

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

M.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
White Plains, NY, Employer**

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**Docket No. 17-1831
Issued: February 6, 2018**

Appearances:
*Rita H. Patrick, for the appellant*¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 29, 2017 appellant, through her representative, filed a timely appeal from a May 16, 2017 merit decision and a July 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish permanent impairment of a scheduled member, warranting a schedule award; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

On appeal appellant's representative contends that, although appellant was given a 30-day time period to submit evidence in support of her schedule award claim, she was slightly confused with the process. She asks the Board to reverse the denial of appellant's schedule award claim and allow appellant an opportunity to pursue her claim.

FACTUAL HISTORY

On December 6, 2015 appellant, then a 50-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she had swelling in her right foot when she accidentally stepped on plastic wrap and fell down onto the floor. She stopped work on the date of injury. OWCP accepted the claim for right ankle fibula fracture. On May 14, 2016 appellant returned to full-time, regular-duty work with no restrictions.

On April 10, 2017 appellant filed a claim for a schedule award (Form CA-7). She did not submit any additional evidence.

By letter dated April 11, 2017, OWCP advised appellant of the deficiencies of her claim and requested that she submit a medical report from her physician assessing her 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 she reached maximum medical improvement (MMI). Appellant was afforded 30 days to submit the requested information. No response was received.

In a May 16, 2017 decision, 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 she did not respond to the April 11, 2017 development letter.

OWCP received a May 18, 2017 progress note from Dr. Eric M. Spencer, a Board-certified orthopedic surgeon, who examined appellant and diagnosed chronic right ankle sprain, one and one-half years status post right distal fibular fracture.

In an appeal request form dated and postmarked June 29, 2017 and received by OWCP on July 7, 2017, appellant requested an oral hearing before an OWCP hearing representative.

By decision dated July 27, 2017, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that it was untimely filed as it was postmarked on June 29, 2017, more than 30 days after its May 16, 2017 merit decision. After exercising its

³ A.M.A., *Guides* (6th ed. 2009).

discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

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

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

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

⁵ *K.H.*, Docket No. 09-341 (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).

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 (February 2013).

⁸ *Supra* note 3 at 493-531.

⁹ *Id.* at 521.

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

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

OWCP accepted appellant's claim for right ankle fibula fracture as a result of a December 6, 2015 employment injury. Appellant stopped work on the date of injury and returned to full-time regular-duty work without restrictions on May 14, 2016. On April 10, 2016 she filed a claim for a schedule award (Form CA-7). By decision dated May 16, 2017, OWCP denied appellant's schedule award claim finding that she had failed to submit an impairment evaluation to establish a permanent impairment resulting from her work injury.

The Board finds that appellant has not submitted any evidence of permanent impairment to a scheduled member, warranting a schedule award. By letter dated April 11, 2017, OWCP informed her of the type of evidence necessary to establish her schedule award claim and specifically requested that she submit an impairment evaluation from her 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 the requested evidence prior to the issuance of OWCP's May 16, 2017 decision. As she has not submitted medical evidence sufficient to establish permanent impairment of a scheduled member related to the December 6, 2015 employment injury, appellant has failed to meet her burden of proof.

On appeal appellant's representative contends that, although appellant was given a 30-day time period to submit evidence in support of her schedule award claim, she was slightly confused with the process. She asks the Board to reverse the denial of appellant's schedule award claim and allow appellant an opportunity to pursue her claim. The Board notes that it is appellant's burden of proof to establish permanent impairment of a scheduled member as a result of an employment injury.¹² Appellant did not submit such evidence and thus, OWCP properly denied her schedule award claim.¹³

Appellant may, however, 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

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

¹² *Supra* note 6.

¹³ *L.F.*, Docket No. 10-0343 (issued November 29, 2010); *V.W.*, Docket No. 09-2026 (issued February 16, 2010).

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 appellant's request and must exercise its discretion.¹⁷ OWCP 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

A request for a hearing or review of the written record must be made within 30 days after the date of the issuance of a final OWCP decision. Appellant's hearing request was dated and postmarked on June 29, 2013, more than 30 days after the issuance of OWCP's May 16, 2017 decision. Because the postmark date was more than 30 days after the date of OWCP's May 16, 2017 decision, the Board finds that the request was untimely filed and she was not entitled to an oral hearing as a matter of right.¹⁹

The Board further finds that OWCP properly exercised its discretion in denying appellant's request for a hearing by determining that the issue in the case could be addressed equally as well by requesting reconsideration and submitting new evidence relevant to the issue at hand.²⁰ The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.²¹ In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for an oral hearing.

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); *supra* note 7 at Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

¹⁹ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. See *Donna A. Christley*, 41 ECAB 90 (1989).

²⁰ *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

²¹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

Accordingly, the Board finds that OWCP properly denied her request for a hearing as untimely filed under section 8124.²²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 27 and May 16, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 6, 2018
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

²² *R.P.*, Docket No. 16-0554 (issued May 17, 2016).