

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 15, 2004 appellant, then a 56-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her back, hip, and knees as a result of her federal employment duties. Her supervisor noted on the claim form that appellant had performed limited duty since July 6, 2004. Appellant did not stop work. OWCP accepted the claim for bilateral sprain of the lateral collateral ligament (LCL), lumbar sprain, bilateral meniscus tears, right lower extremity osteoarthritis, bilateral shoulder arthropathy, and bilateral rheumatoid arthritis. On March 15, 2006 appellant underwent accepted left knee arthroscopic surgery.

OWCP received appellant's request for a schedule award (Form CA-7) on June 29, 2006.

In a report dated July 13, 2006, appellant's treating physician, Dr. James C. Mayoza, an orthopedic surgeon, reported that appellant had reached maximum medical improvement (MMI). He opined that appellant had 40 percent permanent impairment of her right knee and 25 percent permanent impairment of her left knee.

OWCP referred appellant to Dr. Timothy Pettingell, a Board-certified physiatrist, for a second opinion examination to determine the extent of appellant's permanent impairment. In a report dated November 1, 2006, Dr. Pettingell opined that appellant had 22 percent lower extremity permanent impairment on the right and 12 percent left lower extremity permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

In a report dated December 19, 2006, an OWCP medical adviser opined that under the sixth edition of the A.M.A., *Guides* appellant had 20 percent left lower extremity permanent impairment and 10 percent right lower extremity permanent impairment based on loss of knee range of motion.

By decision dated February 13, 2007, OWCP issued a schedule award for 20 percent permanent impairment of the left lower extremity and 10 percent permanent impairment of the right lower extremity. The period of the award was 86.40 weeks commencing July 13, 2006.

Appellant underwent right knee total arthroplasty surgery on June 25, 2008. In a report dated April 22, 2009, Dr. J. Arden Blough, a Board-certified family practitioner, provided results on examination. He opined that under the sixth edition of the A.M.A., *Guides*,⁵ appellant had 59 percent right lower extremity permanent impairment due to the total knee replacement surgery. Dr. Blough also found that appellant had two percent left lower extremity permanent impairment

³ Docket No. 13-1220 (issued November 22, 2013).

⁴ 5th ed. 2000.

⁵ 6th ed. 2009.

due to a torn meniscus, and two percent whole person impairment due to recurrent low back pain with radicular symptoms.

In a report dated August 13, 2009, an OWCP medical adviser opined that appellant had 59 percent right lower extremity permanent impairment due to the total knee arthroplasty, and 2 percent right lower extremity permanent impairment from the lumbar injury. As to the left lower extremity, he found 2 percent impairment for the meniscectomy, which was less than the 10 percent previously awarded. The medical adviser found that appellant did have an additional two percent left lower extremity permanent impairment based on the lumbar spine injury.

By decision dated September 15, 2009, OWCP issued a schedule award for an additional 50 percent permanent impairment of the right lower extremity and 2 percent permanent impairment of the left lower extremity. The period of the award was 149.76 weeks of compensation commencing April 22, 2009.

Appellant underwent additional left knee arthroscopic surgery on February 5, 2010. In a report dated May 28, 2010, Dr. M. Stephen Wilson, an orthopedic surgeon, opined that appellant had 37 percent left lower extremity permanent impairment due to her knee injury.

OWCP subsequently referred appellant to Dr. Michael Smith, a Board-certified physiatrist, for a second opinion examination. In a report dated January 4, 2011, Dr. Smith opined that appellant had 59 percent right lower extremity permanent impairment based on the right knee surgeries, and 22 percent permanent impairment to the left lower extremity based on the left knee.

