

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

J.T., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Punta Gorda, FL, Employer**

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**Docket No. 15-1424
Issued: February 4, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 17, 2015 appellant filed a timely appeal of a February 18, 2015 merit decision and an April 29, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.²

ISSUES

The issues are: (1) whether OWCP's Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely filed; and (2) whether OWCP properly found four percent impairment of appellant's right upper extremity for which he received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² Following OWCP's February 18, 2015 merit decision appellant submitted new evidence. As OWCP did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On December 11, 2013 appellant, then a 51-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral shoulder rotator cuff tears due to repetitive motions in the performance of his job duties. In a narrative statement, he attributed his shoulder conditions to repetitive motions of reaching, grasping, separating, fingering, pushing, pulling, twisting, turning, and lifting tubs with mail as well as trays, bundles of mail, and parcels. Appellant stated that opening and closing the rear door of his truck placed great stress on his shoulders. He noted that the rear door required frequent lubrication and service requests as it had to be jerked upward to open. Appellant also noted that he delivered to multiple unit boxes which required him to extend his arm to place the mail. He stated that he was required to push hampers which put great pressure on his shoulders due to the weight of the double doors.

Appellant underwent a magnetic resonance imaging (MRI) scan of his left shoulder on July 12, 2011 which demonstrated a diffuse near full-thickness tear, intrasubstance tearing of the supraspinatus tendon with a full-thickness tear anteriorly, 50 percent thickness diffuse tearing of the infraspinatus tendon, and superior labrum tear from anterior to posterior (SLAP lesion). A right shoulder MRI scan dated March 26, 2013 demonstrated a partial thickness tear of the supraspinatus tendon, findings associated with extrinsic impingement, and a small tear of the posterosuperior labrum. On September 3, 2013 appellant underwent an additional right shoulder MRI scan which demonstrated full-thickness tears of the supraspinatus, and anterior infraspinatus tendons, a partial thickness tear of the subscapularis and mild degenerative changes at the acromioclavicular (AC) joint.

In a letter dated January 8, 2014, OWCP requested additional factual and medical evidence in support of appellant's claim. By decision dated February 25, 2014, it accepted appellant's claim for chronic bilateral rotator cuff tear. On April 21, 2014 appellant's attending physician, Dr. David Kaler, a Board-certified orthopedic surgeon, performed an arthroscopic rotator cuff repair with opus system.

In a note dated August 5, 2014, Dr. Kaler noted that appellant was having difficulty sleeping due to chronic pain in the left shoulder. He also noted trouble with internal rotation and adduction in the right upper extremity. Appellant returned to full duty on September 10, 2014.

In a note dated September 9, 2014, Dr. Kaler stated that appellant was returning to full duty and had reached maximum medical improvement. He noted that appellant had forward flexion to a relatively normal position, but limited external rotation, adduction, and internal rotation. On October 8, 2014 Dr. Kaler noted that appellant had 90 percent range of motion of his shoulder and lacked a little strength. He opined that appellant's shoulder was quite functional.

Appellant requested a schedule award on December 17, 2014. In a letter dated December 29, 2014, OWCP requested that Dr. Kaler provide appellant's permanent impairment rating for schedule award purposes. Dr. Kaler completed a form report on January 6, 2015 and found that appellant had reached maximum medical improvement on September 9, 2014. He

noted that appellant had decreased range of motion and strength. Dr. Kaler found that appellant had two percent impairment of the whole person.

OWCP's medical adviser reviewed appellant's medical records on February 10, 2015 and noted that appellant had a massive rotator cuff tear in the right shoulder with an arthroscopic repair. He noted that appellant experienced decreased range of motion and strength. The medical adviser found that based on Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ appellant had four percent impairment of the upper extremity based on Dr. Kaler's finding of two percent impairment of the whole person utilizing Table 15-11.⁴

In a decision dated February 18, 2015, OWCP granted appellant a schedule award for four percent impairment of his right upper extremity. Appellant requested an oral hearing through a form dated April 4, 2015, but postmarked April 3, 2015.

By decision dated April 29, 2015, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing as the request was untimely. The Branch of Hearings and Review noted that OWCP had issued its merit decision on February 18, 2015 and that appellant's request for an oral hearing was postmarked on April 3, 2015 outside the 30-day time period. The Branch of Hearings and Review considered appellant's request and in its discretion determined that the issue in this case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered to establish that appellant had greater than four percent impairment of his right upper extremity.

