

(2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On April 17, 1997 appellant, then a 41-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 16, 1997 he sustained a back injury when a door slammed down and hit his back. He did not stop work. OWCP accepted appellant's claim for thoracic sprain. It paid him wage-loss compensation on the supplemental rolls for periods of intermittent disability for the period July 18, 1997 to February 4, 1998. The case was closed in 1999 and retired in 2002.

On February 24, 2018 appellant filed a claim for a schedule award (Form CA-7). On the reverse side of the claim form, a human resource specialist for the employing establishment indicated that appellant had retired on November 2, 2015.

In a March 12, 2018 development letter, OWCP advised appellant of the type of evidence needed to establish his schedule award claim. It requested that he provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ OWCP afforded appellant 30 days to submit the requested information.

In a March 27, 2018 letter, appellant indicated that he received OWCP's March 12, 2018 letter. He related that his treating physician was no longer practicing. Appellant requested that OWCP send him to a medical facility or physician for a medical report. He also asked for a list of physicians.

OWCP subsequently received an April 17, 1997 state workers' compensation form by Dr. Michael D. Hadley, a general surgeon. Dr. Hadley noted a diagnosis of thoracic spine strain.

In an April 21, 1997 narrative report and attending physician's report (Form CA-20), Dr. Clayton Patchett, who specializes in physical medicine and rehabilitation, described the April 16, 1997 employment injury and the medical treatment that appellant received. He noted lumbar examination findings of slight midline tenderness and tenderness around the right periscapular area medially and inferiorly. Dr. Patchett diagnosed thoracic spine strain and contusion. He checked a box marked "yes" indicating that the condition was caused or aggravated by the employment injury. Dr. Patchett reported that appellant could return to work.

Appellant also submitted work status notes dated July 11 and September 5, 1997 by Dr. Patchett. Dr. Patchett reported that appellant was not disabled from work. In a December 30, 1997 work status report, he indicated that appellant could work modified duty.

OWCP received a February 4, 1998 attending physician's supplemental report (Form CA-20a) by Dr. Patchett, who noted a diagnosis of thoracic strain and shoulder pain.

³ A.M.A., *Guides* (6th ed. 2009).

By decision dated April 1, 2019, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of his accepted April 16, 1997 employment injury.

In a letter dated May 8, 2019 and postmarked May 16, 2019, appellant requested an oral hearing before an OWCP hearing representative.

By decision dated June 5, 2019, OWCP's Branch of Hearings and Review denied appellant's hearing request as untimely filed. OWCP's hearing representative noted that OWCP had issued its decision on April 1, 2019 while appellant's hearing request was postmarked May 16, 2019, more than 30 days after OWCP's decision. He found that appellant was not entitled to a hearing as a matter of right, as the request was submitted more than 30 days after OWCP's decision. The hearing representative also considered whether to grant appellant a discretionary hearing, but determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁴ and its implementing regulations⁵ 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.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.⁷

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.⁸ Furthermore, the back is specifically excluded from the definition of organ under FECA.⁹ The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.806.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

⁹ *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter* is to be applied.¹⁰

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.¹¹ 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 maximum medical improvement (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*.¹² 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.¹³ If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In support of his claim, appellant submitted several reports and work status forms by Dr. Patchett dated April 21, 1997 to February 4, 1998. He described the April 16, 1997 employment injury and provided physical examination findings. Dr. Patchett diagnosed thoracic spine strain and contusion. OWCP also received an April 17, 1997 state workers' compensation form by Dr. Hadley. Neither physician, however, addressed MMI nor described a permanent impairment resulting from a thoracic spinal nerve impairment causally related to appellant's accepted April 16, 1997 employment injury. These reports, therefore, do not establish permanent impairment of a scheduled member or function of the body causally related to his accepted April 16, 1997 employment injury.¹⁵ As none of these physicians provided an estimate of

¹⁰ *Supra* note 7 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

¹¹ *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹² *Supra* note 7 at Chapter 2.808.5 (March 2017).

¹³ *Id.* at Chapter 2.808.6(a) (March 2017).

¹⁴ *Id.* at Chapter 2.808.6(c).

¹⁵ *See M.G.*, Docket No. 19-0823 (issued September 17, 2019); *see also M.M.*, Docket No. 18-0292 (issued July 9, 2018).

impairment to appellant's upper or lower extremities due to his accepted thoracic sprain injury, their reports are insufficient to establish his schedule award claim.¹⁶

As noted above, OWCP procedures provide that, to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state, indicates the date on which this occurred, describes the impairment insufficient detail so that it can be visualized on review, and computes the percentage of permanent impairment in accordance with the A.M.A., *Guides*.¹⁷ Although it requested a medical opinion on the extent of appellant's permanent impairment, the evidence submitted does not establish that he had a ratable spinal nerve impairment to his lower or upper extremities in accordance with the A.M.A., *Guides* or *The Guides Newsletter*. The Board finds, therefore, that he has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.¹⁸

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."¹⁹ 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.²⁰ 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.²¹ 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.²²

¹⁶ 20 C.F.R. § 10.404 (1999); *see also B.V.*, Docket No. 17-0656 (issued March 13, 2018); *Jacqueline S. Harris*, 54 ECAB 139 (2002).

¹⁷ *Supra* note 12.

¹⁸ *See I.R.*, Docket No. 16-1796 (issued January 13, 2017); *P.L.*, Docket No. 13-1592 (issued January 7, 2014).

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. §§ 10.616, 10.617.

²¹ *Id.* at § 10.616(a); *see also supra* note 7 at Chapter 2.1601.4(a) (October 2011).

²² *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

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.

On April 1, 2019 OWCP denied appellant's schedule award claim. Appellant requested an oral hearing in a statement dated May 8, 2019 and postmarked on May 16, 2019. OWCP denied his request for a hearing in a decision dated June 5, 2019 because his request was not timely filed. The Board finds that OWCP properly determined that appellant's request for a telephone hearing was untimely as it was filed more than 30 days after the issuance of OWCP's April 1, 2019 merit decision. The May 8, 2019 statement where appellant requested the hearing was postmarked on May 16, 2019. Because the postmark date of the hearing request was more than 30 days after the date of OWCP's April 1, 2019 decision, it was untimely filed and he was not entitled to a hearing as a matter of right.²³

Although appellant's request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its June 5, 2019 decision, it properly exercised its discretion by notifying him 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.²⁴ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a hearing. Accordingly, the Board finds that OWCP properly denied his May 16, 2019 request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

On appeal appellant contends that he did not receive the denial decision in a timely manner. The April 1, 2019 decision, however, was mailed to his address of record. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received.²⁵ Appellant did not submit evidence of nondelivery of OWCP's denial decision such that the presumption of receipt would be rebutted. OWCP, therefore, properly denied his May 16, 2019 hearing request as untimely filed 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 a scheduled member or function of the body, due to his accepted April 16, 1997

²³ *J.M.*, Docket No. 19-1111 (issued November 20, 2019); *Eddie Franklin* 51 ECAB 223 (1999). 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).

²⁴ *B.W.*, Docket No. 16-1860 (issued May 4, 2017); *Samuel R. Johnson*, 51 ECAB 612 (2000).

²⁵ This is known as the mailbox rule. See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

employment injury, 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).

ORDER

IT IS HEREBY ORDERED THAT the June 5 and April 1, 2019 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 3, 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