 11, 2014, OWCP denied the request for a hearing. It found the request was untimely filed, and the issue could equally well be addressed by requesting reconsideration and submitting relevant evidence.

On June 13, 2014 appellant submitted the February 20, 2014 report from Dr. Langerman, who provided results on examination and diagnosed painful hardware, left ankle.

Appellant requested reconsideration of his claim on July 7, 2014. He stated that to his knowledge he had never received the May 9, 2012 decision.

By decision dated October 3, 2014, OWCP denied the request for reconsideration of the schedule award finding it untimely and that it failed to show clear evidence of error by OWCP.

LEGAL PRECEDENT -- ISSUE 1

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of OWCP. Section 8124(b)(1) provides as follows: "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary....”

OWCP regulations state that the hearing request must be sent within 30 days, as determined by the postmark or other carriers’ date marking.² If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing as a matter of right.³ The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁴

The Board has held that in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee.⁵ This presumption applies equally to OWCP and claimant’s representatives.⁶ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of OWCP itself, will raise the presumption that the original was received by the addressee.⁷

ANALYSIS -- ISSUE 1

On May 9, 2012 OWCP issued a decision denying appellant’s request for a schedule award. Appellant requested an oral hearing by letter postmarked September 5, 2014. The hearing request therefore was clearly made more than 30 days after the May 9, 2012 decision. Appellant stated that he has no knowledge of receiving the May 9, 2012 decision. However, the copy of the decision in the record reflects that it was properly addressed to appellant’s correct address of record. Therefore, as noted above, there is a presumption that the decision was properly mailed and received by appellant in the due course of business.⁸ No contrary evidence was submitted to rebut the presumption in this case and the decision was not returned to OWCP. The Board, thus, finds that OWCP properly found appellant’s hearing request to be untimely.

As the hearing request was untimely, appellant is not entitled to a hearing as a matter of right. OWCP must exercise its discretion in determining whether to grant the hearing. In this case, it stated that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the OWCP’s discretionary

² 20 C.F.R. § 10.616(a).

³ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁵ *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

⁶ *Id.*

⁷ *See Larry L. Hill*, *supra* note 5; *see also L.D.*, Docket No. 14-468 (issued July 1, 2014).

⁸ *Supra* note 7.

authority.⁹ The Board accordingly finds that OWCP properly denied the hearing request in this case.

LEGAL PRECEDENT -- ISSUE 2

To the extent that a claimant asserts that a schedule award decision was erroneous based on his or her medical condition at that time, this would properly be considered a request for reconsideration.¹⁰ A claimant may, however, seek an increased schedule award if the evidence establishes that he sustained increased impairment at a later date causally related to the accepted employment injury. Even if the term reconsideration is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an increased schedule award.¹¹ A proper claim for an increase in permanent impairment is not subject to time limitations or to the clear evidence of error standard.¹²

ANALYSIS -- ISSUE 2

In the present case, there was no indication that appellant was seeking reconsideration of the May 9, 2012 decision. Appellant had not submitted medical evidence prior to May 9, 2012 discussing a permanent impairment, and he provided no arguments as to the error in the decision. He submitted new medical evidence, including February 20 and May 30, 2014 reports from Dr. Langerman, which provided an opinion as to a permanent impairment under the A.M.A., *Guides*, based on a February 20, 2014 examination.

The Board finds that appellant had submitted new medical evidence in support of a claim for a schedule award. OWCP should have issued a new merit decision on the claim consistent with Board precedent on the issue. The case will be remanded to OWCP for a proper decision on the claim.

CONCLUSION

The Board finds that OWCP properly denied a request for a hearing. The Board further finds that OWCP improperly adjudicated a claim for an increased schedule award as a request for reconsideration.

⁹ See *Mary E. Hite*, 42 ECAB 641, 647 (1991).

¹⁰ See *J.K.*, Docket No. 14-1082 (issued November 24, 2014).

¹¹ *B.K.*, 59 ECAB 228 (2007).

¹² *R.P.*, Docket No. 10-1123 (issued January 25, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 11, 2014 is affirmed. The decision dated October 3, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 9, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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