LEGAL PRECEDENT -- ISSUE 1

A claimant, injured on or after July 4, 1966, who has received a final adverse decision by OWCP, may obtain a hearing by writing to the address specified in the decision.⁵ 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. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. If the request is not made within 30 days, a claimant is not entitled to a hearing as a matter of right. However, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.⁶

ANALYSIS -- ISSUE 1

In the instant case, OWCP properly determined that appellant's April 4, 2015 request for an oral hearing was untimely filed as it was made more than 30 days after the issuance of the

³ A.M.A., *Guides* 403, Table 15-5 (6th ed. 2009).

⁴ *Id.* at 420, Table 15-11.

⁵ 20 C.F.R. § 10.616(a).

⁶ *Supra* note 1 at §§ 8124(b)(1) and 8128(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

OWCP's February 18, 2015 decision. It, therefore, properly denied appellant's hearing as a matter of right.

OWCP then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. It determined that a hearing was unnecessary as the issue could be resolved through the submission of evidence in the reconsideration process. Therefore, OWCP properly denied appellant's request for a hearing as untimely and properly exercised its discretion to deny appellant's request for a hearing.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA⁷ and its implementing regulations⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁹

In addressing upper extremity impairments, the sixth edition requires identification of the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁰

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for a decision.

Appellant developed bilateral rotator cuff tears due to his federal job duties. He underwent an arthroscopic repair of his right shoulder on April 21, 2014. Dr. Kaler found that appellant had reached maximum medical improvement in regard to his right shoulder on September 9, 2014. In his September 9, 2014 report, he noted that appellant had forward flexion to a relatively normal position, but limited external rotation, adduction, and internal rotation. Dr. Kaler did not provide any range of motion figures. On October 8, 2014 he noted that appellant had 90 percent range of motion of his shoulder and lacked a little strength. Again,

⁷ *Supra* note 1 at 8107.

⁸ *Supra* note 5 at § 10.404.

⁹ For decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 411.

Dr. Kaler failed to provide specific findings on range of motion or specific loss of strength. He completed a form report on January 6, 2015 and noted that appellant had reached maximum medical improvement on September 9, 2014. Dr. Kaler noted that appellant had decreased range of motion and strength. He found that appellant had two percent impairment of the whole person. FECA and the implementing regulations do not allow for a schedule award due to impairments of the whole person. No schedule award is payable for a member, organ or function of the body that is not specified in FECA or the implementing regulations.¹¹ Therefore, appellant is not entitled to schedule award based on an impairment rating to the whole person.

OWCP referred Dr. Kaler's reports to OWCP's medical adviser to determine appellant's upper extremity impairment rating. The medical adviser completed a report on February 10, 2015 listing Dr. Kaler's general findings that appellant experienced decreased range of motion and strength as well as his rating of two percent of the whole person. He found that based on Table 15-5 of the A.M.A., *Guides*, which correlates whole person impairments to the extremities, that appellant had four percent impairment of the right upper extremity. However, the medical adviser did not apply the appropriate standards of the A.M.A., *Guides* in reaching this impairment rating. He did not calculate appellant's grade modifiers and then apply the appropriate formula as noted above. Instead, the medical adviser determined appellant's permanent impairment for schedule award based solely on Dr. Kaler's finding of two percent impairment of the whole person, utilizing Table 15-11¹² to convert this impairment rating to one of the upper extremity. As neither appellant's attending physician nor the medical adviser appropriately applied the A.M.A., *Guides* to reach appellant's permanent impairment for schedule award purposes, this case must be remanded for further development and an appropriate impairment rating under the A.M.A., *Guides*.¹³

Following this and any necessary further development, it should issue a *de novo* decision regarding any permanent impairment of the right upper extremity.

CONCLUSION

The Board finds OWCP's Branch of Hearings and Review properly denied appellant's request for an oral hearing. The Board further finds that this case is not in posture for a decision on the extent of permanent impairment to appellant's right upper extremity.

¹¹ *Tania R. Keka*, 55 ECAB 354 (2004).

¹² A.M.A., *Guides* 420, Table 15-11.

¹³ *See C.S.*, Docket No. 14-1085 (issued August 27, 2014) (finding that when the medical adviser does not provide sufficient explanation for his rating, his report is not entitled to the weight of the medical evidence).

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed. The February 18, 2015 decision of OWCP is set aside and remanded for further proceedings consistent with this decision.

Issued: February 4, 2016
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