



## **FACTUAL HISTORY**

On July 26, 2004 appellant, then a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on July 24, 2004 he fractured his right wrist while in the performance of duty. He explained that he was pushing down trash into a trash can when he slipped and fell on his right hand. Appellant stopped work on July 27, 2004.

On July 29, 2004 appellant underwent an open reduction internal fixation surgery performed by Dr. Jim Roderique, a Board-certified orthopedic surgeon.

OWCP accepted appellant's claim on August 20, 2004 for a fracture of the right distal radius.

In a September 6, 2004 medical report, Dr. Roderique evaluated appellant's right wrist following his July 29, 2004 surgery. He explained that appellant would continue rehabilitation and that he did not expect him to reach maximum medical improvement (MMI) before six months following his injury. Dr. Roderique noted that he expected that appellant would return to work in the next few weeks, long before he reached MMI.

In a September 23, 2004 report of termination of disability and/or payment (Form CA-3), appellant's supervisor indicated that he returned to full-duty work with no restrictions on September 22, 2004.

In an October 28, 2004 medical report, Dr. Roderique noted that appellant was able to return to work without restrictions on September 22, 2004 and checked a box marked "Yes" to indicate his belief that appellant had a permanent disability. In accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>2</sup> he opined that appellant sustained 19 percent permanent impairment of his right upper extremity.

On July 22, 2019 appellant filed a claim for a schedule award (Form CA-7).

In an August 29, 2019 development letter, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing whether he had reached MMI and evaluating the extent of permanent impairment, if any, in accordance with the sixth edition of the A.M.A., *Guides*.<sup>3</sup> It afforded him 30 days to submit the necessary evidence. Appellant did not submit additional evidence within the time allotted.

By decision dated October 15, 2019, OWCP denied appellant's claim for a schedule award as the medical evidence was insufficient to establish permanent impairment to a scheduled member. It noted that he had not responded to its August 29, 2019 request for medical evidence, including an impairment evaluation. OWCP concluded, therefore, that the requirements had not been met to establish entitlement to a schedule award.

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<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On a request form dated and postmarked November 25, 2019, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 23, 2019, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that the request was untimely filed as it had a carrier's mark of November 25, 2019, more than 30 days after its October 15, 2019 merit decision. After exercising its 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<sup>4</sup> and its implementing regulations<sup>5</sup> 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants and the Board has concurred in such adoption.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.<sup>7</sup>

It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function of the body as a result of an employment injury.<sup>8</sup> 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*.<sup>9</sup> Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.<sup>10</sup> If the claimant does not provide an impairment evaluation and there is no

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808,5(a) (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> *T.K.*, Docket No. 19-1222 (issued December 2, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>9</sup> *Supra* note 7 at Chapter 2.808.5 (March 2017).

<sup>10</sup> *Id.* at Chapter 2.808.6(a) (March 2017).

indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his right upper extremity, warranting a schedule award.

In his October 28, 2004 medical report, Dr. Roderique opined that appellant had 19 percent permanent impairment of the right upper extremity due to his wrist fracture. However, he utilized the fifth edition of the A.M.A., *Guides* in reaching his impairment rating, and thus his opinion is of diminished probative value.<sup>12</sup>

The Board finds that the medical evidence of record does not describe the right upper extremity impairment in sufficient detail so that it can be visualized on review, and does not compute the percentage of impairment in accordance with the most recent edition of the A.M.A., *Guides*,<sup>13</sup> the sixth edition. On August 29, 2019 OWCP requested that appellant submit a medical opinion addressing whether he had reached MMI and the extent of permanent impairment; however, appellant did not provide such a rating. Accordingly, the Board finds that he has not met his burden of proof to establish his schedule award claim.<sup>14</sup>

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.”<sup>15</sup> 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.<sup>16</sup> 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

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<sup>11</sup> *Id.* at Chapter 2.808.6(c).

<sup>12</sup> *S.J.*, Docket No. 16-1162 (issued February 8, 2017) (a medical opinion not based on the appropriate edition of the A.M.A., *Guides* is of diminished probative value in determining the extent of permanent impairment).

<sup>13</sup> *C.T.*, Docket No. 18-0257 (issued May 21, 2019).

<sup>14</sup> *D.F.*, Docket No. 18-1337 (issued February 11, 2019).

<sup>15</sup> 5 U.S.C. § 8124(b)(1).

<sup>16</sup> 20 C.F.R. §§ 10.616, 10.617.

postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>17</sup> 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.

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought. Because appellant's hearing request was postmarked November 25, 2019, it postdated OWCP's October 15, 2019 decision by more than 30 days and, therefore, is untimely. Appellant was therefore not entitled to an oral hearing as a matter of right.<sup>18</sup>

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.<sup>19</sup> The Board finds that, in the December 23, 2019 decision, OWCP's Branch of Hearings and Review properly exercised discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

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.<sup>20</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish permanent impairment of the right upper extremity, warranting a schedule award. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>17</sup> *Id.* at § 10.616(a).

<sup>18</sup> *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 23, 2019 and October 15, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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