In a report dated July 8, 2011, Dr. Wilson opined that appellant had 59 percent permanent impairment to both her right and left lower extremities based on her bilateral knee conditions. By report dated July 28, 2011, an OWCP medical adviser found that appellant had not reached maximum medical improvement with respect to the left lower extremity.⁶

By report dated February 10, 2012, Dr. Wilson again opined that appellant had 59 percent permanent impairment to each lower extremity based on the A.M.A., *Guides*. In a report dated March 6, 2012, an OWCP medical adviser reviewed Dr. Wilson's report. He concurred that appellant had 59 percent bilateral lower extremity permanent impairment. For the right lower extremity, the medical adviser found that appellant was not entitled to an additional award. For the left lower extremity, he noted that appellant had previously received 20 percent due to the left knee, and 2 percent from the lumbar spine injury. The medical adviser found that 59 minus 20 was 39 percent. He then combined 2 percent with 39 percent under the Combined Values Chart in the A.M.A., *Guides*, for a total of 40 percent impairment. The medical adviser then subtracted 2 percent, and opined that appellant had an additional 38 percent permanent impairment of the left lower extremity.

By decision dated April 11, 2012, OWCP issued a schedule award for an additional 38 percent permanent impairment of the left lower extremity. The period of the award was 109.44

⁶ The medical adviser referred to a report by a Dr. Kalisky without further explanation.

weeks from March 6, 2012. The decision found that appellant was not entitled to an additional schedule award for permanent impairment of the right lower extremity.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 10, 2012. By decision dated October 12, 2012, the hearing representative affirmed the April 11, 2012 decision, finding that the A.M.A., *Guides* had been properly applied in this case.

On April 10, 2013 appellant appealed to the Board. In the November 22, 2013 decision,⁷ the Board found that appellant did not have an additional impairment for the right lower extremity, but as to the left lower extremity, the Board indicated that OWCP's medical adviser did not clearly explain how he calculated the additional 38 percent permanent impairment of the left lower extremity. The case was remanded for a clarification from the medical adviser.

By report dated June 25, 2014, an OWCP medical adviser opined that appellant was not entitled to an additional schedule award for the left lower extremity above the 60 percent previously awarded. He indicated that the Combined Values Chart would be used to calculate the knee impairment with the lumbar permanent impairment affecting the left lower extremity.

In a decision dated July 31, 2014, OWCP found that appellant was not entitled to an additional schedule award for the left lower extremity. It found that the medical evidence of record did not establish more than 60 percent permanent impairment of the left lower extremity.

By undated letter postmarked September 15, 2014, appellant requested a hearing before an OWCP hearing representative.⁸ By decision dated December 17, 2014, OWCP denied the hearing request. It found the request was untimely, and that the issue in the case could equally well be addressed by submitting evidence with a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁹ Neither FECA nor its implementing regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all

⁷ *Supra* note 3.

⁸ The appeal request form accompanying the letter was dated August 30, 2014.

⁹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

claimants.¹⁰ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.¹¹

With respect to knee impairment, the A.M.A., *Guides* provides a regional grid at Table 16-3.¹² The Class of Diagnosis (CDX) is determined based on specific diagnosis, and then the default value for the identified CDX is determined. The default value (grade C) may be adjusted by using grade modifiers for Functional History ((GMFH), Table 16-6), Physical Examination ((GMPE), Table 16-7) and Clinical Studies ((GMCS), Table 16-8). The adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹³

ANALYSIS -- ISSUE 1

In the present case, OWCP issued a schedule award decision dated February 13, 2007 for 20 percent left lower extremity permanent impairment. An additional two percent permanent impairment was awarded in a September 15, 2009 decision and an additional 38 percent permanent impairment was awarded on April 11, 2012. As noted in the history of the case, both Dr. Wilson and an OWCP medical adviser subsequently opined that appellant had 59 percent left lower extremity permanent impairment under Table 16-3. In the June 25, 2014 report, the medical adviser noted that for total knee replacement, poor result (class 4), the default (grade C) lower extremity permanent impairment was 67 percent.¹⁴ Applying the net adjustment formula, the medical adviser used a grade modifier 3 (severe problem) for functional history GMFH, grade modifier 3 (severe problem) for physical examination GMPE, and grade modifier 2 (moderate problem) for clinical studies GMCS. Since the poor result from knee replacement surgery was CDX 4, the net adjustment formula resulted in a grade A impairment, totaling 59 percent permanent impairment of the left lower extremity.¹⁵

