

FACTUAL HISTORY

On June 29, 2009 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his left ankle while in the performance of duty when he fell backwards while being attacked by a dog. He stopped work on the date of injury and sought treatment at Kaiser Permanente Hospital. OWCP accepted the claim for a closed fracture of left tibia and fibula, shaft; left ankle sprain, deltoid ligament; and closed trimalleolar fracture of left ankle.²

On July 7, 2009 appellant underwent open reduction internal fixation (ORIF) midshaft fibular fracture, left lower extremity, open repair of distal tibiofibular syndesmosis, and repair of superficial deltoid ligament, left ankle. On July 8, 2009 he was diagnosed with deep vein thrombosis of the left lower extremity. Appellant later developed suture abscesses of the left ankle. OWCP expanded acceptance of the claim to include deep vein thrombosis, lower left extremity, and postoperative infection, left side. Appellant returned to full-time limited-duty work on January 23, 2010 with walking restrictions. On September 13, 2011 he stopped work and underwent an OWCP-authorized removal of support implant. On January 9, 2012 appellant was released to return to full-time sedentary work; however, the employing establishment was unable to accommodate his restrictions. OWCP paid intermittent wage-loss benefits on the supplemental rolls through June 10, 2013.

On February 16, 2017 appellant filed a claim for a schedule award (Form CA-7). He did not submit any additional evidence.

By development letter dated May 12, 2017, OWCP advised appellant of the deficiencies of his claim and requested that he submit a medical report from his physician assessing his permanent impairment based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ (A.M.A., *Guides*) and establishing the date on which he reached maximum medical improvement (MMI). It noted that, if appellant's physician was unable or unwilling to provide the required report, appellant could advise OWCP in writing and, if his case met the essential elements for a schedule award claim and the medical evidence of record was insufficient to determine his permanent impairment, then they would schedule him for a second opinion medical evaluation. OWCP afforded appellant 30 days to submit the requested information. No response was received.

By decision dated July 27, 2017, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body. It noted that he did not respond to the May 12, 2017 development letter

² Under OWCP File No. xxxxxx235, appellant has an accepted left ankle sprain for a January 16, 2009 traumatic injury when he rolled his left ankle while walking down steps in the performance of duty. He stopped work after the injury and was released to full-time work with restrictions on January 22, 2009. Effective April 10, 2009, appellant returned to full duty. On September 30, 2011 OWCP combined OWCP File No. xxxxxx235 with OWCP File No. xxxxxx904, making the current claim, File No. xxxxxx904 the master file number.

³ A.M.A., *Guides* (6th ed. 2009).

and that the last medical report on file describing the physical state of his left ankle condition was dated November 22, 2013 from Dr. Mark A. Hardy, a podiatrist.

In separate July 27, 2017 appeal request forms postmarked August 31, 2017, appellant requested reconsideration, a review of the written record before OWCP's Branch of Hearings and Review, and an oral hearing before an OWCP hearing representative. OWCP received the respective requests on September 6, 7, and 9, 2017.

On September 12, 2017 OWCP informed appellant that it had received three different avenues of appeal and that he was only able to choose one appeal right for a decision. Appellant was directed to submit a statement in writing clarifying the avenue of appeal that he wished to pursue concerning the July 27, 2017 decision.

OWCP received a July 14, 2017 statement from appellant and an August 24, 2017 letter from Dr. Kimberly Togliatti-Trickett, a Board-certified physiatrist, pertaining to appellant's disability status from September 9, 2016 to February 3, 2017.

On September 28, 2017 OWCP received appellant's letter dated September 25, 2017 requesting reconsideration. Appellant additionally noted that his physician had moved and that he needed a new physician to assess his ankle for a schedule award.

By decision dated October 10, 2017, OWCP's hearing representative denied appellant's request for a review of the written record. It found that as appellant's request for a hearing was postmarked August 31, 2017, it was not made within 30 days of the July 27, 2017 decision and therefore appellant was not entitled to a review of the written record as a matter of right. However, OWCP exercised its discretion and determined that the issue of whether he sustained a permanent impairment due to his June 29, 2009 employment injury could be equally well addressed by requesting reconsideration before OWCP.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members or functions of the body.⁴ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵

⁴ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁵ *K.H.*, Docket No. 09-0341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

It is the claimant's burden of proof to establish a permanent impairment of the scheduled member or function as a result of an employment injury.⁶ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁷

The A.M.A., *Guides* provide a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF). For lower extremity impairments, the evaluator identifies 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).⁸ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁹ Evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids, and calculations of modifier scores.¹⁰

Before the A.M.A., *Guides* can be utilized, a description of permanent impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not submitted any evidence of permanent impairment of a scheduled member, warranting a schedule award.

By letter dated May 12, 2017, OWCP informed him of the type of evidence necessary to establish his schedule award claim and specifically requested that he submit an impairment evaluation from his attending physician in accordance with the sixth edition of the A.M.A., *Guides*. It afforded appellant 30 days for a response. Appellant did not submit any response prior to the issuance of OWCP's July 27, 2017 decision.

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

⁸ *Supra* note 3 at 493-531.

⁹ *Id.* at 521.

¹⁰ *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

¹¹ *D.M.*, Docket No. 11-775 (issued October 11, 2011); *Peter C. Belkind*, 56 ECAB 580 (2005).

Appellant failed to submit medical evidence sufficient to establish that he sustained a permanent impairment of his left lower extremity causally related to his accepted employment injury. The evaluation from the physician must include a description of the impairment in sufficient detail that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹² As appellant has not submitted any medical evidence to establish permanent impairment of a scheduled member related to the June 29, 2009 employment injury, he has failed to meet his burden of proof.¹³

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

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁵ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹⁶ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny his or her request and must exercise its discretion.¹⁷ Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed.

¹² See *B.V.*, Docket No. 17-0656 (issued March 13, 2018).

¹³ See *M.G.*, Docket No. 17-1831 (issued February 6, 2018).

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. §§ 10.616, 10.617.

¹⁶ *Id.* at § 10.616(a).

¹⁷ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹⁸ See *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

The July 27, 2017 appeal form on which appellant requested the review was postmarked on August 31, 2017. The time limitation to request a hearing from OWCP's Branch of Hearings and Review expired on Saturday, August 26, 2017, 30 days after OWCP's July 27, 2017 decision. As August 26, 2017 was a Saturday, appellant had until Monday, August 28, 2017 to file his appeal.¹⁹ However, his request was postmarked August 31, 2017 and was therefore untimely filed. Section 8124(b)(1) sets an unequivocal time limitation for requesting a review of the written record.²⁰ Because the request was untimely filed, appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA.

Although appellant's request for a review of the written record was untimely filed, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its October 10, 2017 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP's authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²¹ Accordingly, the Board finds that OWCP properly denied appellant's August 31, 2017 request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish permanent impairment of a scheduled member, warranting a schedule award. The Board further finds that OWCP properly denied his request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

¹⁹ See *John B. Montoya*, 43 ECAB 1148 (1992). The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday.

²⁰ See *William F. Osborne*, 46 ECAB 198 (1994).

²¹ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 10 and July 27, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 27, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board