

FACTUAL HISTORY

Appellant, a 61-year-old former housekeeping aid, filed a traumatic injury claim alleging that he injured his back in the performance of duty on January 9, 2006.³ OWCP initially accepted the claim for lumbar sprain/strain and intervertebral disc disorder with myelopathy. Subsequently, it expanded appellant's claim to include left disc protrusion at L4-5, central disc protrusion at L5-S1, and left lumbar and sciatic radiculopathy. Appellant underwent lumbar surgery in November 2009 and April 2012. OWCP authorized both surgical procedures.

By decision dated November 2, 2010, OWCP granted a schedule award for one percent left lower extremity (LLE) impairment.⁴ The Branch of Hearings and Review affirmed the schedule award in a May 3, 2011 decision, and OWCP denied reconsideration on October 19, 2011.

As noted, appellant underwent a revision lumbar fusion on April 2, 2012, performed by Dr. Terry C. Smith, a neurosurgeon. Following surgery, appellant returned to full-time, modified duty on July 10, 2012. He filed a claim (Form CA-7) for an additional schedule award on February 12, 2013.

In a March 3, 2013 report, Dr. Smith indicated that appellant had reached maximum medical improvement (MMI) as of December 5, 2012. He diagnosed post-laminectomy syndrome. Dr. Smith reported subjective complaints of back pain and leg numbness, but noted objectively appellant's examination was normal. He found 12 percent LLE impairment based on spinal nerve extremity impairment.

OWCP referred the case to its district medical adviser (DMA), who found there was no change from the prior award.⁵ In a March 25, 2013 report, the DMA explained that appellant's surgeon noted that objectively his examination was normal. He also noted that Dr. Smith failed to explain how he had arrived at his 12 percent LLE impairment rating.

In an April 10, 2013 decision, OWCP denied appellant's claim for an additional schedule award.

On April 7, 2014 OWCP received appellant's request for reconsideration. Appellant utilized the appeal request form that accompanied the April 10, 2013 decision. Additionally, he resubmitted Dr. Smith's March 3, 2013 impairment rating.⁶

³ Appellant alleged that he felt pain in his mid to lower back while picking up a heavy trash bag to place in a dumpster.

⁴ The rating was based on a mild sensory deficit involving the S1 nerve root. *See Proposed Table 2, The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009).*

⁵ Dr. Howard "H.P." Hogshead, the DMA, is a Board-certified orthopedic surgeon.

⁶ Since issuing its April 10, 2013 decision, OWCP received various other medical records, many of which pertained to appellant's April 2012 hospitalization, surgery, and postsurgery recovery period.

By decision dated April 17, 2014, OWCP denied appellant's request for reconsideration. The senior claims examiner found that the additional evidence submitted was cumulative and repetitious, and therefore, insufficient to warrant further merit review. Additionally, OWCP noted that Dr. Smith's March 3, 2013 rating had already been deemed insufficient to support an award in excess of the previous one percent LLE impairment.

In October 2014 appellant again submitted the appeal request form that accompanied OWCP's April 10, 2013 decision. The form was undated, and this time he requested both an oral hearing and an appeal before the Board. Appellant identified OWCP's April 17, 2014 decision as the subject of his appeal. The envelope was addressed to the Board and it was postmarked October 7, 2014.

In an October 30, 2014 decision, the Branch of Hearings and Review denied appellant's request for an oral hearing. The decision noted that appellant had already requested reconsideration, which OWCP denied on April 17, 2014. As such, appellant was not entitled to a hearing on the same issue as a matter of right.

LEGAL PRECEDENT

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.⁷ A request for a hearing must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁸ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."⁹ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.¹⁰ Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing where a claimant requests a second hearing on the same issue.¹¹

ANALYSIS

Appellant requested an oral hearing utilizing the appeal request form that accompanied OWCP's April 10, 2013 merit decision. The hearing request was postmarked on October 7, 2014. Appellant had previously requested reconsideration of the April 10, 2013 decision, which OWCP denied on April 17, 2014. His October 7, 2014 hearing request was not only untimely as it was postmarked more than 30 days after the April 10, 2013 decision, but he

⁷ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

⁸ *Id.* at § 10.616(a).

⁹ *Id.*

¹⁰ *Hubert Jones Jr.*, 57 ECAB 467, 472-73 (2006).

¹¹ *Id.*

had also previously requested reconsideration. Consequently, appellant is not entitled to a hearing as a matter of right.¹²

CONCLUSION

The Branch of Hearings and Review properly denied appellant's October 7, 2014 request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² 20 C.F.R. § 10.616(a).