In the prior appeal, the Board indicated that it was unclear how the medical adviser determined the additional left lower extremity impairment. The September 15, 2009 OWCP decision had provided two percent permanent impairment to the left lower extremity based on a lumbar injury, unrelated to the left knee. As the Board noted, the current permanent impairment would not be reduced by a prior impairment to the same member that did not duplicate the current impairment.¹⁶

¹⁰ A. George Lampo, 45 ECAB 441 (1994).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹² A.M.A., *Guides* 509, Table 16-3.

¹³ The net adjustment is up to +2 (grade E) or -2 (grade A).

¹⁴ A.M.A., *Guides* 511, Table 16-3.

¹⁵ *Id.*

¹⁶ T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(d)(2).

The medical adviser indicated in the June 25, 2014 report that, under the A.M.A., *Guides*, the left knee permanent impairment and the lumbar impairment affecting the left knee would be combined. A claimant cannot receive more than a 100 percent permanent impairment for a given member, and the A.M.A., *Guides* provides a Combined Values Chart to combine regional impairments to a scheduled member of the body.¹⁷

In this case, the current left knee permanent impairment of 59 percent is combined with 2 percent for the lumbar injury. Under the Combined Values Chart, combining 59 and 2, results in 60 percent impairment.¹⁸ Therefore, the left lower extremity permanent impairment is 60 percent. Appellant previously received schedule awards for the left lower extremity of 20, 2, and 38 percent, for a total of 60 percent. The Board accordingly finds that, based on the evidence of record, appellant does not have more than a 60 percent left lower extremity permanent impairment.

On appeal appellant contends that she still has problems with her right knee, and has arthritis in both knees. The issue on appeal is permanent impairment to the left lower extremity. As explained above, appellant has not established greater impairment than that previously awarded. She may pursue additional claims with OWCP as appropriate.

Appellant may request a schedule award or increased schedule award, at any time, based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

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....”

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.¹⁹ The Board has held that OWCP, in its broad discretionary authority in the administration of FECA,²⁰ 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.²¹ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is

¹⁷ See *S.L.*, Docket No. 09-0835 (issued October 23, 2009).

¹⁸ A.M.A., *Guides* 605.

¹⁹ *Claudio Vazquez*, 52 ECAB 496 (2001).

²⁰ 5 U.S.C. §§ 8101-8193

²¹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.²²

ANALYSIS -- ISSUE 2

OWCP issued a final decision dated July 31, 2014. Appellant had 30 days to timely request a hearing. A hearing request must be mailed within 30 days, as determined by the postmark or other carrier's date marking.²³ In this case, the postmark date of appellant's hearing request was September 15, 2014. As this was more than 30 days after the July 31, 2014 decision, it is untimely.²⁴

Appellant is therefore not entitled to a hearing as a matter of right.²⁵ OWCP must exercise its discretion with respect to the untimely hearing request. In this case, it found that the issues could equally well be addressed by requesting reconsideration and submitting additional evidence. This is considered a proper exercise of OWCP's discretionary authority.²⁶

The Board accordingly finds that OWCP properly denied the hearing request in this case. The hearing request was untimely and OWCP properly exercised its discretionary authority.

CONCLUSION

The Board finds that appellant has not established more than 60 percent permanent impairment of the left lower extremity, for which she previously received a schedule award. The Board further finds that OWCP properly denied the hearing request.

²² *Teresa M. Valle*, 57 ECAB 542 (2006).

²³ 20 C.F.R. § 10.616. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

²⁴ *See R.B.*, Docket No. 16-1071 (issued December 14, 2016).

²⁵ *Claudio Vazquez*, *supra* note 17.

²⁶ *See Mary E. Hite*, 42 ECAB 641, 647 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 17, and July 31, 2014 are affirmed.

Issued: May 4, 2017
Washington, DC

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

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

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